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1927

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1927

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(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1927 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing Seriatim the pages of INDIAN LAW REPORTS, LAHORE SERIES for the year 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 8 LAHORE.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 8 Lahore=All India Reporter

LR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1927	*L*	115	136	1927	*L*	369	257	1927	*L*	103	360	1927	*L*	280	597	1927	*PC*	121
15	1926	"	603	139	"	"	329	263	"	"	500	362	"	"	394	605	1928	*L*	17
19	1927	"	97	144	"	"	143	265	"	"	470	366	"	"	441	613	"	"	27
22	"	"	119	149	"	"	261	267	"	"	124	373	"	"	408	617	1927	"	435
24	1926	"	651	156	"	"	174	269	"	"	181	384	"	"	289	632	1928	"	83
30	"	"	659	161	1926	"	499	274	"	"	273	496	"	"	671	647	"	"	72
35	1927	"	110	167	1927	"	433	276	"	"	443	501	"	"	693	651	1927	"	448
38	"	"	102	173	"	"	391	281	"	"	241	514	"	"	687	655	1928	"	98
41	"	"	37	181	"	"	404	306	"	"	344	521	"	"	217	662	"	"	92
46	1926	"	630	193	"	*PC*	26	308	"	"	505	524	"	"	287	666	"	"	78
48	"	"	654	196	"	*L*	476	310	"	"	333	527	"	"	677	671	"	"	65
52	"	"	639	198	"	"	176	318	"	"	476	531	"	"	499	673	"	"	103
54	1927	"	200	203	"	"	398	320	"	"	338	536	"	"	510	678	"	"	111
98	1926	"	695	205	"	"	158	326	"	"	343	541	"	"	539	681	1927	"	540
100	1927	"	191	208	"	"	395	329	"	"	425	544	"	"	420	684	"	"	674
103	"	"	58	212	"	"	355	331	"	"	495	549	1926	"	624	693	"	"	362
105	"	"	228	215	"	"	198	335	"	"	512	555	1927	"	471	702	"	"	577
111	"	"	350	219	"	"	126	340	"	"	605	568	"	"	357	711	"	"	348
114	"	"	52	225	"	"	508	347	"	"	421	570	"	"	332	716	"	"	637
117	"	"	60	230	"	*PC*	215	351	"	"	638	573	"	*PC*	102	719	"	"	613
123	"	"	272	241	"	*L*	485	354	"	"	248	584	"	*L*	477	721	"	"	445
127	"	"	400	253	"	*PC*	25	356	"	"	625	593	1928	"	28	730	1928	"	113

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

9 Lahore Law Journal=All India Reporter

LLJ)	A. I. R.			LLJ)	A. I. R.			LLJ)	A. I. R.			LLJ)	A. I. R.			LLJ)	A. I. R.		
1	1927	*L*	130	117	1927	*L*	280	218	1927	*L*	425	342	1928	*L*	117	468	1927	*L*	570
5	"	"	192	119	"	"	249	220	"	"	413	347	1927	"	679	477	"	"	785
7	"	"	894	125	"	"	795	223	"	"	793	351	"	"	825	481	1928	"	105
9	"	"	777	130	"	"	169	231	"	"	344	352	"	"	248	482	1927	"	880
12	"	"	105	133	"	"	110	233	"	"	385	354	"	"	495	484	"	"	887
14	"	"	141	135	"	"	170	237	"	"	449	357	"	"	847	486	"	"	872
19	"	"	911	136	"	"	783	245	"	"	399	359	"	"	625	488	1928	"	90
22	"	"	140	141	"	"	330	248	"	"	420	362	1928	"	103	493	1927	"	826
25	"	"	103	146	"	"	832	252	"	"	762	365	1927	"	526	496	"	*PC*	121
30	"	"	152	149	"	"	287	254	"	"	864	369	"	"	617	502	1928	*L*	46
32	"	"	888	152	"	"	770	257	"	"	424	373	"	"	421	508	"	"	97
36	"	"	74	154	"	"	281	260	"	"	355	376	"	"	510	511	1927	"	800
39	1926	"	691	157	"	"	373	262	"	"	516	379	"	"	590	514	"	"	862
42	1927	"	139	165	"	"	231	268	"	"	480	384	"	"	867	518	1928	"	105
45	1926	"	590	169	"	"	383	270	"	"	900	393	1928	"	60	522	"	"	95
57	1927	"	174	174	"	"	418	276	"	"	757	396	1927	"	658	525	*Non H.C.Case*		
61	"	"	133	178	"	"	888	281	"	"	497	399	"	"	873	526	1927	*L*	821
63	"	"	828	180	"	"	443	285	"	"	388	400	"	"	499	529	"	"	881
68	1926	"	376	184	1926	"	630	290	"	"	884	405	"	"	512	533	1928	"	110
76	1927	"	106	186	1928	"	81	293	"	"	543	408	"	"	708	536	1927	"	833
80	"	"	791	189	1927	"	915	296	"	"	815	411	1928	"	20	541	1928	"	109
81	1926	"	673	191	"	"	172	301	"	"	445	414	1927	"	874	543	"	"	116
89	1927	"	844	193	"	"	852	309	"	"	768	417	"	"	878	545	1927	"	886
91	"	"	82	195	"	"	351	311	"	"	898	420	"	"	348	547	"	"	848
94	"	"	782	197	"	"	221	315	"	"	491	424	"	"	703	548	1928	"	119
96	"	"	157	199	"	"	252	319	"	"	530	428	"	"	817	550	"	"	202
98	*Non H.C.Case*			206	"	"	861	329	1928	"	34	433	"	"	477	566	1927	"	905
100	1927	*L*	737	209	"	"	193	331	1927	"	853	440	"	"	731	569	"	"	362
103	"	"	724	211	"	"	900	334	1928	"	32	444	"	"	642	577	1928	"	112
109	"	"	268	213	"	"	191	337	1927	"	858	455	"	"	610	579	1927	"	890
111	"	"	836	215	"	"	186	339	"	"	736	463	"	"	691	583	1928	"	114
114	"	"	775																

28 Punjab Law Reporter=All India Reporter

PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.		
1	1927	*L*	734	71	1927	*L*	894	136	1927	*L*	911	201	1927	*L*	280	273	1927	*L*	193
3	"	"	94	72	"	"	847	138	"	"	231	202	*Non H.C.Case*			275	"	"	415
6	"	"	81	74	*Non H.C.Case*			141	*Non H.C.Case*			204	1927	*L*	791	277	1928	"	81
8	*Non H.C.Case*			78	1927	*L*	126	143	1927	*L*	865	205	"	"	276	279	1927	"	730
9	1927	*L*	860	82	*Non H.C.Case*			146	"	"	848	209	"	"	282	283	"	"	97
10	1926	*PC*	94	86	1927	*L*	153	148	"	"	851	211	"	"	271	285	"	"	102
14	1927	*L*	107	88	1926	*J*	185	150	"	"	226	212	"	"	421	287	"	"	6
15	"	"	103	90	1927	*L*	105	153	"	"	141	215	"	"	728	289	"	"	461
19	"	"	524	93	"	"	106	157	"	"	188	217	"	"	416	295	"	"	864
24	"	"	72	96	"	"	880	158	"	"	186	220	"	"	770	297	"	"	431
27	"	"	51	98	"	"	782	161	"	"	333	222	1926	"	310	299	"	"	355
29	1925	*PC*	150	99	"	"	165	166	"	"	733	227	1927	"	371	300	"	"	376
39	1927	*L*	78	101	"	"	844	167	"	*PC*	26	228	"	"	268	303	"	"	802
41	"	"	75	103	"	"	744	169	"	*L*	832	230	"	"	331	307	"	"	385
45	"	"	60	106	"	"	172	171	"	"	746	232	"	"	54	311	"	"	399
48	1926	*J*	182	107	"	"	822	173	"	"	281	235	"	"	836	313	"	"	549
50	"	"	190	109	"	*PC*	15	174	"	"	287	238	"	"	833	322	"	"	793
52	1927	*L*	87	113	1926	"	142	177	"	"	357	239	"	"	110	324	"	"	883
55	"	"	777	117	1927	"	25	178	"	"	346	241	"	"	783	325	"	"	373
57	"	"	140	119	"	*L*	343	181	"	"	426	245	1926	"	264	330	"	"	418
59	1926	"	457	121	"	"	895	184	"	"	330	257	1927	"	908	334	"	"	383
61	"	"	514	123	"	"	828	187	"	"	739	258	"	"	907	338	"	"	884
62	1927	"	37	127	"	"	876	192	"	"	388	260	"	"	727	339	"	"	768
65	"	"	133	130	"	"	808	196	"	"	377	263	"	"	795	341	"	"	198
66	*Non H.C.Case*			132	"	"	839	197	"	"	412	266	"	"	249	344	"	"	391
68	1927	*L*	137	134	"	"	152	199	"	"	332	272	"	"	423	349	"	"	395

28 Punjab Law Reporter=All India Reporter—(*Concld.*)

PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.			PLR)	A. I. R.		
351	1927	*L*	176	427	1927	*L*	228	489	1927	*L*	308	575	1927	*L*	580	634	1928	*L*	28
355	"	"	404	432	"	"	505	490	"	"	119	577	"	"	672	637	"	"	27
363	"	"	433	433	"	"	500	492	"	"	355	580	1928	"	39	640	1927	"	497
367	"	"	344	434	"	"	508	494	"	"	58	583	1927	"	765	643	"	"	477
369	"	"	835	438	"	"	470	495	"	"	191	590	"	"	718	649	1928	"	17
370	"	"	493	439	"	"	476	497	"	"	594	593	1928	"	12	655	1927	"	898
371	"	"	815	440	"	"	124	514	"	"	590	595	"	"	35	658	"	*PC*	102
375	"	"	760	441	"	"	273	518	1926	"	689	601	"	"	55	665	"	*L*	471
377	"	"	850	443	"	"	181	519	1927	"	495	604	"	"	51	674	"	"	516
378	"	"	521	446	"	"	445	521	"	"	338	605	"	"	16	679	"	"	480
380	"	"	445	449	1926	"	651	525	*Non H.C.Case*			607	1927	"	852	681	"	"	677
386	"	"	779	453	1927	*PC*	72	537	1928	*L*	45	608	"	"	762	683	"	"	900
388	"	"	530	455	"	*L*	115	539	1927	"	174	610	"	"	793	688	"	"	671
396	1928	"	117	461	"	"	797	542	"	"	693	617	"	"	915	692	"	"	638
400	"	"	134	463	"	*PC*	121	550	"	"	687	619	"	"	221	694	"	"	248
403	1927	"	785	468	1928	*L*	202	554	"	"	622	620	"	"	252	695	"	"	625
406	"	"	811	481	1926	"	630	559	"	"	217	626	"	"	900	698	"	"	394
407	"	"	449	483	1927	"	158	561	1928	"	103	627	"	"	861	700	"	"	441
414	"	"	400	485	"	"	476	564	1927	"	510	629	*Non H.C.Case*			705	"	"	512
420	"	"	261	486	"	"	350	567	"	*PC*	230	631	1927	*L*	526	708	"	"	605
425	"	"	425																

Further pages not received till 2-4-1928.

28 Criminal Law Journal=All India Reporter

CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.		
1	*Too old*			66	1927	*S*	104	141*b*	1927	*C*	199	207*a*	1927	*M*	434	268	1926	*J*	185
2*a*	1926	*J*	135	70	"	*M*	199	144	"	*O*	101	207*b*	"	*M*	397	270	1927	*M*	473
2*b*	1927	*C*	63	72	"	*P*	130	145	"	*R*	61	208*a*	"	*L*	58	271	"	*M*	376
4*a*	"	*M*	66	73	"	*A*	184	151	"	*A*	121	208*b*	"	*M*	393	273	"	*C*	257
4*b*	"	*C*	28	76	"	*O*	42	152	"	*C*	175	209	1926	*J*	116	275	"	*M*	413
5	"	*B*	21	77	"	*P*	100	153	"	*A*	49	210	1927	*C*	261	277	1926	*J*	184
6	"	*C*	73	80	1926	*P*	449	155	"	*C*	196	212	1926	*J*	187	278	1927	*C*	460
8	"	*A*	146	85	"	*J*	138	156	"	*L*	791	213	1927	*R*	68	279	"	*M*	1112
9	1926	*A*	759	86	1927	*C*	95	157	"	*O*	91	217	1926	*J*	114	281	"	*A*	279
10	"	*C*	961	87	1926	*J*	115	158	"	*L*	145	219	1927	*R*	74	285	"	*M*	533
12	1927	*M*	78	88	1927	*A*	157	159	"	*A*	267	225*a*	"	*M*	1060	291*a*	"	*C*	946
14	"	*N*	24	89	1926	*J*	174	160	"	*L*	647	225*b*	"	*L*	16	291*b*	"	*A*	350
15	1926	*A*	752	90	"	*O*	615	161	1926	*J*	180	226	"	*R*	73	293	"	*L*	352
16	1927	*O*	14	91	1927	*A*	147	162	1927	*S*	112	227*a*	"	*A*	270	294	"	*A*	384
17	"	*L*	149	92	"	*C*	98	163	"	*R*	59	227*b*	"	*L*	173	295	"	*M*	442
19	1926	*J*	158	94*a*	"	*A*	149	164*a*	"	*L*	66	229	"	*A*	217	296	"	*A*	334
23*a*	1927	*L*	62	94*b*	"	*A*	199	164*b*	"	*M*	307	230	"	*L*	161	297	"	*C*	250
23*b*	"	*M*	81	95	"	*M*	77	166	"	*A*	238	231	"	*A*	286	301*a*	"	*A*	742
24	"	*L*	733	97	"	*A*	124	167	1926	*J*	145	232	"	*A*	237	301*b*	"	*M*	396
25	"	*C*	78	99	"	*C*	17	168	1927	*S*	128	233	"	*C*	224	302	"	*L*	238
26	"	*L*	30	104	1926	*J*	179	170	"	*L*	109	235	"	*M*	444	303	"	*P*	181
28	"	*A*	122	106	1927	*C*	213	171	"	*A*	223	236	"	*L*	168	304	"	*M*	503
30	"	*C*	70	107	"	*O*	85	172	"	*L*	129	237	"	*M*	1148	305*a*	"	*L*	220
31	1926	*A*	719	108	1926	*J*	177	173	"	*S*	148	238*a*	"	*L*	775	305*b*	"	*N*	14
32	1927	*M*	129	110	1927	*O*	70	176	"	*L*	124	238*b*	"	*M*	410	307	"	*M*	475
33	1926	*L*	590	112	"	*L*	79	177	"	*N*	117	239*a*	"	*L*	470	310*a*	"	*M*	500
38	1927	*L*	80	113	"	*M*	18	179	"	*L*	524	239*b*	"	*L*	139	310*b*	"	*C*	515
39*a*	"	*A*	730	114	1926	*J*	141	180	"	*N*	397	241*a*	"	*L*	735	311	"	*O*	140
39*b*	1926	*L*	554	116*a*	1927	*M*	156	181	"	*M*	308	241*b*	"	*C*	265	312	"	*L*	220
43	1927	*L*	874	116*b*	"	*L*	51	183	"	*N*	388	244	"	*L*	222	313*a*	"	*A*	730
44	"	*B*	38	118*a*	"	*M*	172	185	1921	*J*	6	245	"	*C*	944	313*b*	"	*M*	879
45	"	*L*	63	118*b*	"	*L*	74	186	1927	*N*	43	247	"	*L*	745	316*a*	"	*C*	405
48	"	*L*	69	120*a*	"	*M*	277	188*a*	1926	*J*	191	248	"	*M*	343	316*b*	"	*L*	102
49	"	*B*	47	120*b*	"	*L*	52	188*b*	1927	*N*	384	250	"	*L*	900	317	1926	*P*	506
50	"	*L*	138	122	"	*B*	4	189	"	*N*	163	251	"	*M*	361	320*a*	1927	*L*	833
51	"	*B*	46	129	"	*M*	19	190	"	*L*	164	252	"	*L*	194	320*b*	"	*M*	506
52	"	*L*	91	131	"	*R*	60	191	"	*N*	131	254	"	*PC*	26	321	"	*O*	132
53	"	*B*	35	133	"	*S*	113	193	"	*L*	78	255	"	*L*	353	323*a*	"	*L*	343
55	"	*L*	178	134	"	*O*	64	194*a*	"	*C*	242	256	"	*L*	772	323*b*	"	*A*	383
57	1928	*S*	49	136	"	*L*	88	194*b*	"	*S*	123	257	"	*L*	735	324	"	*C*	478
58	1927	*L*	831	137	1926	*J*	191	197	"	*C*	218	258	"	*L*	729	325	"	*M*	368
59	"	*C*	61	138	1927	*M*	298	199	"	*L*	162	259	"	*PC*	44	326	"	*L*	744
60	1926	*J*	189	139	"	*R*	43	201	"	*C*	200	264	"	*L*	193	327	"	*C*	480
61	1927	*S*	108	140	"	*A*	136	203	"	*O*	122	266	"	*L*	217	328	"	*L*	822
65	"	*O*	31	141*a*	"	*R*	98	205	"	*C*	215	267	"	*M*	345	329	"	*C*	327

CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.		
332	1927	*L*	337	464	1927	*R*	120	568	1927	*B*	414	680	1927	*L*	634	828	1927	*L*	713
334	"	*C*	324	465	"	*B*	666	575*a*	"	*L*	733	681	"	*O*	326	831	"	*C*	702
337	"	*O*	151	466	"	*C*	296	575*b*	"	*B*	436	683*a*	"	*L*	647	833	"	*C*	816
339	"	*L*	725	467	"	*B*	361	577	1928	*C*	24	683*b*	"	*O*	259	834	1928	*P*	13
340	"	*N*	203	468	"	*L*	191	578	1927	*B*	654	685	"	*L*	617	838	1927	*L*	786
341	"	*L*	285	469	"	*C*	409	579	"	*C*	527	687	"	*N*	333	840	"	*C*	718
342	"	*A*	754	471	"	*N*	222	581	"	*B*	410	688	"	*O*	611	843	1928	*P*	31
343	"	*C*	313	472	"	*C*	303	582	"	*C*	514	689	"	*C*	680	847	1927	*O*	359
345	"	*L*	430	474	"	*B*	366	584	"	*L*	727	692	"	*P*	370	848	"	*L*	705
347	"	*C*	330	475	"	*A*	834	585	"	*L*	746	697	"	*C*	505	849	"	*M*	851
349	"	*S*	159	476	"	*B*	353	586	"	*A*	831	701	"	*R*	241	850*a*	"	*O*	598
350	"	*C*	306	478*a*	"	*C*	936	588	"	*L*	520	703	"	*O*	318	850*b*	1928	*P*	129
351*a*	"	*P*	176	478*b*	"	*L*	435	589	"	*A*	783	704	"	*O*	318	854	1927	*L*	765
351*b*	"	*L*	165	479	"	*C*	343	590	"	*L*	526	705	"	*B*	483	857	1928	*P*	12
353	"	*P*	111	480	"	*L*	268	591	"	*A*	767	709	"	*P*	243	859	"	*C*	96
357	"	*L*	274	481	"	*C*	307	592	"	*L*	515	714	"	*B*	401	860*a*	"	*L*	42
359	"	*P*	126	483	1926	*J*	193	593	"	*L*	740	719	"	*P*	231	860*b*	1927	*O*	352
363	"	*L*	227	484*a*	1927	*C*	931	596	"	*A*	757	721	"	*L*	500	861	"	*R*	248
364	"	*B*	209	484*b*	"	*R*	149	597	"	*P*	325	723	"	*C*	698	865*a*	"	*R*	329
372	"	*R*	170	485	"	*C*	395	598	"	*L*	674	727	"	*L*	610	865*b*	1928	*P*	59
373	"	*B*	177	487	"	*L*	730	601	"	*A*	804	742	"	*C*	631	868*a*	1927	*R*	261
380	"	*B*	96	489	"	*N*	209	603*a*	"	*L*	476	744	"	*O*	306	868*b*	1928	*P*	46
381	"	*M*	425	490	"	*R*	122	603*b*	"	*P*	301	749	"	*O*	319	871	1927	*C*	801
383	"	*M*	613	491	"	*M*	602	604	"	*A*	531	750	"	*L*	355	872	1928	*P*	56
384	"	*M*	591	492	"	*A*	478	605	"	*P*	314	751	"	*C*	575	874	1927	*C*	820
385	"	*B*	163	493	"	*N*	221	606	"	*A*	755	752	"	*O*	597	877*a*	"	*O*	316
388	"	*N*	184	494	"	*A*	291	607	"	*L*	815	753	"	*L*	708	877*b*	"	*C*	823
394	"	*B*	159	495*a*	"	*N*	250	608	"	*A*	618	754	"	*B*	518	879	"	*M*	797
397*a*	"	*M*	582	495*b*	"	*A*	375	609	"	*A*	579	755	"	*L*	731	881	1928	*P*	1
397*b*	"	*B*	154	497	"	*P*	257	611	"	*P*	292	756	"	*O*	353	887	1927	*C*	724
399	"	*A*	475	502	"	*A*	334	615	"	*C*	593	757	"	*R*	240	888	"	*A*	567
401	1928	*O*	36	505	"	*N*	225	619	"	*L*	801	758	"	*L*	658	889	"	*C*	787
402	1927	*B*	161	507	"	*M*	695	621	"	*P*	302	759	"	*R*	254	893	1928	*P*	50
404	"	*C*	520	508	"	*L*	369	623	"	*R*	177	760	"	*P*	385	894*a*	1927	*O*	441
405	"	*L*	728	509	"	*M*	611	625	"	*L*	581	761	"	*S*	232	894*b*	"	*M*	1113
407	"	*C*	509	510	"	*A*	825	634	"	*O*	555	763	"	*L*	654	895	"	*O*	607
409	"	*O*	235	511	"	*N*	210	635	"	*L*	567	765	"	*R*	239	896	"	*B*	360
410	"	*L*	379	513	"	*L*	496	638	"	*O*	277	766	"	*C*	679	897	"	*C*	747
411	"	*P*	403	514	"	*A*	764	639*a*	"	*P*	402	767	"	*L*	650	898	1928	*N*	21
413	"	*L*	370	515*a*	"	*M*	624	639*b*	"	*C*	574	769	"	*P*	398	900	1927	*C*	751
415*a*	"	*L*	808	515*b*	"	*A*	473	641	"	*L*	541	771	"	*L*	781	901	1928	*P*	88
415*b*	"	*L*	430	517	"	*N*	244	643	"	*P*	327	772	"	*P*	315	902*a*	1927	*O*	294
416	"	*L*	357	518	"	*P*	197	644	"	*S*	231	773	"	*R*	205	902*b*	1928	*P*	102
417	"	*S*	175	520	"	*O*	193	645	"	*N*	189	776	"	*P*	393	903	1927	*C*	848
418	"	*N*	234	522	"	*M*	501	647	"	*L*	546	778	"	*L*	669	905	1928	*P*	98
419	"	*L*	432	523	"	*N*	170	648	"	*A*	646	780	"	*N*	204	908	1927	*R*	303
421	1928	*S*	73	529	"	*P*	199	649	"	*R*	174	781	"	*L*	398	910	"	*P*	265
424	1927	*R*	335	531	"	*A*	470	650	"	*O*	264	782	"	*M*	816	912	"	*R*	328
425*a*	"	*S*	261	532	"	*P*	282	651*a*	*Too old*			783	"	*C*	628	913	1928	*S*	1
425*b*	"	*N*	240	534*a*	"	*A*	472	651*b*	1927	*L*	893	785	"	*A*	654	928	1927	*M*	1018
426	"	*S*	161	534*b*	"	*B*	432	652*a*	"	*B*	657	787	"	*L*	709	929	1928	*N*	81
431	"	*S*	166	536	"	*A*	815	652*b*	"	*A*	516	788	"	*O*	345	932	1927	*R*	322
433	"	*R*	113	537	"	*B*	426	653	"	*B*	445	790	"	*L*	672	934	1928	*N*	17
437	"	*A*	476	539	"	*M*	566	656*a*	"	*L*	780	792	"	*A*	660	937*a*	1927	*O*	549
439	"	*S*	173	541	"	*P*	406	656*b*	"	*L*	799	794	"	*L*	594	937*b*	"	*R*	313
442	"	*A*	480	543*a*	"	*A*	571	657	1928	*L*	189	802	"	*O*	321	939	"	*B*	440
443	"	*P*	191	543*b*	"	*M*	688	659	1927	*N*	279	805	"	*C*	644	944	"	*M*	973
445	"	*R*	121	544	"	*A*	829	661	1928	*L*	191	807	"	*L*	682	945	"	*M*	986
446	"	*C*	372	545	"	*M*	938	662	1927	*O*	313	809	"	*C*	621	946	"	*A*	727
447	"	*P*	429	546	"	*C*	532	663	"	*L*	580	812	"	*M*	778	948	"	*M*	985
449	"	*C*	949	547*a*	"	*A*	828	664	"	*O*	257	813	1928	*L*	49	949	"	*N*	404
450	"	*O*	175	547*b*	"	*L*	519	665	"	*L*	495	814	1927	*O*	571	950	"	*A*	721
451	"	*L*	332	549	"	*A*	555	666	"	*A*	560	815	"	*L*	689	952	1928	*N*	79
452*a*	"	*O*	174	552	"	*M*	626	667	"	*L*	774	816	"	*O*	352	954	"	*S*	43
452*b*	"	*M*	544	554	"	*A*	536	668	"	*A*	571	817	"	*C*	721	955	1927	*M*	974
453	"	*O*	609	556	"	*L*	549	670	"	*L*	500	819	"	*L*	792	957	"	*M*	981
456	"	*L*	739	561	"	*M*	603	671	"	*L*	561	820	1928	*P*	159	959	"	*S*	257
459	"	*L*	737	562	"	*C*	516	672	"	*N*	255	821	1927	*L*	702	960	1928	*S*	49
460	"	*O*	196	564	1928	*L*	30	673	"	*O*	296	824	"	*M*	789	961	"	*L*	107
461	"	*L*	724	566	1927	*M*	612	674	"	*S*	241	825	"	*L*	699	962*a*	1927	*M*	1080
463	"	*M*	512	567	"	*A*	592	679	"	*O*	312	827	"	*C*	701	962*b*	1928	*P*	38

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CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.			CrLJ)	A. I. R.		
964	1927	*L*	830	977	1927	*M*	1022	991	1928	*A*	14	1007	1928	*M*	20[illegible]	1028	1928	*P*	103
965	"	*A*	705	978	1928	*S*	69	993	1927	*L*	706	1009	"	*M*	18	1029	"	*O*	15
966	1928	*L*	93	979	1927	*M*	975	995	1928	*M*	129	1010	1927	*L*	871	1032	1927	*B*	629
967	1927	*A*	647	980	"	*O*	588	996	"	*N*	58	1011	"	*A*	708	1034	"	*M*	976
969	1928	*L*	69	982	1928	*M*	18	1001	"	*A*	20	1012	"	*B*	501	1035	"	*P*	351
971*a*	1927	*L*	870	983*a*	1927	*A*	744	1002	"	*M*	20	1020	1928	*L*	20	1036	1928	*L*	187
971*b*	1928	*P*	22	983*b*	1928	*L*	17	1002	"	*L*	27	1021	1927	*B*	647	1037	1927	*P*	369
972	1927	*L*	851	986	"	*A*	21	1004	1927	*M*	970	1022	"	*M*	969	1038	1928	*M*	161
973	"	*L*	805	988	"	*L*	75	1005	"	*M*	1011	1023	"	*B*	369	1039	1927	*P*	432
974	"	*M*	961	989	"	*S*	68	1007	"	*M*	996	1025	"	*B*	630	1040	"	*L*	825

99 Indian Cases=All India Reporter.

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
1	1927	*A*	128	105	1927	*A*	184	241	1927	*M*	163	393	1927	*M*	295	518*a*	1927	*N*	365
2	"	*O*	104	108	"	*O*	42	244	"	*C*	291	399	"	*N*	133	518*b*	"	*L*	131
4	"	*L*	148	109	"	*P*	100	255	"	*O*	66	400	1926	*B*	585	519	"	*R*	33
5	"	*A*	191	112	1926	*P*	449	258	"	*C*	168	401	1927	*R*	61	524	"	*L*	108
7	"	*L*	136	117	"	*J*	138	265	1926	*PC*	131	407	"	*A*	121	525	"	*M*	120
8	"	*M*	1	118	1927	*C*	95	269	1927	*M*	282	408	"	*C*	173	528	"	*A*	206
17	1926	*J*	187	119	1926	*J*	115	271	1926	*J*	181	409	"	*A*	49	530	"	*M*	114
18	1927	*M*	22	120	1927	*A*	157	274	1927	*M*	292	411	"	*C*	196	531	"	*A*	212
30	"	*L*	147	121	1926	*J*	184	277	1926	*J*	191	412	"	*L*	791	532	"	*M*	304
32	"	*M*	109	122	"	*O*	615	278	1927	*M*	1150	413	"	*O*	91	534	"	*A*	745
33*a*	*Too old*			123	1927	*A*	147	280	"	*A*	177	414	"	*L*	145	535	1926	*J*	181
33*b*	1926	*J*	135	124	"	*C*	98	284	"	*M*	166	415	"	*A*	267	536	1927	*M*	153
34	1927	*C*	63	126*a*	"	*A*	149	288	"	*L*	78	416	"	*L*	647	538	"	*L*	83
36*a*	"	*M*	66	126*b*	"	*A*	199	289	"	*B*	17	417	1926	*B*	584	539	"	*M*	406
36*b*	"	*C*	28	127	"	*M*	77	291	"	*L*	153	418	1927	*R*	45	542*a*	"	*L*	764
37	"	*B*	21	129	1926	*J*	194	292	"	*A*	201	420	"	*L*	159	542*b*	"	*M*	245
38	"	*C*	73	138	1927	*A*	132	293	1926	*B*	590	422	"	*N*	102	547	"	*O*	59
40	"	*A*	146	143	"	*M*	85	299	1927	*A*	189	424	"	*A*	209	548	"	*A*	283
41	1926	*A*	759	147	"	*O*	103	300	"	*L*	20	425	"	*M*	427	550	"	*M*	173
42	"	*C*	931	148*a*	"	*R*	108	307	"	*B*	11	427	1926	*J*	194	553	"	*A*	268
44	1927	*M*	78	148*b*	"	*M*	93	309	"	*R*	55	428	1927	*C*	182	554	"	*S*	126
46	"	*N*	24	151	"	*R*	58	310	1926	*B*	582	436	"	*N*	398	557	"	*A*	221
47	1926	*A*	752	152	"	*M*	130	312	1927	*M*	287	438*a*	"	*M*	1137	559	"	*M*	137
48	1927	*O*	14	154	"	*O*	27	313	"	*N*	370	438*b*	"	*N*	156	561	"	*A*	270
49	"	*L*	149	158	"	*M*	111	315	"	*R*	37	440	"	*A*	220	563	1926	*L*	616
51	1926	*J*	158	160	"	*N*	162	318	"	*L*	24	441	"	*L*	57	564	1927	*M*	403
55*a*	1927	*L*	62	161	"	*A*	1	321	"	*M*	18	443*a*	"	*M*	1104	565	"	*L*	129
55*b*	"	*M*	81	177	"	*C*	237	322	1926	*J*	141	443*b*	"	*A*	76	566	"	*M*	210
56	"	*L*	733	178	"	*S*	103	324*a*	1927	*M*	156	445*a*	"	*N*	119	568	"	*A*	526
57	"	*C*	78	180	"	*C*	106	324*b*	"	*L*	51	445*b*	"	*L*	146	571	"	*M*	255
58	"	*L*	30	183	1926	*J*	178	326*a*	"	*M*	172	446	"	*M*	207	578	"	*A*	274
60	"	*A*	122	185*a*	1927	*O*	90	326*b*	"	*L*	74	448	"	*N*	113	581	1926	*PC*	121
62	"	*C*	70	185*b*	"	*M*	124	328*a*	"	*M*	277	452	"	*M*	140	585	1927	*M*	317
63	1926	*A*	719	187	"	*N*	129	328*b*	"	*L*	52	455	"	*A*	208	588	"	*A*	756
64	1927	*M*	129	189	"	*C*	1	330	"	*B*	4	456	"	*M*	157	589	"	*M*	299
65	1926	*L*	590	199	"	*O*	89	337	"	*M*	19	459	"	*M*	89	591	"	*L*	122
70	1927	*L*	80	200	"	*C*	179	339	"	*R*	60	461	"	*N*	121	592*a*	"	*M*	1180
71*a*	"	*A*	730	203	"	*O*	46	341	"	*S*	113	463	"	*L*	125	592*b*	"	*L*	107
71*b*	1926	*L*	554	204	1926	*J*	191	342	"	*O*	64	464	"	*M*	34	593	1926	*J*	180
75	1927	*L*	874	205	1927	*C*	130	344	"	*L*	88	466	"	*O*	53	594	1927	*S*	112
76	"	*B*	38	211	1926	*O*	613	345	1926	*J*	191	468	"	*M*	301	595	"	*R*	59
77	"	*L*	63	213	1927	*M*	36	346	1927	*M*	298	472	"	*O*	97	596*a*	"	*L*	66
80	"	*L*	69	215	"	*O*	52	347	"	*R*	43	475	"	*M*	382	596*b*	"	*M*	307
81	"	*B*	47	216	"	*C*	191	348	"	*A*	136	476	1928	*A*	12	598	"	*A*	238
82	"	*L*	138	217	1926	*O*	593	349*a*	"	*R*	98	478	1927	*O*	60	599	1926	*J*	145
83	"	*B*	46	218	"	*J*	195	349*b*	"	*C*	199	482	"	*B*	16	600	1927	*S*	128
84	"	*L*	91	219	"	*O*	610	352	"	*O*	101	483	"	*O*	55	602	"	*L*	109
85	"	*B*	35	221	"	*M*	1051	353	"	*A*	81	489	"	*B*	13	603	"	*A*	223
87	"	*L*	178	222	1927	*O*	68	367	"	*M*	411	492	"	*P*	97	604	"	*L*	129
89	1928	*S*	49	223	"	*M*	1156	369	"	*N*	2	495	1926	*B*	585	605	"	*S*	148
90	1927	*L*	831	225	"	*A*	124	376	"	*A*	214	500	"	*J*	107	608	"	*L*	124
91	"	*C*	61	227	"	*C*	17	377	"	*M*	53	501	1927	*P*	92	609	"	*M*	99
92	1926	*J*	189	232	1926	*J*	179	382	"	*A*	219	503	"	*M*	228	619	"	*L*	118
93	1927	*S*	108	234	1927	*C*	213	383	"	*M*	188	507	"	*P*	93	620	"	*M*	426
97	"	*O*	31	235	"	*O*	85	384	"	*B*	1	510	"	*N*	120	621	"	*M*	381
98	"	*S*	104	236	1926	*J*	177	387	"	*R*	40	511	"	*M*	371	622	"	*A*	215
102	"	*M*	199	238	1927	*O*	70	390	"	*L*	135	515	"	*L*	84	625	"	*M*	378
104	"	*P*	130	240	"	*L*	79	391	"	*O*	72	516	"	*M*	415	626	"	*N*	358

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I. C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.		
627	1927	*M*	184	708	1926	*L*	621	822	1927	*L*	158	917	1927	*C*	244	994	1927	*R*	88
628	"	*N*	204	709	1927	*M*	278	823	"	*B*	140	920	"	*L*	45	996*a*	1926	*J*	85
629	"	*M*	328	713	"	*M*	249	828	"	*M*	1155	921	"	*C*	225	996*b*	1927	*R*	94
630	"	*N*	133	717	"	*R*	46	829	"	*L*	166	922	"	*L*	36	997	1926	*J*	143
632	"	*M*	391	718	"	*C*	156	831	1923	*M*	160	923	1926	*J*	173	998	1927	*R*	83
634	"	*M*	148	720	"	*M*	1128	835	1927	*N*	134	926	1927	*A*	241	999	1926	*J*	109
635	"	*N*	132	723	*Too old*			838	"	*M*	311	928	"	*L*	41	1000	1927	*A*	278
637	"	*M*	272	726	1927	*A*	245	845	"	*M*	459	929	"	*L*	78	1002	"	*L*	156
638	"	*L*	120	727	"	*R*	49	846	"	*M*	369	930*a*	"	*C*	242	1003	"	*M*	357
640	"	*M*	123	734	"	*L*	722	849	"	*N*	117	930*b*	"	*S*	123	1004	"	*L*	29
642	"	*L*	171	735	"	*R*	39	851	"	*L*	524	933	"	*C*	218	1006	"	*L*	179
643	1926	*O*	388	736	"	*C*	163	852	"	*N*	397	935	"	*L*	162	1008	"	*L*	799
648	1927	*L*	174	742	1926	*PC*	136	853	"	*M*	308	937	"	*C*	200	1009	1926	*J*	116
650	1926	*PC*	85	748	1927	*R*	44	855	"	*N*	388	939	"	*O*	122	1010	1927	*C*	261
654	1927	*L*	123	749	1926	*PC*	142	857	1921	*J*	6	941	"	*C*	215	1012	1926	*J*	187
655	"	*M*	435	751	"	*L*	486	858	1927	*N*	43	943*a*	"	*M*	434	1013	1927	*R*	68
656	"	*M*	190	752	*Too old*			860*a*	1926	*J*	191	943*b*	"	*M*	397	1017	1926	*J*	114
658	"	*M*	431	753*a*	1927	*R*	85	860*b*	1927	*N*	384	944*a*	"	*L*	58	1019	1927	*R*	74
659	"	*N*	64	753*b*	"	*M*	1146	861	"	*N*	163	944*b*	"	*M*	393	1025	"	*M*	1060
660	"	*M*	233	755	*Too old*			862	"	*L*	164	945	"	*L*	82	1025	"	*L*	16
666	"	*L*	111	756	1927	*L*	350	863	"	*N*	131	946	*Too old*			1026	"	*R*	73
668	"	*M*	216	757	1926	*PC*	37	865	"	*P*	114	948	1927	*L*	86	1027	"	*A*	270
669*a*	"	*M*	1099	759*a*	1927	*R*	56	868	"	*N*	375	949	"	*R*	86	1027	"	*L*	173
669*b*	"	*PC*	2	759*b*	"	*A*	765	869	"	*P*	113	952	"	*L*	37	1029	"	*A*	217
676	"	*M*	421	760	"	*R*	72	870	"	*L*	780	954	"	*M*	355	1030	"	*L*	161
677	"	*M*	288	761	"	*C*	175	871	"	*S*	151	956	1926	*J*	182	1031	"	*A*	286
681*a*	"	*L*	132	762	"	*A*	244	875	"	*L*	72	957	1927	*M*	683	1032	"	*A*	237
681*b*	"	*M*	215	763*a*	1922	*L*	364	876	"	*O*	74	958	1926	*J*	190	1033	"	*C*	224
682	1926	*J*	179	763*b*	1927	*B*	75	890*a*	"	*L*	845	959	1927	*P*	105	1035	"	*M*	444
683	1927	*M*	412	767	"	*L*	169	890*b*	"	*O*	138	962	"	*L*	75	1036	"	*L*	168
684	"	*L*	355	769	"	*N*	158	893	"	*M*	327	964	"	*M*	1119	1037	"	*M*	1148
685	"	*M*	1081	770	"	*L*	103	894	"	*O*	135	970	"	*L*	87	1038	"	*L*	775
686	"	*PC*	1	772	"	*M*	458	895	"	*C*	240	971	"	*M*	1094	1038	"	*M*	410
687	"	*M*	204	774	"	*N*	157	897	1928	*O*	40	972*a*	1926	*S*	143	1039	"	*L*	470
690	"	*L*	134	775	"	*M*	383	898	1927	*L*	170	972*b*	1927	*M*	433	1039	"	*L*	139
691	"	*M*	455	779	"	*N*	165	899	"	*O*	591	974	"	*M*	1159	1041	"	*N*	406
692	"	*L*	143	780	"	*N*	365	901	"	*C*	238	977	"	*M*	182	1045	"	*A*	257
694	"	*M*	284	782	1926	*P*	582	902	"	*M*	322	979	1926	*J*	95	1046	"	*N*	392
698	"	*L*	753	812	1927	*L*	176	907	"	*C*	230	981	1927	*M*	331	1049	"	*A*	239
699	"	*M*	449	814	"	*B*	87	909	"	*L*	157	985	"	*R*	91	1050	"	*N*	145
700	"	*M*	261	818	"	*L*	130	910	"	*C*	234	988	1926	*J*	120	1052	"	*A*	255
703	"	*L*	814	820	"	*B*	84	912	"	*O*	125	989	1927	*M*	450	1055	"	*L*	71
705	"	*M*	494													1055	"	*M*	350

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I C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.		
1	1927	*PC*	15	38	1927	*A*	288	75	1927	*L*	798	117	1927	*C*	944	162	1927	*L*	609
3	"	*L*	862	39	"	*A*	289	76*a*	"	*A*	573	119	"	*L*	745	164*a*	"	*L*	719
4	"	*N*	159	40	"	*M*	273	76*b*	"	*L*	235	120	"	*M*	343	164*b*	"	*L*	778
5	"	*A*	793	45	"	*A*	296	77	"	*PC*	27	122	"	*L*	900	165*a*	"	*M*	178
7	"	*C*	268	46*a*	"	*L*	187	82	"	*M*	445	123	"	*M*	361	165*b*	"	*L*	761
9	"	*A*	243	46*b*	"	*N*	363	84	"	*L*	198	124	"	*L*	194	166	"	*L*	860
10	"	*M*	219	49	"	*L*	196	86	"	*PC*	32	126	"	*PC*	26	167	"	*C*	373
17*a*	"	*L*	772	50	"	*A*	487	90	"	*M*	329	127	"	*L*	353	168	"	*L*	105
17*b*	"	*L*	189	51	"	*L*	230	91	"	*PC*	17	128	"	*L*	772	169	"	*N*	139
18	"	*A*	329	52	"	*A*	822	92	"	*L*	187	129	"	*L*	237	177	"	*C*	207
19	"	*L*	734	53	"	*L*	133	93	"	*PC*	20	130	"	*PC*	37	180	"	*O*	595
20	"	*M*	347	54*a*	"	*M*	1111	95	"	*B*	61	134	"	*L*	763	182	"	*C*	947
21	"	*N*	378	54*b*	"	*L*	126	97	"	*L*	181	135	"	*M*	335	185	"	*B*	63
22	"	*PC*	25	56	"	*PC*	18	98	"	*B*	55	137	"	*L*	914	189	"	*A*	317
23	"	*L*	852	58	1926	*J*	180	104	"	*L*	810	138	"	*B*	81	190	"	*C*	357
24	"	*M*	625	59	1927	*A*	167	105	"	*PC*	42	140	"	*C*	253	193	1928	*O*	25
25	"	*A*	797	60	"	*L*	272	108	"	*L*	847	143	"	*B*	19	195	1927	*S*	265
27	"	*N*	161	62*a*	"	*A*	598	109	"	*B*	83	145	"	*L*	790	197	"	*C*	344
29	"	*A*	749	62*b*	"	*M*	572	110	"	*L*	152	146	"	*C*	374	198	"	*A*	290
30	"	*N*	368	67	"	*L*	183	111	"	*M*	1101	147	"	*B*	68	199	"	*O*	108
31	"	*A*	817	70	"	*L*	380	112	"	*L*	234	153	"	*L*	842	202	"	*M*	528
32	"	*PC*	22	72	"	*M*	360	113*a*	"	*L*	735	154	"	*B*	79	204	"	*S*	130
35	"	*A*	308	73•	"	*L*	759	113*b*	"	*C*	265	156	"	*L*	894	223	1926	*O*	499
37	"	*N*	164	74	"	*R*	84	116	"	*L*	222	157	"	*M*	398	224	1927	*M*	474

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
225	1927	*L*	735	365	1927	*M*	533	521	1927	*C*	479	634	1927	*M*	436	741	1927	*M*	404
226	"	*L*	729	371*a*	"	*C*	946	522	"	*M*	394	636	"	*A*	364	743	"	*A*	405
227	"	*PC*	44	371*b*	"	*A*	350	525	"	*C*	410	637	"	*O*	207	744	"	*M*	271
232	"	*L*	193	373	"	*L*	352	526	"	*O*	559	638	"	*A*	358	745	"	*A*	421
234	"	*L*	217	374	"	*A*	384	527	"	*A*	365	639	"	*M*	530	747	"	*M*	1084
235	"	*M*	345	375	"	*M*	442	529*a*	"	*L*	220	640	"	*A*	349	748	"	*A*	242
236	1926	*J*	185	376	"	*A*	334	529*b*	"	*N*	14	641	"	*C*	934	749	"	*A*	246
238	1927	*M*	473	377	"	*C*	250	531	"	*M*	475	642	"	*M*	409	754	"	*P*	144
239	"	*M*	376	381*a*	"	*A*	742	534*a*	"	*M*	500	644	"	*A*	345	756	"	*A*	299
241*a*	"	*M*	439	381*b*	"	*M*	396	534*b*	"	*C*	515	645	"	*M*	1125	762*a*	"	*A*	733
241*b*	"	*O*	113	382	"	*L*	238	535	"	*O*	140	646	"	*A*	806	762*b*	"	*L*	336
250	"	*R*	102	383	"	*P*	181	536	"	*L*	220	648	"	*M*	498	763	"	*A*	420
254	1926	*PC*	52	384	"	*M*	503	537*a*	"	*A*	730	650	"	*A*	410	764	"	*A*	258
255	1927	*R*	95	385	1926	*M*	530	537*b*	"	*M*	379	651	"	*O*	565	772	"	*N*	207
260	"	*A*	316	389	1927	*S*	155	540*a*	"	*C*	405	652	"	*A*	788	773	"	*L*	53
261	"	*R*	100	399	1926	*M*	699	540*b*	"	*L*	102	653	"	*L*	232	774*a*	"	*A*	238
263	"	*M*	348	404	1927	*C*	275	541	1926	*P*	506	655*a*	"	*O*	539	774*b*	"	*L*	288
264	"	*C*	309	406	"	*N*	77	544*a*	1927	*L*	833	655*b*	"	*M*	386	775	"	*A*	395
265	"	*R*	105	413	"	*C*	359	544*b*	"	*M*	506	661	"	*A*	415	776	"	*M*	597
269	"	*L*	113	418	"	*L*	94	545*a*	"	*L*	110	662	"	*L*	844	778	"	*A*	252
270	"	*A*	338	420	"	*C*	259	545*b*	"	*M*	377	663	"	*O*	145	781	"	*C*	305
272	"	*N*	150	422	"	*L*	252	546	"	*A*	359	665	"	*M*	1138	783	"	*L*	865
277	"	*R*	99	425	"	*O*	131	548	"	*L*	443	666	"	*A*	336	784	"	*O*	613
278	"	*C*	931	426	"	*L*	140	550	"	*A*	352	668	"	*PC*	50	785	"	*N*	199
280	"	*M*	363	427	"	*C*	431	553*a*	"	*M*	1114	670	"	*A*	417	786	"	*L*	895
285	"	*R*	104	429	1926	*J*	189	553*b*	"	*A*	348	672	"	*L*	188	787	1928	*O*	98
286	"	*C*	277	430	1927	*B*	97	555	"	*M*	265	673	"	*A*	340	788*a*	1927	*L*	388
288	"	*A*	272	438	"	*N*	147	561	*Too old*			675*a*	"	*L*	248	788*b*	"	*O*	181
289	"	*C*	256	440	"	*M*	511	563	1927	*A*	776	675*b*	"	*A*	333	790	"	*A*	802
291	"	*M*	545	441	"	*C*	286	565	1928	*N*	43	677	"	*L*	239	791	*Too old*		
293	"	*C*	216	444	"	*A*	366	566	1927	*A*	344	678	"	*M*	440	792	1926	*J*	183
294	"	*A*	309	446	"	*N*	104	567	"	*L*	223	679	"	*A*	315	793	1927	*L*	224
296	"	*C*	197	449	"	*A*	412	568	"	*A*	355	680	"	*M*	468	794	"	*N*	195
298	"	*L*	190	450*a*	"	*S*	263	570	"	*O*	147	683	"	*A*	170	795	"	*L*	269
299	"	*C*	227	450*b*	"	*O*	106	571	"	*A*	400	686	"	*O*	574	797	"	*C*	281
301*a*	"	*R*	82	452	"	*L*	197	573	"	*L*	240	687*a*	"	*C*	921	800	"	*L*	337
301*b*	"	*L*	879	453	"	*C*	210	574	"	*A*	827	687*b*	"	*A*	784	802	1927	*O*	170
302	"	*C*	220	456	"	*A*	374	575	"	*B*	91	689	"	*O*	149	803	"	*L*	896
306	"	*M*	493	457	"	*N*	122	577*a*	"	*J*	221	691*a*	"	*A*	564	805	"	*O*	142
307	"	*R*	81	464	"	*O*	120	577*b*	"	*A*	341	691*b*	"	*N*	112	807	"	*L*	266
308	"	*O*	134	466	"	*C*	413	578	"	*B*	111	692	"	*A*	16	810	"	*L*	912
309	"	*C*	203	468	"	*L*	861	580	"	*M*	429	701	"	*P*	164	812	"	*N*	175
313	"	*L*	904	469	"	*C*	477	582	"	*B*	93	703	"	*A*	463	813	"	*L*	891
315	"	*A*	760	471	"	*A*	346	584	1926	*P*	606	704	"	*A*	320	815	"	*L*	848
316	"	*A*	813	472	"	*L*	888	586	1927	*B*	103	705	"	*O*	132	817	"	*O*	151
318	"	*C*	247	473	"	*A*	590	593	"	*A*	677	707*a*	"	*L*	343	819	"	*L*	726
320	"	*A*	418	474	1926	*O*	240	595*a*	"	*L*	911	707*b*	"	*A*	383	820	"	*N*	203
321	1926	*C*	507	475	1927	*L*	106	595*b*	"	*A*	357	708	"	*C*	478	821	"	*L*	285
323	1927	*R*	111	476	"	*A*	335	596	"	*L*	172	709	"	*M*	368	822	"	*A*	754
324	"	*A*	305	477	"	*L*	236	597	"	*A*	330	710	"	*L*	744	823	"	*C*	313
327	"	*R*	90	479	"	*A*	342	598	1926	*J*	119	711	"	*C*	480	825	"	*L*	430
329	"	*L*	141	481	"	*O*	305	599	1927	*A*	319	712	"	*L*	822	827	"	*C*	330
331	"	*C*	290	482	"	*A*	331	600	"	*M*	1136	713	"	*C*	327	829	"	*S*	159
332	"	*A*	292	484	"	*M*	359	601	"	*A*	297	716	"	*L*	338	830	"	*C*	306
336	"	*L*	777	485	"	*PC*	8	603	"	*C*	940	718	"	*C*	324	831*a*	"	*P*	176
338	"	*M*	560	493	"	*M*	1142	605	"	*A*	471	721	"	*L*	115	831*b*	"	*L*	165
341	"	*A*	236	494	"	*O*	159	607*a*	"	*C*	417	726*a*	"	*A*	754	833	"	*L*	284
343	"	*C*	938	495	"	*A*	378	607*b*	"	*M*	422	726*b*	"	*C*	464	834	"	*L*	225
344	1921	*J*	34	498	"	*L*	216	610	"	*A*	361	727	"	*A*	386	835	1922	*PC*	102
345*a*	1926	*PC*	118	499	"	*A*	318	614	"	*C*	279	728	"	*O*	148	838	1927	*L*	382
345*b*	1927	*N*	155	500	"	*M*	1149	616	"	*M*	491	729	"	*A*	424	839	"	*L*	851
346	"	*A*	311	501	"	*C*	951	619	"	*B*	123	730	"	*O*	198	841	"	*M*	416
350	"	*O*	146	503	"	*O*	110	621	"	*O*	136	732	"	*L*	119	846	"	*L*	333
351	"	*C*	284	504	"	*L*	218	623	"	*A*	381	733*a*	"	*A*	411	849	"	*L*	259
352	"	*A*	849	506	"	*M*	1134	625	"	*L*	226	733*b*	"	*L*	371	851	"	*O*	183
353	"	*C*	257	507	"	*C*	457	626	"	*A*	377	734	"	*A*	523	854	"	*L*	192
355	"	*M*	413	508	"	*A*	752	628	"	*M*	489	735*a*	"	*A*	419	855	"	*N*	180
357	1926	*J*	184	510	"	*C*	421	630	"	*C*	472	735*b*	"	*C*	285	859	1928	*L*	33
358	1927	*C*	460	516	"	*A*	741	631	"	*O*	541	737	"	*A*	654	860	1927	*N*	168
359	"	*M*	1112	518	"	*C*	420	632	"	*P*	413	738	"	*L*	876	862	"	*L*	903
361	"	*A*	279	520	"	*A*	398	633	"	*A*	781	740	"	*A*	520	863	"	*N*	177

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I.C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.		
865	1927	*C*	363	913	1927	*P*	123	955	1927	*L*	273	996	1927	*R*	334	1023	1927	*A*	407
874	1928	*L*	51	916	"	*L*	871	956	"	*B*	131	997	"	*C*	315	1025	"	*B*	187
875	1927	*C*	299	917	"	*L*	255	961	"	*P*	111	1004	"	*R*	329	1029	"	*A*	422
886	"	*P*	175	921	"	*R*	136	965	"	*L*	274	1004	"	*B*	129	1031	"	*B*	256
887	"	*C*	322	922	"	*L*	396	967	"	*P*	126	1007	"	*M*	488	1032	"	*A*	393
889	"	*P*	344	924	"	*L*	241	971	"	*L*	227	1007	"	*R*	195	1033	"	*B*	145
890	"	*S*	177	932	"	*B*	384	972	"	*B*	209	1008	"	*B*	143	1037	"	*A*	385
896	"	*L*	347	936	"	*L*	342	980	"	*B*	170	1010	"	*L*	358	1039	"	*B*	175
897	"	*P*	132	937	"	*B*	110	981	"	*B*	177	1014	"	*R*	127	1040	"	*A*	406
901	"	*L*	283	939	"	*L*	382	988	"	*B*	96	1014	"	*L*	366	1041	"	*B*	163
903	"	*C*	394	941	"	"	113	989	"	*M*	425	1017	"	*R*	133	1044	"	*N*	184
907	"	*L*	433	943	"	*L*	605	991	"	*M*	613	1018	"	*M*	471	1050	"	*B*	159
909	"	*L*	839	946	"	*B*	660	992	"	*M*	591	1020	"	*R*	135	1053	"	*M*	582
910	"	*L*	328	949	"	*L*	278	993*a*	"	*R*	168	1021	"	*B*	176	1053	"	*B*	154
911	"	*L*	264	951	"	*B*	135	993*b*	"	*B*	125	1022	"	*A*	414	1055	"	*A*	475

101 Indian Cases=All India Reporter

I.C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.		
1	1927	*PC*	89	143	1927	*M*	497	262	1927	*N*	379	385	1927	*B*	664	488	1927	*L*	739
9	"	*C*	354	144	"	*B*	167	265	"	*O*	177	386	1928	*M*	33	491	"	*L*	737
12	"	*M*	526	153*a*	"	*L*	425	269	"	*S*	168	388	1927	*B*	230	492	"	*O*	196
15	"	*C*	559	153*b*	"	*M*	1090	274	1928	*O*	145	390	"	*M*	650	493	"	*L*	724
17	"	*PC*	70	155	"	*B*	157	275	1927	*N*	193	393	"	*B*	240	495	"	*M*	512
18	"	*M*	441	157	"	*M*	610	277	"	*P*	131	396	"	*M*	522	496	"	*R*	120
20	"	*PC*	57	158	*Too old*			279	1928	*N*	29	398	"	*B*	237	497	"	*A*	434
23	"	*M*	460	160	1927	*S*	182	280	1927	*L*	771	399	"	*M*	538	498	"	*M*	662
24	"	*PC*	73	165	"	*M*	659	281	"	*N*	192	403	"	*B*	264	499	"	*A*	739
27	"	*C*	462	166*a*	"	*L*	423	282	1928	*O*	103	409	"	*A*	211	500	"	*P*	221
29	"	*PC*	84	166*b*	"	*S*	187	284	1927	*N*	127	411	"	*B*	247	501	"	*A*	717
35	"	*B*	192	171	"	*L*	394	285	"	*O*	202	414	"	*PC*	99	503	"	*O*	188
38	"	*PC*	97	172	"	*L*	420	287	"	*A*	254	416	"	*B*	228	505	"	*A*	467
39	"	*M*	531	174	"	*O*	156	288	"	*N*	198	419	"	*R*	126	506	"	*P*	224
40	"	*B*	184	177	1928	*O*	36	289	"	*P*	61	420	"	*M*	614	507	"	*A*	459
44	"	*PC*	56	178	1927	*B*	161	319	"	*R*	335	426	"	*PC*	101	511	"	*P*	207
45	"	*C*	546	180	"	*C*	520	320*a*	"	*N*	197	427	"	*O*	614	513	"	*A*	538
46	"	*B*	151	181	"	*L*	728	320*b*	"	*R*	134	428	"	*R*	123	514	"	*M*	660
49	"	*M*	448	183	"	*C*	509	321	"	*L*	5	430	"	*B*	259	516	"	*A*	552
50	"	*PC*	60	185	"	*O*	235	322	"	*A*	437	431	"	*R*	127	518	"	*A*	540
52	"	*O*	217	186	"	*L*	379	324	"	*L*	81	432	"	*B*	221	520	"	*L*	808
53	"	*M*	1093	187	"	*P*	408	325	"	*L*	137	434	"	*R*	130	522	"	*O*	625
54	"	*O*	604	189	"	*L*	370	327	"	*R*	333	436	"	*M*	536	524	1928	*A*	38
55	"	*M*	639	191*a*	"	*L*	808	328	"	*L*	860	438	"	*S*	160	525	1927	*M*	1081
57	"	*A*	444	191*b*	"	*L*	430	329	"	*R*	330	439	"	*M*	664	526	"	*A*	779
58	"	*M*	645	192	"	*L*	357	330	"	*B*	251	442	"	*PC*	108	527	"	*C*	340
62	"	*C*	117	193	"	*O*	161	334	"	*C*	511	444	"	*L*	791	529	"	*A*	458
78	"	*M*	609	194	"	*L*	345	335	"	*B*	234	445	"	*P*	188	530	"	*C*	425
79	"	*PC*	80	196	"	*O*	158	338	"	*B*	663	446	"	*A*	432	536	"	*A*	751
82	"	*M*	681	198	"	*R*	109	339	"	*C*	494	448	"	*P*	232	537	"	*C*	298
85	"	*M*	568	200*a*	"	*O*	208	340	"	*B*	270	449	"	*S*	175	538	"	*A*	735
89*a*	"	*O*	591	200*b*	"	*R*	134	343	"	*B*	257	450	"	*N*	234	539	"	*C*	352
89*b*	"	*M*	1133	201	"	*L*	280	346	"	*M*	1116	451	"	*L*	432	541	"	*L*	281
91	"	*O*	605	202	"	*R*	129	347	"	*C*	493	453	1928	*S*	73	542	"	*C*	918
93	"	*M*	1093	203	"	*L*	365	348	"	*B*	244	456	1927	*R*	336	544	"	*L*	832
96	"	*M*	456	204	"	*R*	132	349*a*	"	*M*	579	457*a*	"	*S*	261	545	"	*PC*	131
98	"	*M*	550	205	"	*L*	428	349*b*	"	*C*	415	457*b*	"	*N*	240	549	"	*L*	828
100	"	*M*	546	207	"	*P*	189	351	"	*B*	656	458	"	*S*	161	551	"	*A*	522
104	"	*C*	382	210	"	*B*	115	353	"	*PC*	116	463	"	*S*	166	552	"	*B*	223
110	1928	*M*	159	220	"	*P*	422	354	"	*R*	119	465	"	*R*	113	554	"	*A*	790
112	1927	*C*	548	224	"	*A*	161	355	"	*PC*	102	469	"	*A*	476	555	"	*B*	217
118	"	*M*	593	227	"	*N*	205	359*a*	"	*R*	125	471	"	*S*	173	559	"	*P*	178
119	"	*P*	225	229	"	*B*	195	359*b*	"	*PC*	117	474	"	*A*	480	563	"	*O*	534
124	"	*C*	522	247	"	*A*	469	363*a*	1926	*J*	198	475	"	*P*	191	564	"	*P*	177
129	"	*B*	156	249	"	*PC*	52	363*b*	1927	*PC*	123	477	"	*R*	121	565	"	*C*	297
130	"	*C*	393	252	"	*N*	200	367	"	*R*	118	478	"	*C*	372	566	"	*O*	556
132	"	*M*	669	254	"	*L*	186	368	"	*PC*	113	479	"	*P*	429	568*a*	"	*M*	1144
133	"	*C*	312	255	"	*N*	196	371	"	*R*	116	481	"	*C*	949	568*b*	"	*L*	797
135	"	*B*	191	257*a*	"	*A*	190	373	"	*PC*	121	482	"	*O*	175	569	"	*O*	549
136	"	*O*	129	257*b*	"	*L*	424	375	"	*M*	666	483	"	*L*	332	570	"	*L*	776
139	"	*L*	421	258	1928	*O*	32	377	"	*PC*	111	484*a*	"	*O*	174	571	"	*M*	715
140	"	*B*	149	259	1927	*L*	789	379	"	*M*	563	484*b*	"	*M*	544	573	"	*C*	376
142	"	*L*	403	261	"	*O*	154	382	"	*P*	414	485	"	*O*	609	580	"	*A*	492

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I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.		
581	1927	*C*	311	632*a*	1927	*R*	159	686	1927	*L*	721	756	1927	*N*	242	830*b*	1927	*L*	60
582	"	*B*	272	632*b*	"	*O*	173	687	"	*A*	496	758	"	*C*	606	832	"	*O*	225
588	"	*L*	415	634	"	*R*	143	688	"	*C*	388	759	"	*A*	538	833	"	*M*	1086
589*a*	"	*R*	173	635	"	*L*	329	690	"	*O*	176	760	"	*C*	579	835	"	*O*	610
589*b*	"	*L*	356	637	"	*R*	156	691*a*	"	*R*	158	762	"	*L*	228	836	"	*M*	699
590	"	*R*	335	638	"	*A*	530	691*b*	"	*A*	435	765	"	*A*	494	838	"	*L*	470
591*a*	"	*M*	648	640	"	*P*	220	693	"	*N*	208	766	"	*B*	232	839	"	*N*	214
591*b*	"	*A*	551	641	"	*R*	159	694	"	*P*	261	769	"	*O*	566	841*a*	"	*O*	221
592	"	*L*	391	642	"	*L*	417	695	"	*A*	524	770	"	*N*	248	841*b*	"	*S*	205
593	"	*B*	666	643	"	*A*	451	697	"	*O*	585	771	"	*O*	544	843	"	*O*	220
594	"	*C*	296	644	"	*L*	287	698	"	*A*	514	773	"	*A*	763	844*a*	"	*A*	486
595	"	*B*	361	645	"	*P*	402	700	"	*N*	385	774	"	*N*	359	844*b*	"	*S*	197
596	"	*L*	191	646	"	*M*	598	701	"	*O*	239	775	"	*A*	488	847	"	*O*	616
597	"	*C*	409	647	"	*N*	237	702	"	*L*	414	776	"	*L*	423	848	"	*S*	194
599	"	*N*	222	648	"	*M*	1131	703	"	*R*	128	777	"	*A*	758	849	"	*O*	219
600	"	*C*	303	650	"	*N*	235	704	"	*S*	120	779	"	*PC*	139	850	"	*L*	441
602	"	*B*	366	651	"	*M*	487	707	"	*P*	248	786	"	*L*	465	852	"	*L*	340
603	"	*A*	834	652	"	*L*	825	710	"	*S*	116	791	"	*R*	139	854	"	*C*	332
604	"	*B*	363	653	"	*M*	1102	712	"	*P*	201	792	"	*C*	576	867	"	*O*	226
606*a*	"	*C*	936	654	"	*N*	233	714	"	*O*	209	794	"	*R*	137	868	"	*A*	465
606*b*	"	*L*	435	655	"	*M*	505	715	"	*S*	118	796	"	*S*	268	870	"	*O*	186
607	"	*C*	343	657	"	*C*	307	717	"	*R*	179	797	"	*R*	145	873	"	*PC*	128
608	"	*L*	268	659	1926	*J*	198	718	"	*P*	183	800	"	*C*	603	877	"	*A*	482
609	"	*C*	389	660*a*	1927	*C*	931	723	"	*N*	219	802	"	*S*	193	880	"	*O*	211
610	"	*M*	657	660*b*	"	*R*	149	725	"	*L*	408	803	"	*O*	538	881	"	*P*	257
613*a*	"	*L*	398	661	"	*C*	398	728	"	*M*	703	804	"	*A*	546	886	"	*A*	394
613*b*	"	*M*	714	663	"	*L*	730	730	"	*O*	582	806	"	*M*	502	890	"	*N*	225
615	"	*L*	376	665	"	*N*	209	733	"	*N*	373	807	"	*L*	400	891	"	*M*	695
616	"	*P*	170	666	"	*R*	122	734	"	*O*	586	810	"	*N*	236	892	"	*L*	369
617	"	*L*	372	667	"	*M*	602	736	"	*PC*	146	812	"	*O*	234	893	"	*M*	611
618	"	*R*	148	668	"	*A*	478	738	"	*C*	608	813	"	*M*	509	894	"	*A*	825
619	"	*M*	649	669	"	*N*	221	742	"	*L*	385	816*a*	"	*O*	236	895	"	*N*	210
621	"	*A*	554	670	"	*A*	291	744	"	*A*	518	816*b*	"	*A*	772	897	"	*PC*	62
622	"	*C*	411	671*a*	"	*N*	250	747	"	*L*	276	818	"	*L*	261	901	"	*C*	418
624	"	*L*	354	671*b*	"	*A*	375	750*a*	"	*A*	719	820	"	*O*	608	903	"	*PC*	66
625	"	*R*	157	673	"	*A*	413	750*b*	"	*P*	182	821	"	*A*	490	907	"	*O*	180
626	"	*A*	532	674	"	*P*	256	751	"	*L*	282	822	"	*N*	226	908	"	*P*	252
628	"	*R*	154	676	"	*A*	439	752	"	*M*	705	826	"	*O*	531	910*a*	"	*O*	215
629	"	*L*	760	678	"	*A*	387	753	"	*P*	240	828	"	*M*	708	910*b*	"	*P*	410
630*a*	"	*R*	142	683	1928	*O*	209	755	"	*C*	592	830*a*	"	*O*	223	911	"	*O*	612
630*b*	"	*A*	544																

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1	1927	*A*	589	34	1927	*M*	1145	111	1927	*A*	577	161	1927	*N*	395	209	1927	*L*	496
2	"	*M*	1154	37	1928	*L*	28	113	"	*C*	458	164	"	*O*	190	210	"	*A*	764
3	"	*O*	294	38	1927	*A*	584	114	"	*A*	833	167	"	*A*	767	211*a*	"	*M*	624
5*a*	"	*A*	746	39	"	*L*	856	115	"	*C*	474	171	"	*O*	575	211*b*	"	*A*	473
5*b*	"	*L*	476	41	"	*N*	249	118	"	*M*	707	172	"	*A*	597	213	"	*N*	244
6	"	*N*	252	42	"	*L*	864	120	"	*A*	575	174	"	*O*	579	214	"	*P*	197
8	"	*A*	587	43	"	*A*	543	121	"	*N*	216	175	1928	*A*	45	216	"	*O*	193
9	"	*L*	416	46	"	*L*	499	123*a*	"	*A*	829	176	1927	*S*	202	218	"	*M*	501
10	"	*N*	239	48	"	*L*	489	123*b*	"	*N*	247	179	"	*A*	574	219	"	*N*	170
11	"	*L*	494	49	"	*B*	371	124	"	*A*	585	181	"	*A*	488	225	"	*B*	225
12	"	*L*	506	62	"	*O*	237	125	"	*C*	381	183	1928	*S*	81	228	"	*N*	238
14	"	*M*	1105	64	"	*B*	368	126	"	*A*	513	184	1927	*A*	564	229	"	*B*	245
17*a*	"	*O*	531	65	"	*A*	586	128	"	*C*	375	186	"	*A*	566	231	"	*A*	821
17*b*	"	*PC*	76	66	"	*A*	454	129	"	*B*	387	187	"	*M*	580	232	"	*B*	260
22*a*	"	*L*	804	72	"	*O*	261	135	"	*A*	807	189	"	*A*	397	236	"	*A*	563
22*b*	"	*O*	212	74	"	*M*	710	138	"	*B*	437	191	"	*A*	266	238	"	*L*	510
24	"	*N*	251	77	"	*O*	162	139	"	*A*	791	193*a*	"	*S*	192	239	1928	*A*	74
25	"	*L*	915	92	"	*A*	731	141	"	*M*	1158	193*b*	"	*A*	830	243	1927	*M*	507
26	"	*O*	206	94	"	*O*	216	142	"	*O*	204	194	"	*L*	770	245	"	*A*	508
27	"	*N*	398	96	"	*A*	446	144	"	*A*	569	195	"	*N*	390	246	"	*M*	513
28*a*	"	*M*	1190	101	"	*M*	1092	145	"	*B*	433	198*a*	"	*L*	377	255	"	*A*	816
28*b*	"	*A*	803	103	"	*A*	581	148	"	*C*	936	198*b*	"	*PC*	135	257	*Non J.C's Ct.*		
30	"	*N*	394	105	"	*R*	169	149	"	*L*	471	202	"	*A*	743	261	1927	*A*	491
31	"	*L*	840	106	"	*P*	171	154	"	*M*	706	204	"	*O*	558	263	"	*O*	199
32	"	*N*	383	108	"	*C*	562	155	"	*A*	441	205	"	*A*	567	266	"	*M*	701
33	"	*L*	412	110	"	*A*	578	160	"	*O*	224	207	"	*O*	551	268	"	*O*	533

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270	1927	*M*	462	391	1927	*P*	167	504	1927	*B*	414	639*b*	1927	*PC*	151	781	1927	*P*	314
273*a*	"	*L*	769	395	"	*C*	391	511*a*	"	*L*	733	645	"	*A*	611	782	"	*A*	755
273*b*	"	*A*	507	396	"	*M*	592	511*b*	"	*B*	436	647	"	*C*	496	783	"	*L*	815
275	"	*O*	231	398	"	*C*	933	513	"	*C*	581	656	"	*M*	717	784	"	*A*	618
277	"	*S*	206	400	"	*B*	357	523*a*	"	*A*	608	659	"	*B*	422	785	"	*N*	273
280	"	*L*	418	403	"	*P*	193	523*b*	"	*L*	200	661*a*	"	*M*	722	788	"	*L*	562
281	"	*O*	568	408	"	*B*	362	539	"	*C*	529	661*b*	"	*B*	399	791	"	*P*	318
283	"	*L*	748	409	"	*C*	262	543	"	*N*	262	662	"	*L*	534	792	"	*A*	593
287	"	*A*	826	413	"	*B*	657	545	1928	*C*	24	663	"	*B*	431	796	"	*L*	395
289	"	*L*	484	416	"	*S*	228	546	1927	*B*	654	664	"	*M*	667	797	"	*P*	297
290	"	*M*	676	418*a*	"	*B*	365	547	"	*C*	527	665	"	*A*	401	800	"	*R*	197
295	1928	*L*	81	418*b*	"	*L*	461	549	"	*B*	410	670	"	*PC*	105	801	"	*L*	577
296	1927	*A*	811	421	"	*P*	285	550	"	*C*	514	673	"	*P*	234	804	"	*A*	631
298	"	*L*	512	423	"	*L*	388	552	"	*L*	727	679	"	*L*	399	807	"	*L*	391
300	"	*M*	595	425	"	*B*	367	553	"	*L*	746	680	"	*M*	792	809	"	*A*	785
304	"	*L*	783	426	"	*L*	426	554	"	*A*	831	688	"	*L*	431	811	"	*P*	215
305	"	*N*	353	428	"	*O*	275	556	"	*L*	520	689	"	*L*	554	814	"	*A*	799
307	"	*O*	227	429	"	*M*	576	557	"	*A*	783	690	"	*R*	165	817	"	*L*	485
311	"	*S*	199	432	"	*L*	351	558	"	*L*	526	694	"	*L*	249	821	"	*P*	305
313	"	*L*	477	433*a*	"	*O*	535	559	"	*A*	767	696	"	*R*	203	827	"	*R*	181
316	"	*M*	631	433*b*	"	*A*	774	560	"	*L*	515	698	"	*L*	795	829	"	*L*	413
321	"	*S*	264	435	"	*O*	607	561	"	*M*	478	700	"	*M*	687	830	"	*R*	201
323	"	*C*	406	436	"	*L*	501	586	"	*A*	609	701	"	*L*	556	832	1922	*PC*	212
326	"	*O*	214	440	"	*A*	371	587	"	*L*	807	702	"	*M*	684	835	1927	*M*	790
327	1928	*P*	86	444	"	*M*	693	588	"	*N*	259	705	"	*L*	543	836	"	*L*	508
328	1927	*M*	551	446	"	*P*	404	592	"	*O*	300	706	"	*R*	204	838	"	*O*	194
337	"	*P*	199	447	"	*L*	492	596	"	*A*	605	707	"	*L*	536	841*a*	"	*L*	768
339	"	*A*	470	449	"	*P*	271	599	"	*PC*	159	708	"	*O*	542	841*b*	"	*M*	782
340	"	*P*	282	464	"	*B*	412	602	"	*A*	616	710*a*	"	*L*	846	843	"	*L*	540
342*a*	"	*A*	472	467	"	*O*	218	603	"	*P*	300	710*b*	"	*M*	1105	844	"	*M*	1139
342*b*	"	*B*	432	468	"	*L*	529	605	"	*A*	823	711	"	*N*	272	845	"	*C*	432
344	"	*A*	815	470	"	*O*	222	607	"	*P*	241	712*a*	"	*M*	816	870	"	*A*	628
345	"	*B*	426	471	"	*A*	561	608	"	*A*	614	712*b*	"	*N*	374	871	"	*C*	538
347	"	*M*	566	473*a*	"	*R*	112	610	"	*PC*	156	713	"	*M*	733	877	"	*M*	1162
349	"	*P*	406	473*b*	"	*M*	599	612	"	*N*	267	751	"	*L*	793	878	"	*R*	183
351*a*	"	*A*	571	476	"	*L*	522	614	"	*P*	208	752	"	*P*	311	884	"	*L*	876
351*b*	"	*M*	688	478	"	*O*	547	615	"	*L*	884	753	"	*L*	544	885	"	*M*	674
352	"	*A*	829	479	"	*C*	533	616	"	*P*	233	754	"	*L*	883	887	"	*A*	613
353	"	*S*	230	481	"	*M*	938	617	"	*C*	495	755	"	*L*	773	888	"	*N*	362
354	"	*O*	233	482	"	*C*	532	618	"	*M*	725	756	"	*A*	426	889	"	*PC*	110
356	"	*A*	777	483*a*	"	*A*	828	621	"	*L*	527	766	"	*A*	621	890	"	*L*	756
357	"	*C*	939	483*b*	"	*L*	519	622	"	*N*	253	768	"	*P*	313	891	"	*A*	619
358	"	*L*	330	485	"	*A*	555	624	"	*A*	787	769	"	*L*	740	893	"	*L*	757
360	"	*M*	586	488	"	*M*	626	626	"	*O*	297	772	"	*A*	757	895	"	*P*	223
365	"	*P*	270	490	"	*A*	536	628	"	*L*	909	773	"	*P*	325	897	"	*A*	579
366	"	*S*	195	492	"	*L*	549	630	"	*O*	315	774	"	*L*	674	899	"	*P*	292
370	"	*C*	345	497	"	*M*	603	631	"	*L*	534	777	"	*A*	804	903	"	*C*	593
379	"	*R*	150	498	"	*C*	516	633*a*	"	*M*	1110	779*a*	"	*L*	476	907	"	*L*	801
384	"	*C*	401	500	1928	*L*	30	633*b*	"	*A*	599	779*b*	"	*P*	301	909	"	*P*	302
386	"	*P*	172	502	1927	*M*	612	635	"	*N*	264	780	"	*A*	531	911	"	*R*	177
389	"	*R*	140	503	"	*A*	592	639*a*	"	*L*	536								

103 Indian Cases=All India Reporter

I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
1	1927	*PC*	72	40	1927	*R*	161	73	1927	*L*	640	101	1927	*N*	189	119	1927	*L*	886
2	"	*C*	465	43	"	*A*	633	74	"	*M*	791	103	"	*L*	546	120*a*	"	*M*	670
12	"	*N*	286	45*a*	"	*A*	789	75	"	*P*	329	104	"	*A*	646	120*b*	"	*C*	518
13	"	*C*	403	45*b*	"	*L*	666	77	"	*A*	636	105	"	*R*	174	123	"	*A*	664
22	"	*R*	192	48	"	*M*	819	79	"	*R*	199	106	"	*O*	264	124*a*	"	*L*	850
23	"	*O*	598	49	"	*L*	581	80	"	*L*	546	107*a*	*Too old*			124*b*	"	*C*	488
29	"	*L*	788	58	"	*O*	555	84	"	*A*	626	107*b*	1927	*L*	893	128	"	*A*	780
30	"	*N*	324	59	"	*L*	567	86	"	*L*	537	108*a*	"	*B*	657	129	"	*S*	223
31	"	*M*	443	62	"	*O*	277	87	"	*A*	484	108*b*	"	*A*	516	131	"	*N*	217
32	"	*P*	316	63*a*	"	*P*	402	90*a*	"	*L*	908	109	"	*B*	445	133	"	*R*	188
34	"	*A*	659	63*b*	"	*C*	574	90*b*	"	*M*	643	112*a*	"	*L*	780	134	"	*M*	820
36	"	*L*	841	65*a*	"	*N*	289	93	"	*C*	941	112*b*	"	*L*	799	139	"	*R*	161
37*a*	"	*P*	323	65*b*	"	*C*	543	96	"	*M*	818	113	"	*N*	389	140	"	*N*	288
37*b*	"	*M*	1150	68	"	*L*	555	97	"	*L*	541	114	"	*L*	566	141	"	*R*	175
38	"	*N*	283	69	"	*C*	534	99	"	*P*	327	115	"	*N*	295	142	"	*L*	556
39	"	*P*	218	71	"	*N*	277	100	"	*S*	231	116	"	*A*	835	143	"	*N*	386

103 Indian Cases=All India Reporter—(*Contd.*)

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
144	1927	*R*	171	274*b*	1927	*M*	1182	393	1927	*A*	695	531	1927	*L*	621	706	1927	*L*	657
146	"	*M*	722	276	"	*R*	164	394	"	*M*	620	532	"	*N*	319	707	"	*C*	825
148	"	*N*	284	277	"	*A*	668	398	"	*L*	904	533	"	*C*	502	710	"	*N*	323
150	"	*M*	805	279	"	*N*	308	399	"	*A*	696	537	"	*L*	618	711	"	*P*	291
158	"	*N*	281	280	"	*L*	593	400	"	*L*	637	538	"	*C*	192	712	"	*L*	653
160	"	*A*	499	281	"	*M*	830	401	"	*O*	296	540	"	*R*	480	713	"	*N*	320
163	"	*R*	200	285	"	*A*	690	402	"	*S*	241	542	"	*C*	561	714	"	*C*	827
165	"	*A*	734	286	"	*A*	509	407	"	*O*	312	543	"	*L*	493	715	"	*L*	898
166	"	*N*	382	287	"	*L*	854	408	"	*L*	634	544	"	*P*	242	717	1928	*P*	177
167	1928	*S*	82	289	"	*A*	713	409	"	*O*	326	545	"	*C*	680	720	1927	*N*	230
170	"	*L*	212	290	"	*N*	302	411*a*	"	*L*	647	548	"	*P*	370	722	"	*P*	296
172	1927	*S*	218	292	"	*L*	521	411*b*	"	*O*	259	553	"	*C*	505	724*a*	"	*L*	760
173	"	*O*	586	293	"	*A*	681	413	"	*L*	617	557	"	*R*	241	724*b*	"	*P*	288
174	"	*R*	190	295	"	*P*	333	415	"	*N*	333	559	"	*O*	318	725	"	*C*	636
178	"	*N*	245	297	"	*A*	762	416	"	*O*	611	560	"	*O*	318	731	"	*B*	529
181	"	*R*	176	298*a*	"	*L*	592	417	"	*A*	287	561	"	*C*	481	740	"	*C*	652
182	1928	*L*	214	298*b*	"	*P*	405	418	"	*B*	398	568	"	*R*	209	742	"	*L*	373
184	1927	*R*	193	299	"	*L*	842	419	"	*L*	779	592	"	*P*	230	746	"	*O*	335
186	"	*N*	269	302	"	*M*	636	421*a*	"	*A*	692	593	"	*B*	483	748	"	*C*	682
189	"	*R*	242	305	"	*A*	641	421*b*	"	*L*	626	597	"	*P*	243	752	"	*L*	817
192	"	*L*	562	306	"	*N*	299	424	"	*A*	779	602	"	*B*	401	754	"	*C*	629
193	1928	*L*	189	308	"	*A*	545	425	"	*L*	622	607	"	*P*	231	756	"	*N*	328
195	1927	*N*	279	309	"	*N*	304	428	"	*A*	669	609	"	*C*	353	757	"	*O*	572
197	1928	*L*	191	310	"	*A*	693	430	1928	*P*	19	615	"	*P*	375	759	"	*L*	602
198	1927	*O*	313	311	"	*M*	842	434	1927	*M*	1141	616	1928	*L*	117	762	"	*O*	325
199	"	*L*	580	313	"	*P*	286	435	"	*P*	254	618	1927	*M*	1088	763	"	*L*	631
200	"	*O*	257	315	"	*A*	771	437	"	*L*	445	620	"	*P*	369	766	"	*R*	208
201	"	*L*	495	316	"	*P*	352	440	"	*S.*	225	621	"	*C*	818	767	"	*L*	663
202	"	*A*	560	317	"	*A*	591	444	"	*L*	530	623	"	*L*	424	768	1928	*M*	210
203	"	*L*	774	318	"	*M*	583	448	"	*P*	352	624	"	*L*	639	769	1927	*L*	590
204	"	*A*	571	322	"	*A*	679	449	1928	*L*	209	625	"	*C*	619	771	"	*C*	698
206	"	*L*	500	323	"	*M*	671	452	1927	*B*	420	627	"	*P*	401	775	"	*L*	610
207	"	*L*	561	326	"	*A*	559	454	"	*L*	835	629	"	*C*	625	790	"	*C*	631
208	"	*N*	255	328	"	*L*	346	455	"	*N*	310	634*a*	"	*A*	503	792	"	*O*	306
209	"	*N*	290	329	"	*A*	687	456	"	*P*	383	634*b*	"	*C*	601	797	"	*O*	319
213*a*	"	*P*	332	331	"	*M*	653	457	"	*A*	848	637	"	*B*	499	798	"	*L*	355
213*b*	"	*N*	276	335	"	*N*	294	459	"	*P*	251	639	"	*C*	616	799	"	*C*	575
215	"	*L*	574	337	"	*N*	321	460	"	*S*	268	643	"	*N*	307	800	"	*O*	597
218	"	*A*	795	338	"	*A*	683	461	1928	*P*	173	644	"	*C*	578	801	"	*N*	330
220	"	*N*	212	339	"	*M*	604	464	1927	*P*	266	645	"	*B*	514	802	"	*O*	341
221	"	*A*	436	344	"	*A*	740	466	"	*L*	815	648	"	*C*	647	805	"	*L*	659
222	"	*L*	894	346	"	*A*	810	468	"	*C*	928	654	1928	*A*	19	809	"	*N*	337
223	1928	*L*	120	347	"	*M*	1152	470	"	*L*	344	655*a*	1927	*C*	604	811	1928	*C*	92
224	1927	*L*	629	348*a*	"	*A*	676	471	"	*P*	376	655*b*	"	*P*	337	812	1927	*N*	327
225	"	*B*	424	348*b*	1928	*L*	63	474	"	*O*	603	657	"	*L*	635	814	"	*M*	773
227	"	*L*	812	349	1927	*A*	694	475	"	*L*	619	659	"	*C*	689	816	"	*S*	237
229	"	*A*	704	351	"	*N*	316	476	"	*O*	316	662*a*	"	*O*	581	818	"	*N*	325
231	"	*N*	300	353	1928	*L*	58	477	"	*A*	703	662*b*	"	*C*	763	819	"	*P*	289
232	"	*A*	522	354	1927	*P*	339	479	"	*L*	793	665	"	*L*	642	821	"	*M*	935
233	"	*C*	614	360	"	*A*	635	482	"	*P*	262	670	"	*M*	859	823	"	*C*	925
235*a*	"	*L*	614	361	"	*N*	314	485	"	*L*	762	673	"	*L*	651	825	"	*M*	813
235*b*	"	*C*	623	363	"	*A*	534	486	"	*N*	166	674	"	*C*	748	827	"	*C*	945
237	"	*A*	662	365*a*	1928	*L*	115	488	"	*P*	417	677	"	*M*	776	829	"	*M*	720
239	"	*PC*	148	365*b*	1927	*A*	799	493	"	*S*	262	678*a*	"	*L*	664	831	"	*P*	391
242	"	*N*	296	366	"	*PC*	172	494	"	*L*	505	678*b*	"	*N*	377	832	"	*M*	927
244	"	*A*	698	367*a*	"	*A*	517	495	"	*P*	219	679	"	*P*	386	833	"	*L*	708
245	"	*M*	627	367*b*	"	*A*	686	496	"	*L*	755	681	"	*O*	314	834	"	*B*	518
249	"	*B*	462	369	"	*L*	907	497	"	*O*	441	683	"	*C*	659	835	"	*L*	731
255	"	*A*	689	370	"	*A*	747	498	"	*L*	717	690	"	*N*	332	836	"	*O*	353
256	"	*B*	447	372*a*	"	*L*	620	499	"	*M*	783	692	"	*C*	654	837	"	*R*	240
258	"	*R*	189	372*b*	"	*A*	750	501	"	*L*	615	695*a*	"	*O*	304	838	"	*L*	658
259	"	*N*	305	373	"	*N*	312	502	"	*M*	728	695*b*	"	*C*	834	839	"	*R*	254
261	"	*R*	180	376	"	*A*	697	506	"	*L*	404	697	"	*N*	330	840	"	*P*	385
262	"	*B*	455	377	"	*M*	641	510	"	*O*	360	698*a*	"	*C*	847	841	"	*S*	232
264*a*	"	*A*	691	379	"	*A*	505	511	"	*L*	615	698*b*	"	*L*	665	843	"	*L*	654
264*b*	"	*R*	186	381	"	*M*	897	512	"	*O*	310	700	"	*C*	830	845	"	*R*	239
266	"	*L*	607	382	"	*A*	653	516	"	*L*	497	701*a*	"	*L*	847	846	"	*C*	679
268*a*	"	*A*	782	383	"	*P*	335	518	"	*PC*	191	701*b*	"	*N*	369	847	"	*L*	650
268*b*	"	*N*	256	384	"	*M*	1144	522*a*	"	*L*	616	702	"	*L*	763	849	"	*S*	234
271	"	*A*	369	385	"	*A*	756	522*b*	"	*C*	796	703	"	*P*	379	851	"	*M*	713
274*a*	"	*L*	613	386	"	*PC*	165	528	"	*M*	779	705	"	*C*	845	853	"	*C*	821

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
854	1927	*L*	480	864	1927	*C*	850	883*a*	1927	*N*	326	887	1927	*M*	1100	897	1927	*A*	504
855	"	*M*	777	867	"	*P*	416	883*b*	"	*M*	798	888	"	*N*	322	898	"	*B*	492
858	"	*L*	900	869*a*	"	*M*	1187	884*a*	"	*N*	324	889	"	*L*	448	905	"	*N*	213
860	"	*C*	692	869*b*	"	*P*	392	884*b*	"	*P*	388					906	"	*B*	487
862	"	*M*	963	870	"	*S*	209	886	"	*O*	569	890	"	*C*	704	911	"	*M*	937

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
1	1927	*PC*	162	213	1927	*N*	339	348	1927	*R*	280	464	1927	*L*	705	648	1927	*B*	513
2	"	*O*	332	215	"	*P*	312	349	"	*C*	711	465	"	*A*	629	650	"	*M*	1066
4	"	*C*	694	216	"	*S*	245	352	"	*M*	772	466	"	*C*	904	653	"	*B*	540
8*a*	"	*O*	369	218	"	*P*	324	353*a*	"	*C*	884	468	"	*M*	844	655	"	*C*	902
8*b*	"	*B*	278	219	"	*C*	870	353*b*	"	*N*	342	470	"	*N*	241	658	"	*N*	360
89	"	*R*	284	222	"	*L*	685	355	"	*M*	1163	472	"	*M*	801	659	"	*B*	517
92	"	*PC*	208	223	"	*M*	732	357	"	*C*	930	476	"	*PC*	164	661	1928	*L*	35
94	"	*B*	428	225	"	*A*	654	358*a*	"	*O*	609	478	"	*R*	265	664	1927	*O*	361
97	"	*P*	398	227	"	*L*	709	358*b*	"	*N*	345	484	"	*C*	725	666	"	*B*	527
99	"	*L*	781	228	"	*O*	345	360	"	*C*	887	493	"	*N*	350	668	"	*C*	952
100	"	*P*	315	230	"	*L*	672	361	"	*R*	234	494	"	*C*	741	671	"	*R*	330
101	"	*R*	205	232	"	*A*	660	364	1928	*P*	28	503	"	*N*	386	672	"	*P*	334
104	"	*P*	393	234	"	*L*	594	365	1927	*R*	236	504	"	*A*	321	673	"	*B*	479
106	"	*L*	669	242	"	*O*	321	366	"	*C*	882	514	1928	*P*	36	674	"	*M*	1126
108	"	*N*	202	245	"	*C*	644	368	"	*R*	255	516	1927	*R*	274	676*a*	"	*R*	334
109	"	*L*	398	247	"	*L*	682	369	"	*L*	736	518	"	*M*	1107	676*b*	"	*O*	450
110	"	*M*	816	249	"	*C*	621	370	"	*R*	237	520*a*	"	*R*	279	681	"	*B*	537
111	"	*C*	628	252	"	*M*	778	371	"	*M*	799	520*b*	"	*B*	560	683	"	*R*	258
113	"	*PC*	173	253	1928	*L*	49	373	"	*R*	246	526	1928	*P*	24	684	"	*L*	837
115	"	*B*	663	254	1927	*O*	571	375	"	*PC*	204	527*a*	1927	*O*	507	685	"	*B*	521
116	"	*A*	165	255	"	*L*	689	377	"	*R*	247	527*b*	"	*C*	889	691	"	*R*	298
118	"	*L*	883	256	"	*O*	352	378	*Too old*			545	"	*L*	449	692	"	*B*	519
119	"	*R*	256	257	"	*PC*	176	383	1928	*R*	95	547	"	*C*	565	694	"	*C*	776
120	"	*M*	661	267	"	*P*	328	384	1927	*C*	881	557	"	*R*	331	697	"	*A*	497
121	"	*R*	273	268	"	*C*	668	386	"	*R*	233	558	"	*N*	376	700	"	*L*	819
123	"	*L*	378	281	1928	*L*	216	387	"	*C*	714	559	"	*C*	605	702	"	*L*	811
124	1928	*P*	63	284	1927	*C*	868	391	"	*S*	251	561	1928	*L*	39	703	"	*M*	848
125	1927	*M*	850	287	"	*O*	323	394	"	*O*	448	562	1927	*O*	516	704	"	*C*	917
126	1928	*C*	49	289	"	*L*	680	396	"	*M*	1095	563	"	*L*	718	705*a*	"	*R*	329
127	1927	*L*	691	290*a*	"	*L*	721	397	"	*L*	858	565	"	*N*	348	705*b*	1928	*P*	59
129	"	*C*	874	290*b*	"	*M*	826	398	"	*N*	343	566	"	*C*	760	708*a*	1927	*R*	261
133	"	*R*	258	291	"	*N*	381	400*a*	"	*L*	738	569	1928	*N*	37	708*b*	1928	*P*	46
136	"	*C*	920	292	"	*A*	657	400*b*	"	*O*	347	571	1927	*C*	935	711	1927	*C*	801
137	"	*P*	396	294	"	*B*	454	405	"	*M*	668	572	1928	*S*	45	712	1928	*P*	56
139*a*	"	*R*	257	295	"	*P*	397	406	"	*A*	714	576	1927	*C*	794	714	1927	*C*	820
139*b*	"	*PC*	210	296	"	*A*	665	409	"	*M*	817	577	"	*M*	862	717*a*	"	*O*	316
144	"	*L*	715	299	"	*O*	278	410	"	*A*	729	580	"	*P*	203	717*b*	"	*C*	823
145	"	*M*	1021	313	"	*R*	281	412	"	*S*	248	584	"	*N*	351	719	"	*M*	797
146	"	*L*	679	315	"	*O*	580	414	"	*A*	709	585	1928	*L*	51	721	"	*C*	768
147	"	*P*	354	316	"	*R*	283	415	"	*M*	786	586*a*	"	*O*	47	726	"	*L*	785
148	"	*L*	681	318	"	*L*	878	418	"	*L*	231	586*b*	"	*L*	16	728	"	*O*	355
150	"	*C*	878	319	"	*B*	255	419	"	*A*	710	587	1927	*O*	265	729	"	*C*	691
151	"	*C*	733	321	"	*R*	302	420	"	*M*	824	613	1928	*P*	23	730	"	*P*	345
155	"	*O*	240	322	"	*B*	239	422	"	*C*	642	614	1927	*M*	835	733	"	*C*	855
173	"	*L*	823	323	"	*A*	759	424	"	*M*	893	619	"	*C*	900	735	"	*M*	944
174	"	*B*	553	324	"	*R*	317	426	"	*O*	363	621	"	*M*	1116	736	1928	*N*	4
177	"	*M*	826	325	"	*L*	723	431	"	*N*	334	622	"	*P*	403	742	1927	*C*	921
180	"	*C*	752	326	"	*R*	288	433	"	*C*	721	623	"	*C*	880	744	"	*C*	846
185	"	*S*	253	327	"	*PC*	185	435	"	*L*	792	625	"	*M*	851	746	1928	*M*	56
188	"	*C*	657	330	"	*R*	287	436	1928	*P*	159	626*a*	"	*O*	598	747	"	*P*	51
190	"	*P*	395	331	"	*C*	867	437	1927	*L*	702	626*b*	1928	*P*	129	750	1927	*M*	927
191	"	*N*	338	332	"	*PC*	188	440	"	*M*	789	630	1927	*L*	765	753	1928	*P*	40
192	"	*M*	1109	335	"	*R*	276	441	"	*L*	699	633	1928	*P*	12	759	"	*C*	25
193	"	*O*	339	336	"	*N*	336	443	"	*C*	701	635	"	*C*	96	760	"	*O*	18
196	"	*C*	873	337	"	*PC*	206	444	"	*L*	713	636*a*	"	*L*	42	762	"	*O*	33
197	"	*O*	480	339	"	*L*	701	447	"	*C*	702	636*b*	1927	*O*	352	763	1927	*C*	911
198	"	*N*	340	340	"	*C*	885	449	"	*C*	816	637	"	*R*	248	764	"	*B*	470
199	"	*C*	633	342	"	*S*	239	450	1928	*P*	13	641	"	*N*	346	768	"	*M*	898
202	"	*L*	362	344	"	*O*	535	454	1927	*L*	786	642	"	*M*	922	773	"	*B*	468
205	"	*P*	326	345	"	*M*	829	456	"	*C*	718	644	1928	*P*	17	775	"	*C*	737
206	"	*C*	665	347*a*	"	*L*	665	459	1928	*P*	31	645	1927	*M*	841	780	"	*B*	460
209	"	*P*	319	347*b*	"	*C*	888	463	1927	*O*	359	647	"	*N*	347	781	"	*M*	1167

104 Indian Cases=All India Reporter—(Concld.)

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
794	1927	B	474	814a	1927	O	560	824	1927	O	455	842	1927	C	844	904	1927	A	567
799	"	C	906	814b	"	C	907	825	"	C	833	843	1928	N	41	905	"	C	787
800	"	P	348	816	"	R	263	827	"	M	1143	845	"	C	23	909	1928	P	50
803	1928	N	16	817	"	L	625	828	"	C	686	847	"	O	26	910a	1927	O	441
805	1927	S	257	818	"	R	262	831a	"	M	1157	849	1927	L	289				
808	"	C	853	820	"	L	752	831b	"	O	358	892	1928	M	58	910b	"	M	1113
810	1928	N	51	821	1928	P	112	833	"	C	836	897	"	P	1	911	"	O	607
812	1927	C	913	822	1927	C	766	841	1928	P	58	903	1927	C	724	912	"	B	360

105 Indian Cases=All India Reporter

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
1	1928	P	83	138	1927	M	869	247	1927	R	277	454	1928	N	17	592	1928	R	19
4	"	C	73	146	"	O	276	248	"	M	911	457a	1927	O	549	593a	"	L	45
5	1927	M	852	147	"	M	968	255	"	C	862	457b	"	R	313	593b	1927	O	521
12a	"	O	527	148	"	O	559	257	"	PC	244	459	"	B	440	598	1928	R	13
12b	"	C	756	149	1928	C	41	258	"	R	289	464	"	M	973	600	1927	C	831
15a	"	O	557	150	1927	M	890	263	"	PC	261	465	"	R	301	602	"	R	321
15b	1928	C	68	153	1928	P	108	265	"	L	481	466	"	O	512	603	1928	L	134
20	"	P	62	154	1927	M	785	269	1922	LB	28	467	"	R	311	605	1927	C	924
22	1927	C	806	155	1928	N	10	270	1921	O	146	469	"	PC	41	606	"	M	1025
24	"	O	540	159	1927	M	846	271	1927	P	354	470	"	R	318	610	"	L	775
26	1928	P	113	161	"	O	517	279	"	C	857	471	1928	N	78	611	1928	O	30
28	1927	C	926	163	"	M	876	284	1928	C	152	472	"	R	20	612	1927	C	964
30	1928	N	24	164	"	O	594	285	1927	O	337	473	1927	O	484	613	"	M	880
33	"	P	109	165	"	M	919	286	"	N	400	474	1928	R	30	616	1928	L	108
34	1927	M	954	167	"	L	513	288	"	M	1107	475	1927	M	959	617	"	S	61
39	1928	P	106	168	"	M	945	290	1928	C	156	476	"	R	327	620a	1927	N	405
42	"	P	105	169	"	O	263	291	"	N	98	477	1928	N	74	620b	"	M	1009
43	"	N	27	170	1928	M	144	293	"	R	58	479	1927	O	485	621	"	A	672
45	1927	R	250	171	1927	M	825	296	1927	B	510	482	"	R	314	626	1928	C	164
50	"	O	357	172	1928	P	89	299	"	M	908	484	"	P	426	628	1927	A	846
51	"	R	271	179	1927	M	931	302	"	O	552	487	1928	R	26	630	"	O	438
52	"	C	914	184	"	C	791	304	"	M	997	488	*Too Old*			632	"	L	897
54	"	P	412	186	"	A	510	305	"	B	581	489	1927	M	1038	633	"	P	209
55	"	M	877	186	"	C	783	319	1928	S	21	490	"	O	562	639	"	A	711
58	1928	P	87	191	1928	O	28	335	"	N	14	495	1928	N	70	641	1928	C	87
59	1927	O	354	193	1927	C	781	337	1927	O	489	496	1927	O	442	643	"	P	179
61	1928	C	63	194	"	M	948	348	"	C	598	501	"	L	784	647	"	C	130
63	"	P	44	196	"	O	436	351a	"	M	960	502	1928	P	134	653	"	L	60
65	"	C	60	199	"	C	865	351b	"	B	652	507	1927	L	452	654	"	R	15
67	1927	C	808	201	"	R	196	353	1928	N	93	516	"	B	565	655	1924	L	564
75	1928	N	44	202	"	M	1082	356	1927	C	758	533	"	L	776	657	1927	M	986
79	1927	O	537	204	"	L	677	359	"	O	467	534	"	R	306	658	"	A	727
80	1928	C	55	206	"	M	883	361	"	R	319	537	"	B	613	660	"	M	985
81	"	N	20	208	"	O	440	364	"	M	971	540	"	R	310	661	"	N	404
83	"	P	64	209	"	M	889	366	1928	S	40	541	"	B	609	662	"	A	721
84	"	M	96	210	"	O	474	369	"	C	118	544	1928	S	16	664	1928	N	79
85	"	C	47	212	"	M	943	375	1927	M	1181	545	1927	O	488	666	"	S	43
86	1927	M	947	213	"	O	346	377	"	C	968	546	1928	P	95	667	1927	M	974
87	"	O	505	214	"	M	1102	379	"	N	354	549	"	C	148	669	"	M	981
88	"	M	1035	215	"	O	327	383	"	B	542	543	1927	O	471	671	"	S	257
90	1928	C	21	216	"	M	921	395a	1928	P	58	556a	"	L	865	672	1928	S	49
92	1927	M	910	217	"	C	829	395b	1927	B	556	556b	"	O	465	673	"	L	107
93	"	O	457	219	"	M	867	399	"	R	294	558	1928	R	16	674a	1927	M	1080
101	"	M	887	220	"	PC	230	405	"	M	903	559	"	N	32	674b	1928	P	38
103	"	O	529	224	1928	O	47	410	"	O	499	560	1927	L	885	676	1927	L	830
105	1928	M	48	225	1927	C	747	412	"	R	304	561	1928	P	128	677	"	A	705
108	"	P	85	226	1928	N	21	414	"	M	952	562	1927	L	850	678	1928	L	93
109	1927	M	925	228	1927	C	751	416	1928	S	55	563	"	M	973	679	1927	A	647
112	"	N	369	229	1928	P	88	419	1927	M	964	564	"	C	773	681	1928	L	69
113	1928	N	39	230a	1927	O	294	420	1928	N	100	565a	"	O	478	683a	1927	L	870
114	1927	M	834	230b	1928	P	102	421	1927	O	528	565b	"	C	786	683b	1928	P	22
116	"	O	576	231	1927	C	848	422	1928	C	154	567	1928	N	68	684	1927	L	851
119	"	M	940	234	1928	P	98	424	1927	M	863	568	1927	C	780	685	"	L	805
123	1928	N	34	236	1927	R	303	427	1928	N	97	569	1928	L	202	686	"	M	961
124	"	M	154	238	"	P	265	428	1927	R	324	576	1927	M	689	689a	"	L	747
129	"	N	23	240	"	R	328	431	"	N	402	581	"	O	510	689b	1928	P	25
131	"	P	111	241	"	M	917	433	1928	S	1	582	1928	R	1	693	1927	L	872
132	"	O	35	243	"	M	849	448	1927	M	1018	585	1927	P	330				
133	"	C	43	244	"	R	299	449	1928	N	81	586	1928	R	9	694	"	PC	217
136	1927	O	367	246	"	M	1147	452	1927	R	322	590	1927	O	514	701	1928	R	21

105 Indian Cases=All India Reporter—(*Concld.*)

I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.			I. C.	A. I. R.		
703	1927	*PC*	224	745	1927	*A*	623	786	1928	*C*	113	826*b*	1928	*L*	27	857	1927	*C*	966
706	1928	*R*	18	747	1928	*S*	50	788	1927	*PC*	237	828	1927	*M*	970	859	,,	*B*	650
708	1927	*PC*	227	751	,,	*C*	125	789	,,	*M*	965	829	,,	*M*	1011	860	,,	*C*	954
710	1928	*R*	12	754	1927	*B*	627	793	,,	*M*	1031	831*a*	,,	*M*	996	861	,,	*O*	502
711	1927	*M*	465	756*a*	1928	*C*	112	795	1923	*B*	12	831*b*	1928	*M*	207	864*a*	1928	*B*	16
715	,,	*B*	616	756*b*	1927	*B*	649	796	1927	*M*	894	833	1927	*O*	518	864*b*	1927	*M*	988
718	,,	*O*	570	758	1928	*N*	67	799	1928	*N*	65	835	,,	*N*	401	871	,,	*B*	594
720*a*	,,	*B*	651	759	1927	*B*	622	801	1927	*M*	1022	836	1928	*O*	89	877	,,	*M*	1018
720*b*	,,	*M*	1021	763	1928	*C*	106	802	1928	*S*	69	837	,,	*M*	200	878	,,	*A*	720
721	,,	*L*	773	764	1927	*B*	648	803	1927	*M*	975	840	,,	*N*	55	880*a*	1928	*S*	54
722	,,	*B*	611	765	1928	*S*	17	804	,,	*O*	588	841	1927	*C*	970	880*b*	1927	*A*	724
724	,,	*L*	809	769	1927	*B*	655	806	1928	*M*	18	842	1928	*N*	75	881	,,	*M*	1002
725	1928	*C*	196	770	1925	*L*	141	807*a*	1927	*A*	744	843	,,	*N*	73	885	,,	*A*	735
729	,,	*S*	76	771	1927	*A*	548	807*b*	1928	*L*	17	845*a*	1927	*O*	627	891	1928	*N*	70
733	1927	*N*	399	775	1928	*M*	39	810	,,	*A*	21	845*b*	,,	*M*	950	892	,,	*S*	37
734	1928	*O*	269	777	,,	*N*	65	812	,,	*L*	75	847	,,	*L*	800	895	1927	*O*	520
735	,,	*S*	63	778	1927	*O*	508	813	,,	*S*	68	848	1928	*S*	66	896	,,	*O*	476
737	,,	*C*	142	779	1928	*C*	103	815	,,	*A*	14	850	1927	*L*	821	899	,,	*B*	449
739	1927	*A*	617	780	,,	*N*	54	817	1927	*L*	706	851*a*	,,	*A*	634	906	,,	*L*	557
740	1928	*P*	35	781	,,	*O*	8	819	1928	*M*	129	851*b*	1928	*C*	102	909	,,	*A*	638
741	,,	*C*	137	782	1927	*M*	994	820	,,	*N*	58	852	,,	*N*	63	912*a*	,,	*O*	506
742	,,	*P*	29	784	,,	*O*	513	825	,,	*A*	20	854	,,	*S*	57	912*b*	1928	*O*	144
744	1927	*O*	505	785	1928	*L*	103	826*a*	,,	*M*	20								

7 & 8 All India Criminal Reports=All India Reporter.

A. I. Cr. R.	A. I. R.	A.I. Cr. R.	A. I. R.	A.I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A.I. Cr. R.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1927 Allahabad.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1927 LAHORE Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1927 LAHORE.

Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

A. I. R. 1927 Lahore=Other Journals

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	7	*Lah*	423	10	27	*Cr L J*	1294	24	8	*L L J*	539	35	98	*I C*	875
	98	*I C*	584	11	97	*I C*	369		99	*I C*	318	36	99	*I C*	922
	27	*P L R*	663	14	97	*I C*	390	27	27	*P L R*	734		8	*L L J*	546
5	101	*I C*	321		8	*L L J*	578		98	*I C*	900		27	*P L R*	771
6	7	*Lah*	438		27	*P L R*	831	28	95	*I C*	549	37	8	*Lah*	41
	98	*I C*	612	15	97	*I C*	423	29	8	*L L J*	55		8	*L L J*	551
	28	*P L R*	287		27	*Cr L J*	1111		27	*P L R*	165		28	*P L R*	62
8	7	*Lah*	460	16	27	*P L R*	604		99	*I C*	1004		99	*I C*	952
	8	*L L J*	281		99	*I C*	1025	30	8	*L L J*	524	38	98	*I C*	885
	27	*P L R*	414		28	*Cr L J*	225		27	*P L R*	779	39	98	*I C*	870
	95	*I C*	430	17	97	*I C*	426		99	*I C*	58	40	98	*I C*	868
	27	*P L R*	712		27	*Cr L J*	1114		28	*Cr L J*	26	41	99	*I C*	928
9	7	*Lah*	420	18	7	*Lah*	463		7	*A I Cr R*	214		8	*L L J*	555
	98	*I C*	650		27	*P L R*	740	32	91	*I C*	1047		27	*P L R*	767
	27	*P L R*	659		98	*I C*	673	33	95	*I C*	105	42	98	*I C*	906
10	27	*P L R*	615	20	7	*Lah*	491	34	27	*P L R*	112	43	98	*I C*	892
	98	*I C*	190		99	*I C*	300		92	*I C*	892	44	95	*I C*	294
	8	*L L J*	616		27	*P L R*	812		27	*Cr L J*	380				

A. I. R. 1927 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.		
45	99	*I C*	920	71 (1)	27	*P L R*	564	102	S	*Lah*	38	140	9	*L L J*	22
	8	*L L J*	537		99	*I C*	1055		28	*Cr L J*	316		28	*P L R*	57
46	98	*I C*	865	71 (2)	98	*I C*	866		100	*I C*	540		100	*I C*	426
47	98	*I C*	881	72	S	*L L J*	604		28	*P L R*	285	141	9	*L L J*	14
48	8	*L L J*	532		99	*I C*	875	103	9	*L L J*	25		28	*P L R*	153
	98	*I C*	887		28	*P L R*	24		28	*P L R*	15		100	*I C*	329
	27	*P L R*	829	73	98	*I C*	867		99	*I C*	770	143	99	*I C*	692
49	7	*Lah*	539	74	9	*L L J*	36		8	*Lah*	257		8	*Lah*	144
	8	*L L J*	352		99	*I C*	326	105	9	*L L J*	12		29	*P L R*	101
	27	*P L R*	698		28	*Cr L J*	118		28	*P L R*	90	145	28	*Cr L J*	158
	97	*I C*	187	75	S	*L L J*	594		100	*I C*	168		99	*I C*	414
50	98	*I C*	902		28	*P L R*	41	106	9	*L L J*	76	146	99	*I C*	445
51	8	*L L J*	559		99	*I C*	962		28	*P L R*	93	147	99	*I C*	30
	99	*I C*	324	78 (1)	99	*I C*	288		100	*I C*	475	148	99	*I C*	4
	28	*Cr L J*	116	78 (2)	8	*L L J*	610	107	28	*P L R*	14	149	28	*Cr L J*	17
	28	*P L R*	27		28	*P L R*	39		99	*I C*	592		99	*I C*	49
52	8	*L L J*	566		99	*I C*	929	108	99	*I C*	524	152	9	*L L J*	30
	99	*I C*	328		28	*Cr L J*	193	109	28	*Cr L J*	170		28	*P L R*	134
	27	*P L R*	823		7	*A I Cr R*	173		99	*I C*	602		100	*I C*	110
	28	*Cr L J*	120	79	99	*I C*	240		7	*A I Cr R*	319	153	28	*P L R*	86
	8	*Lah*	114		28	*Cr L J*	112	110	S	*Lah*	35		99	*I C*	291
53	27	*P L R*	783		7	*A I Cr R*	287		9	*L L J*	133	154	93	*I C*	956
	100	*I C*	773	80 (1)	98	*I C*	859		100	*I C*	545	155	93	*I C*	1017
54	7	*Lah*	77	80 (2)	99	*I C*	70		28	*P L R*	239	156	99	*I C*	1002
	98	*I C*	393		28	*Cr L J*	38	111	99	*I C*	666	157	9	*L L J*	96
	27	*Cr L J*	1321		7	*A I Cr R*	199	112	7	*L L J*	198		99	*I C*	909
	28	*P L R*	232	81	28	*P L R*	6		26	*P L R*	171	158	99	*I C*	822
55	8	*L L J*	273		101	*I C*	324		92	*I C*	131		8	*Lah*	205
	27	*P L R*	458	82	7	*Lah*	552	113	27	*P L R*	807		28	*P L R*	483
	96	*I C*	420		9	*L L J*	91		100	*I C*	269	159	99	*I C*	420
56	98	*I C*	879		27	*P L R*	857	115	8	*Lah*	1	161	28	*Cr L J*	230
57	8	*L L J*	548		99	*I C*	945		100	*I C*	721		99	*I C*	1030
	27	*P L R*	777	83	99	*I C*	538		28	*P L R*	455	162	28	*Cr L J*	199
	99	*I C*	441	84	99	*I C*	515	118	99	*I C*	619		99	*I C*	935
58	99	*I C*	944	85	26	*P L R*	801	119	8	*Lah*	22	164	28	*Cr L J*	190
	8	*L L J*	564		27	*Cr L J*	430		100	*I C*	732		99	*I C*	862
	27	*P L R*	786		93	*I C*	158		28	*P L R*	490	165	28	*P L R*	99
	28	*Cr L J*	208	86	7	*Lah*	555	120	99	*I C*	638		28	*Cr L J*	351
	8	*Lah*	103		27	*P L R*	864	122	99	*I C*	591		100	*I C*	831
	28	*P L R*	494		99	*I C*	948	123	99	*I C*	654		7	*A I Cr R*	288
59	98	*I C*	942	87	8	*L L J*	575	124	28	*Cr L J*	176	166	99	*I C*	829
60	8	*L L J*	589		28	*P L R*	52		99	*I C*	608	168	28	*Cr L J*	236
	8	*Lah*	117		99	*I C*	970		8	*Lah*	267		99	*I C*	1036
	101	*I C*	830	88	7	*Lah*	484		28	*P L R*	440	169	9	*L L J*	130
	28	*P L R*	45		27	*P L R*	802	125	99	*I C*	463		99	*I C*	767
62	99	*I C*	55		28	*Cr L J*	136	126	28	*P L R*	78	170	9	*L L J*	135
	28	*Cr L J*	23		99	*I C*	344		100	*I C*	54		99	*I C*	898
	7	*A I Cr R*	196	89	95	*I C*	704		8	*Lah*	219	171	99	*I C*	642
63	99	*I C*	77	90	27	*P L R*	162	128	26	*P L R*	248	172	28	*P L R*	106
	28	*Cr L J*	45		93	*I C*	843		98	*I C*	929		100	*I C*	596
	7	*A I Cr R*	220	91	27	*P L R*	642	129 (1)	99	*I C*	565		9	*L L J*	191
65	27	*P L R*	138		99	*I C*	84	129 (2)	28	*Cr L J*	172	173	28	*Cr L J*	227
	94	*I C*	39		28	*Cr L J*	52		99	*I C*	604		99	*I C*	1027
66 (1)	8	*L L J*	518	92	8	*L L J*	101		7	*A I Cr R*	324	174	9	*L L J*	57
	27	*P L R*	705		27	*P L R*	239	130	9	*L L J*	1		99	*I C*	648
	99	*I C*	596		94	*I C*	629		99	*I C*	818		8	*Lah*	156
	28	*Cr L J*	164	94	28	*P L R*	3	131	99	*I C*	518		28	*P L R*	539
66 (2)	98	*I C*	857		100	*I C*	418	132	99	*I C*	681	176	99	*I C*	812
67	7	*Lah*	456	95	95	*I C*	1055	133	9	*L L J*	61		8	*Lah*	198
	8	*L L J*	581	96	7	*L L J*	542		28	*P L R*	65		28	*P L R*	351
	27	*P L R*	424		26	*P L R*	840		100	*I C*	53	178	99	*I C*	87
	96	*I C*	171		92	*I C*	241	134	99	*I C*	690		28	*Cr L J*	55
	8	*L L J*	228	97	8	*Lah*	19	135	99	*I C*	390	179	99	*I C*	1006
68	98	*I C*	883		97	*I C*	435	136	99	*I C*	7	181	100	*I C*	97
69 (1)	8	*L L J*	562		28	*P L R*	283	137	28	*P L R*	68		8	*Lah*	269
	27	*P L R*	784	98	8	*L L J*	136		101	*I C*	325		28	*P L R*	443
	99	*I C*	80		27	*P L R*	203	138	28	*Cr L J*	50	183	100	*I C*	67
	7	*A I Cr R*	204		93	*I C*	1014		99	*I C*	82	186	28	*P L R*	158
	28	*Cr L J*	48	99	98	*I C*	864	139	9	*L L J*	42		101	*I C*	254
69 (2)	98	*I C*	881	100	98	*I C*	884		28	*Cr L J*	239		9	*L L J*	215
70	98	*I C*	878	101	27	*P L R*	801		99	*I C*	1039				

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A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
187 (1)	100 *I C*	46	248	8 *Lah*	354	337	100 *I C*	800	377	102 *I C*	198
187 (2)	100 *I C*	92		9 *L L J*	352	338	8 *Lah*	320	378	104 *I C*	123
188	28 *P L R*	157		28 *P L R*	694		100 *I C*	716	379	101 *I C*	186
	100 *I C*	672	249	9 *L L J*	119		28 *Cr L J*	332		28 *Cr L J*	410
189	100 *I C*	17		28 *P L R*	266		7 *A I Cr R*	572	380	100 *I C*	70
190	100 *I C*	298		102 *I C*	694		28 *P L R*	521	382	100 *I C*	838
191	8 *Lah*	100	252	9 *L L J*	199	340	101 *I C*	852	383	9 *L L J*	169
	9 *L L J*	213		100 *I C*	422	342	100 *I C*	936		28 *P L R*	394
	101 *I C*	596		28 *P L R*	620	343	8 *Lah*	326		100 *I C*	939
	28 *Cr L J*	468	255	100 *I C*	917		28 *P L R*	119	385	9 *L L J*	233
	28 *P L R*	495	259	100 *I C*	849		100 *I C*	707		28 *P L R*	307
192	9 *L L J*	5	261	8 *Lah*	149		28 *Cr L J*	323		101 *I C*	742
	100 *I C*	854		101 *I C*	818		7 *A I Cr R*	291	388(1)	100 *I C*	788
193	9 *L L J*	209		28 *P L R*	420	344	8 *Lah*	306	388(2)	9 *L L J*	285
	28 *Cr L J*	264	264	100 *I C*	911		9 *L L J*	231		23 *P L R*	192
	100 *I C*	232	266	100 *I C*	807		28 *P L R*	367		102 *I C*	423
	28 *P L R*	273	268	9 *L L J*	109		103 *I C*	470	391(1)	101 *I C*	592
194	28 *Cr L J*	252		28 *P L J*	228	345	101 *I C*	194	391(2)	8 *Lah*	173
	100 *I C*	124		101 *I C*	608	346	28 *P L R*	178		28 *P L R*	344
	7 *A I Cr R*	401		28 *Cr L J*	480		103 *I C*	328		102 *I C*	807
196	100 *I C*	49		8 *A I Cr R*	107	347	100 *I C*	896	394	101 *I C*	171
197	100 *I C*	452	269	100 *I C*	795	348	8 *Lah*	711		8 *Lah*	362
168	100 *I C*	84	271	28 *P L R*	211		9 *L L J*	420		28 *P L R*	698
	8 *Lah*	215	272	8 *Lah*	123		29 *P L R*	148	395	8 *Lah*	208
	28 *P L R*	341		27 *P L R*	768	350	8 *Lah*	111		28 *P L R*	349
200	8 *Lah*	54		100 *I C*	60		99 *I C*	756		102 *I C*	796
	102 *I C*	523	273	100 *I C*	955		28 *P L R*	486	396	100 *I C*	922
216	100 *I C*	498		8 *Lah*	274	351	9 *L L J*	195	398(1)	101 *I C*	613
217	28 *Cr L J*	266		28 *P L R*	441		28 *P L R*	230	398(2)	8 *Lah*	203
	100 *I C*	234	274	28 *Cr L J*	357		102 *I C*	432		28 *P L R*	489
	8 *Lah*	521		100 *I C*	965	352	28 *Cr L J*	293		104 *I C*	109
	28 *P L R*	559		7 *A I Cr R*	558		100 *I C*	373		28 *Cr L J*	781
218	100 *I C*	504	276	28 *P L R*	205	353	28 *Cr L J*	255	399	9 *L L J*	245
220(1)	28 *Cr L J*	312		101 *I C*	747		100 *I C*	127		28 *P L R*	311
	100 *I C*	536	278	100 *I C*	949		7 *A I Cr R*	427		102 *I C*	679
220(2)	28 *Cr L J*	305	280	9 *L L J*	117	354	101 *I C*	624	400	8 *Lah*	127
	100 *I C*	529		28 *P L R*	201	355(1)	8 *Lah*	212		101 *I C*	807
221	9 *L L J*	197		101 *I C*	201		99 *I C*	684		28 *P L R*	414
	100 *I C*	577		8 *Lah*	360		28 *P L R*	492	403	101 *I C*	142
	28 *P L R*	619	281	9 *L L J*	154	355(2)	9 *L L J*	260	404	8 *Lah*	181
22	28 *Cr L J*	244		28 *P L R*	173		28 *P L R*	299		28 *P L R*	355
	100 *I C*	116		101 *I C*	541		103 *I C*	798		103 *I C*	506
	7 *A I Cr R*	406	282	28 *P L R*	209		28 *Cr L J*	750	408	101 *I C*	725
223	100 *I C*	567		101 *I C*	751		8 *A I Cr R*	412		8 *Lah*	373
224	100 *I C*	793	283	100 *I C*	901	356	101 *I C*	589	412	28 *P L R*	197
225	100 *I C*	834	284	100 *I C*	833	357	28 *P L R*	177		102 *I C*	33
226	28 *P L R*	150	285	28 *Cr L J*	341		101 *I C*	192	413	9 *L L J*	220
	100 *I C*	625		100 *I C*	821		28 *Cr L J*	416		102 *I C*	829
227	28 *Cr L J*	363		7 *A I Cr R*	562		8 *Lah*	568	414	101 *I C*	702
	100 *I C*	971	287	9 *L L J*	149	358	100 *I C*	1010	415	28 *P L R*	275
	7 *A I Cr R*	561		28 *P L R*	174	362	104 *I C*	202		101 *I C*	588
228	8 *Lah*	105		101 *I C*	644		8 *Lah*	693	416	28 *P L R*	217
	101 *I C*	762		8 *Lah*	524		9 *L L J*	569		102 *I C*	9
	28 *P L R*	427	288	100 *I C*	774	365	101 *I C*	203	417	101 *I C*	642
230	100 *I C*	51	289**FB**	8 *Lah*	384	366	100 *I C*	1014	418	9 *L L J*	174
231	9 *L L J*	165		104 *I C*	849	369	8 *Lah*	136		102 *I C*	280
	28 *P L R*	138	328	100 *I C*	910		28 *Cr L J*	508		28 *P L R*	330
	104 *I C*	418	329	8 *Lah*	139		101 *I C*	892	420	9 *L L J*	248
232	100 *I C*	653		101 *I C*	635		8 *A I Cr R*	149		101 *I C*	172
234	100 *I C*	112	330	9 *L L J*	141	370	101 *I C*	189		8 *Lah*	544
235	100 *I C*	76		28 *P L R*	184		8 *A I Cr R*	41		29 *P L R*	114
236	100 *I C*	477		102 *I C*	358		28 *Cr L J*	413	421	28 *P L R*	212
237	100 *I C*	129	332	28 *P L R*	199	371	28 *P L R*	227		101 *I C*	139
238	28 *Cr L J*	302		101 *I C*	483		100 *I C*	733		8 *Lah*	347
	100 *I C*	382		28 *Cr L J*	451	372	101 *I C*	617		9 *L L J*	373
	8 *A I Cr R*	109		8 *A I Cr R*	83	373	9 *L L J*	157	423(1)	101 *I C*	166
239	100 *I C*	677		8 *Lah*	570		28 *P L R*	325	423(2)	28 *P L R*	272
240	100 *I C*	573	333	28 *P L R*	161		103 *I C*	742		101 *I C*	776
241	100 *I C*	924		100 *I C*	846	376	28 *P L R*	300	424(1)	101 *I C*	257
	8 *Lah*	281		8 *Lah*	310		101 *I C*	615	424(2)	9 *L L J*	257
248	100 *I C*	675	336	100 *I C*	762	377	28 *P L R*	196			

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
424(2)	103	*I C*	623	485	102	*I C*	817	534(1)	102	*I C*	662	610SB	9	*L L J*	455
425	8	*Lah*	329	489	102	*I C*	48	534(2)	102	*I C*	631	613	103	*I C*	274
	101	*I C*	153	491	9	*L L J*	315	536(1)	102	*I C*	639		8	*Lah*	719
	9	*L L J*	218	492	102	*I C*	447	536(2)	102	*I C*	707		29	*P L R*	118
	28	*P L R*	425	493	28	*P L R*	370	537	103	*I C*	86	614	103	*I C*	235
426	28	*P L R*	181		103	*I C*	543	539	8	*Lah*	541	615(1)	103	*I C*	501
	102	*I C*	426	494	102	*I C*	11		29	*P L R*	112	615(2)	103	*I C*	511
428	101	*I C*	205	495	8	*Lah*	331		106	*I C*	225	616	103	*I C*	522
430(1)	28	*Cr L J*	345		28	*Cr L J*	665	540	102	*I C*	843	617	103	*I C*	413
	100	*I C*	825		103	*I C*	201		8	*Lah*	681		28	*Cr L J*	685
430(2)	28	*Cr L J*	415		28	*P L R*	519		29	*P L R*	16		8	*A I Cr R*	360
	101	*I C*	191		8	*A I Cr R*	293	541	28	*Cr L J*	641		9	*L L J*	369
431	28	*P L R*	297		9	*L L J*	354		103	*I C*	97	618	103	*I C*	537
	102	*I C*	688	496	28	*Cr L J*	513		8	*A I Cr R*	254	619	103	*I C*	475
432	28	*Cr L J*	419		102	*I C*	209	543	9	*L L J*	293	620	103	*I C*	372
	101	*I C*	451		8	*A I Cr R*	187		102	*I C*	705	621	103	*I C*	531
433	8	*Lah*	167	497	9	*L L J*	281		29	*P L R*	64	622	103	*I C*	425
	28	*P L R*	363		103	*I C*	516	544	102	*I C*	753		28	*P L R*	554
	100	*I C*	907		28	*P L R*	640	546(1)	28	*Cr L J*	647	625	8	*Lah*	356
435(1)	28	*Cr L J*	478	499	102	*I C*	46		103	*I C*	103		9	*L L J*	359
	101	*I C*	606		8	*Lah*	531	546(2)	103	*I C*	80		28	*P L R*	695
435(2)	8	*Lah*	617		9	*L L J*	400	549	8	*A I Cr R*	196		104	*I C*	817
	29	*P L R*	81	500	8	*Lah*	263		28	*P L R*	313	626	103	*I C*	421
441	101	*I C*	850		28	*P L R*	433		28	*Cr L J*	556	629	103	*I C*	224
	8	*Lah*	366		28	*Cr L J*	670		102	*I C*	492	631	103	*I C*	763
	28	*P L R*	700		103	*I C*	206	554	102	*I C*	689				
443	8	*Lah*	276	501	102	*I C*	436	555	103	*I C*	68	634	103	*I C*	408
	9	*L L J*	180	505	8	*Lah*	308	556(1)	102	*I C*	701		28	*Cr L J*	680
	100	*I C*	548		28	*P L R*	432	556(2)	103	*I C*	142	635	103	*I C*	657
	28	*P L R*	446		103	*I C*	494	557	105	*I C*	906	637	103	*I C*	400
445	9	*L L J*	301	506	102	*I C*	12	561	28	*Cr L J*	671		8	*Lah*	716
	28	*P L R*	380	508	8	*Lah*	225		103	*I C*	207		29	*P L R*	95
	103	*I C*	437		28	*P L R*	434	562 (1)	103	*I C*	192	638	8	*Lah*	351
	8	*Lah*	721		102	*I C*	836	562 (2)	102	*I C*	788		28	*P L R*	692
448	103	*I C*	889	510	102	*I C*	238	566	103	*I C*	114		106	*I C*	141
	8	*Lah*	651		8	*Lah*	536	567	28	*Cr L J*	635	639	103	*I C*	624
	29	*P L R*	74		9	*L L J*	376		103	*I C*	59	640	103	*I C*	73
449	9	*L L J*	237		28	*P L R*	564		8	*A I Cr R*	261	642	103	*I C*	665
	28	*P L R*	407	512	102	*I C*	298	570	9	*L L J*	468		9	*L L J*	444
	104	*I C*	545		8	*Lah*	335		106	*I C*	804		29	*P L R*	154
451		*New case*			9	*L L J*	405	574	103	*I C*	215	647(1)	28	*Cr L J*	160
452	9	*Lah*	38		28	*P L R*	705	577	102	*I C*	801		99	*I C*	416
FB	105	*I C*	507	513	105	*I C*	167		8	*Lah*	702	647(2)	103	*I C*	411
461	28	*P L R*	289	515	28	*Cr L J*	592		29	*P L R*	142		28	*Cr L J*	683
	102	*I C*	418		102	*I C*	560	580	28	*Cr L J*	663		9	*A I Cr R*	24
465	101	*I C*	786	516	9	*L L J*	262		103	*I C*	199	648	107	*I C*	276
470(1)	8	*Lah*	265		28	*P L R*	674		8	*A I Cr R*	432	650	103	*I C*	847
	28	*P L R*	438		106	*I C*	451		28	*P L R*	575		28	*Cr L J*	767
	28	*Cr L J*	239		29	*Cr L J*	35	581	28	*Cr L J*	625	651	103	*I C*	673
	99	*I C*	1039	519	28	*Cr L J*	547		103	*I C*	49	653	103	*I C*	712
470(2)	101	*I C*	838		102	*I C*	483		8	*A I Cr R*	273				
471	102	*I C*	149		8	*A I Cr R*	191	590	28	*P L R*	514	654	103	*I C*	843
	8	*Lah*	555	520	28	*Cr L J*	588		103	*I C*	769		8	*A I Cr R*	562
	28	*P L R*	665		102	*I C*	556		28	*Cr L J*	721		28	*Cr L J*	763
476(1)	8	*Lah*	318		8	*A I Cr R*	260		9	*L L J*	379	657	103	*I C*	706
	28	*P L R*	439	521	28	*P L R*	378		8	*A I Cr R*	403				
	102	*I C*	5		103	*I C*	292	592	103	*I C*	298	658	103	*I C*	838
476(2)	8	*Lah*	196	522	102	*I C*	476	593	103	*I C*	280		8	*A I Cr R*	575
	102	*I C*	779	524	28	*P L R*	19		9	*Lah*	1		9	*L L J*	396
	28	*Cr L J*	603		28	*Cr L J*	179	594	28	*P L R*	497		28	*Cr L J*	758
	28	*P L R*	485		99	*I C*	851		104	*I C*	234	659	103	*I C*	805
477	102	*I C*	313	526	28	*Cr L J*	590		28	*Cr L J*	794	663	103	*I C*	767
	8	*Lah*	584		102	*I C*	558	602	103	*I C*	759	664	103	*I C*	678
	9	*L L J*	433		9	*L L J*	365	605	8	*Lah*	340	665(1)	104	*I C*	347
	28	*P L R*	643		8	*A I Cr R*	340		100	*I C*	943				
480	9	*L L J*	268		28	*P L R*	631		28	*P L R*	708	665(2)	103	*I C*	698
	103	*I C*	854	527	102	*I C*	621	607	103	*I C*	266				
	28	*P L R*	679	529	102	*I C*	468	609	100	*I C*	162	666	103	*I C*	45
481	105	*I C*	265	530	28	*P L R*	388	610	103	*I C*	775	669	104	*I C*	106
484	102	*I C*	289		103	*I C*	444	SB	28	*Cr L J*	727		9	*A I Cr R*	13
485	8	*Lah*	241		9	*L L J*	319		8	*A I Cr R*	408		28	*Cr L J*	778

A. I. R. 1927 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
671	8	*Lah.*	493	724	9	*L L J*	103	756	102	*I C*	890	791(2)	28	*Cr L J*	156
	28	*P L R*	688		3	*A I Cr R*	74	757	9	*L L J*	276		99	*I C*	412
	106	*I C*	342		28	*Cr L J*	461		102	*I C*	893	792	28	*Cr L J*	819
	29	*Cr L J*	6		101	*I C*	493	759	100	*I C*	73		104	*I C*	435
672	28	*P L R.*	577	726	7	*A I Cr R*	571	760(1)	101	*I C*	629	793(1)	28	*P L R*	322
	104	*I C*	230		28	*Cr L J*	339	760(2)	28	*P L R*	375		102	*I C*	751
	28	*Cr L J*	790		100	*I C*	819		103	*I C*	724	793(2)	28	*P L R*	610
674	28	*Cr L J*	598	727	28	*P L R*	260	761	100	*I C*	165		9	*L L J*	223
	102	*I C*	774		8	*A I Cr R*	239	762	9	*L L J*	252		103	*I C*	479
	8	*Lah*	684		28	*Cr L J*	584		28	*P L R*	608	795	28	*P L R*	263
	29	*P L R*	104		102	*I C*	552		103	*I C*	485		9	*L L J*	125
677	8	*Lah*	527	728	28	*P L R*	215	763(1)	100	*I C*	134		102	*I C*	698
	105	*I C*	204		7	*A I Cr R*	429	763(2)	103	*I C*	702	797(1)	101	*I C*	568
	28	*P L R*	681		28	*Cr L J*	405	764	99	*I C*	542	797(2)	28	*P L R*	461
679	9	*L L J*	347		101	*I C*	181	765	28	*P L R*	583	798	100	*I C*	75
	104	*I C*	146	729	7	*A I Cr R*	371		9	*A I Cr R*	56	799(1)	28	*Cr L J*	656
680	104	*I C*	289		28	*Cr L J*	258		28	*Cr L J*	854		103	*I C*	112
681	104	*I C*	148		100	*I C*	226		104	*I C*	630	799(2)	99	*I C*	1008
682	104	*I C*	247	730	28	*P L R*	279	768	9	*L L J*	309	800	29	*P L R*	110
	28	*Cr L J*	807		8	*A I Cr R*	164		28	*P L R*	339		9	*L L J*	511
685	104	*I C*	222		28	*Cr L J*	487		102	*I C*	841		105	*I C*	847
	10	*L L J*	23		101	*I C*	663	769	102	*I C*	273	801	28	*Cr L J*	619
687	8	*Lah*	514	731	9	*L L J*	440	770	9	*L L J*	152		102	*I C*	907
	28	*P L R*	550		8	*A I Cr R*	447		28	*P L R*	220	802	28	*P L R*	303
	106	*I C*	59		28	*Cr L J*	755		102	*I C*	194		106	*I C*	474
689	104	*I C*	255		103	*I C*	835	771	101	*I C*	280	804	102	*I C*	22
	28	*Cr L J*	815	733(1)	7	*A I Cr R*	224	772(1)	100	*I C*	17	805	26	*P L R*	712
691	9	*L L J*	463		28	*Cr L J*	24	772(2)	28	*Cr L J*	256		28	*Cr L J*	973
	104	*I C*	127		99	*I C*	56		100	*I C*	128		105	*I C*	685
693	8	*Lah*	501	733(2)	28	*P L R*	166	773(1)	102	*I C*	755	807	102	*I C*	587
	28	*P L R*	542		7	*A I Cr R*	342	773(2)	26	*P L R*	288	808(1)	28	*Cr L J*	415
	106	*I C*	10		8	*A I Cr R*	214		105	*I C*	721		101	*I C*	191
697	107	*I C*	278		28	*Cr L J*	575	774	28	*Cr L J*	667	808(2)	28	*P L R*	130
699	104	*I C*	441		102	*I C*	511		103	*I C*	203		101	*I C*	520
	28	*Cr L J*	825	734	28	*P L R*	1	775(1)	9	*L L J*	114	809	26	*I C*	237
701	104	*I C*	339		100	*I C*	19		28	*Cr L J*	238		105	*I C*	724
702	104	*I C*	437	735(1)	7	*A I Cr R*	360		99	*I C*	1038	810	100	*I C*	104
	28	*Cr L J*	821		28	*Cr L J*	257	775(2)	26	*P L R*	163	811	28	*P L R*	406
705	104	*I C*	464	735(2)	7	*A I Cr R*	416		105	*I C*	610		104	*I C*	702
	28	*Cr L J*	848		28	*Cr L J*	241	776(1)	101	*I C*	570	812	103	*I C*	227
706	9	*L L J*	424		100	*I C*	113	776(2)	26	*P L R*	435	814	99	*I C*	703
	28	*Cr L J*	993	736	9	*L L J*	339		105	*I C*	533	815(1)	28	*Cr L J*	607
	105	*I C*	817		104	*I C*	369	777	9	*L L J*	9		102	*I C*	783
708	9	*L L J*	408	737	9	*L L J*	100		28	*P L R*	55	815(2)	28	*P L R*	371
	103	*I C*	833		8	*A I Cr R*	78		100	*I C*	336		9	*L L J*	296
	8	*A I CrR*	443		28	*Cr L J*	459	778	100	*I C*	164		103	*I C*	466
	28	*Cr L J*	753	738	101	*I C*	491	779	28	*P L R*	386	817	9	*L L J*	428
709	104	*I C*	227	739	104	*I C*	403		103	*I C*	419		103	*I C*	752
	28	*Cr L J*	787		28	*P L R*	187	780(1)	99	*I C*	870	819	104	*I C*	700
710	29	*Cr L J*	117		8	*A I Cr R*	94	780(2)	28	*Cr L J*	656	821	9	*L L J*	526
	106	*I C*	709	740	28	*Cr L J*	456		103	*I C*	112		105	*I C*	850
713	104	*I C*	444		101	*I C*	488	781	28	*Cr L J*	771	822	28	*P L R*	107
	28	*Cr L J*	828		8	*A I Cr R*	243		104	*I C*	99		7	*A I Cr R*	269
715	104	*I C*	144	744	28	*Cr L J*	593	782	28	*P L R*	98		28	*Cr L J*	328
717	103	*I C*	498		102	*I C*	769		9	*L L J*	94		100	*I C*	712
718	28	*P L R*	590		23	*P L R*	103	783	9	*L L J*	136	823	104	*I C*	173
	104	*I C*	563		7	*A I Cr R*	565		28	*P L R*	241	825(1)	9	*L L J*	351
719	100	*I C*	164		28	*Cr L J*	326		102	*I C*	304		28	*Cr L J*	1040
720	29	*Cr L J*	125	745	100	*I C*	710	784	26	*P L R*	780		106	*I C*	224
	106	*I C*	717		28	*Cr L J*	247		105	*I C*	501		9	*A I Cr R*	176
721(1)	101	*I C*	686	746	100	*I C*	119	785	28	*P L R*	403	825(2)	101	*I C*	652
721(2)	104	*I C*	290		28	*P L R*	171		9	*L L J*	447	826	29	*P L R*	61
722	99	*I C*	734		8	*A I Cr R*	217		104	*I C*	726		9	*L L J*	493
723	104	*I C*	325		28	*Cr L J*	585	786	28	*Cr L J*	833		106	*I C*	40
				747	102	*I C*	553		104	*I C*	454	828	28	*P L R*	123
				748	105	*I C*	689	788	103	*I C*	29		9	*L L J*	63
				752	102	*I C*	283	789	101	*I C*	259		101	*I C*	549
				753	104	*I C*	820	790	100	*I C*	145	830	26	*P L R*	500
				755	99	*I C*	698	791(1)	28	*P L R*	204		28	*Cr L J*	964
					103	*I C*	496		9	*L L J*	80		105	*I C*	676
									101	*I C*	444				

A I. R. 1927 Lahore = Other Journals—(*Concld.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
831	28 *Cr L J* 58	851(1)	105 *I C* 684	874(2)	9 *L L J* 414	894(2)	28 *P L R* 71
	99 *I C* 90	851(2)	28 *P L R* 148		28 *Cr L J* 1010		100 *I C* 156
832	28 *P L R* 169		100 *I C* 839		106 *I C* 98	895	28 *P L R* 121
	9 *L L J* 146	852	28 *P L R* 607	876(1)	102 *I C* 884		100 *I C* 786
	101 *I C* 544		9 *L L J* 193	876(2)	28 *P L R* 127	896	100 *I C* 803
833(1)	28 *P L R* 238		100 *I C* 23		100 *I C* 738	897	26 *P L R* 175
	28 *Cr L J* 320	853	9 *L L J* 331	878	9 *L L J* 417		105 *I C* 632
	100 *I C* 544	854	103 *I C* 287		104 *I C* 318	898	9 *L L J* 311
833(2)	9 *L L J* 536	856	102 *I C* 39	879	100 *I C* 301		28 *P L R* 655
835	28 *P L R* 369	858(1)	9 *L L J* 337	880(1)	28 *P L R* 96		103 *I C* 715
	103 *I C* 454	858(2)	104 *I C* 397	880(2)	9 *L L J* 482	900(1)	9 *L L J* 211
836	28 *P L R* 235	860(1)	100 *I C* 166		29 *P L R* 45		28 *P L R* 626
	9 *L L J* 111	860(2)	28 *P L R* 9	881	9 *L L J* 529		28 *Cr L J* 250
837	104 *I C* 684		101 *I C* 328	883(1)	104 *I C* 118		100 *I C* 122
839	28 *P L R* 132	861	28 *P L R* 627	883(2)	102 *I C* 754	900(2)	9 *L L J* 270
	100 *I C* 909		9 *L L J* 206	884	9 *L L J* 290		28 *P L R* 683
840	102 *I C* 31		100 *I C* 468		28 *P L R* 338		103 *I C* 858
841	103 *I C* 36	862(1)	100 *I C* 3		102 *I C* 615	903	100 *I C* 862
842(1)	100 *I C* 153	862(2)	9 *L L J* 514	885	26 *P L R* 301	904(1)	103 *I C* 398
842(2)	103 *I C* 299	864	28 *P L R* 295		105 *I C* 560	904(2)	100 *I C* 313
844	28 *P L R* 101		9 *L L J* 254	886(1)	103 *I C* 119	905	9 *L L J* 566
	9 *L L J* 89		102 *I C* 42	886(2)	9 *L L J* 545		106 *I C* 826
	100 *I C* 662	865(1)	26 *P L R* 650		29 *P L R* 131	907	28 *P L R* 258
845	99 *I C* 890		105 *I C* 556		106 *I C* 488		103 *I C* 369
846	102 *I C* 710	865(2)	28 *P L R* 143	887	9 *L L J* 484	908	28 *P L R* 257
847(1)	9 *L L J* 357		100 *I C* 783		29 *P L R* 56		103 *I C* 90
	103 *I C* 701	867	9 *L L J* 384	888(1)	9 *L L J* 178	909	102 *I C* 628
847(2)	28 *P L R* 72	870	26 *P L R* 239		28 *P L R* 324	911	9 *L L J* 19
	100 *I C* 108		28 *Cr L J* 971		100 *I C* 472		28 *P L R* 136
848(1)	9 *L L J* 547		105 *I C* 683	888(2)	9 *L L J* 32		100 *I C* 595
848(2)	28 *P L R* 146	871	100 *I C* 916	890	9 *L L J* 579	912	100 *I C* 810
	100 *I C* 815	872(1)	26 *P L R* 151		29 *P L R* 27	914	100 *I C* 137
850(1)	26 *P L R* 673		105 *I C* 693	891	100 *I C* 813	915	9 *L L J* 189
	105 *I C* 562	872(2)	9 *L L J* 486	893	28 *Cr L J* 651		28 *P L R* 617
850(2)	28 *P L R* 377		29 *P L R* 58		103 *I C* 107		102 *I C* 25
	103 *I C* 124	873	9 *L L J* 399	894(1)	103 *I C* 222	916	29 *Cr L J* 11
851(1)	28 *P L R* 290	874(1)	28 *Cr L J* 43	894(2)	9 *L L J* 7		106 *I C* 347
	28 *Cr L J* 972		99 *I C* 75				

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1927 LAHORE

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ABBREVIATIONS EXPLAINED

A. I. Cr. R.	...	... All India Criminal Reports.
All. or A.	...	... Indian Law Reports, Allahabad Series.
A. L. J.	...	... Allahabad Law Journal.
A. I. R. 1927 All.	...	... All India Reporter, 1927 Allahabad.
Bom. or B.	...	... Indian Law Reports, Bombay Series.
Bom. L. R.	...	... Bombay Law Reporter.
A. I. R. 1927 Bom.	...	... All India Reporter, 1927 Bombay.
Bur. L. T.	...	... Burma Law Times.
Bur. L. J.	...	... Burma Law Journal.
Cal. or C.	...	... Indian Law Reports, Calcutta Series.
C. L. J.	...	... Calcutta Law Journal.
C. L. R.	...	... Calcutta Law Reports.
C. W. N.	...	... Calcutta Weekly Notes.
A. I. R. 1927 Cal.	...	... All India Reporter, 1927 Calcutta.
Cr. L. J.	...	... Criminal Law Journal.
I. A.	...	... Law Reports, Indian Appeals.
I. C.	...	... Indian Cases.
Lah. or L.	...	... Indian Law Reports, Lahore Series.
A. I. R. 1927 Lah.	...	... All India Reporter, 1927 Lahore.
Lah. L. J. or L. L. J.	...	... Lahore Law Journal.
L. B. R.	...	... Lower Burma Rulings.
A. I. R. 1921 L. B.	...	... All India Reporter, 1921 Lower Burma.
L. R. A.	...	... The Law Reporter, Allahabad.
L. C.	...	... Lucknow Cases.
Luck.	...	... Indian Law Reports, Lucknow Series.
Mad. or M.	...	... Indian Law Reports, Madras Series.
M. L. J.	...	... Madras Law Journal.
M. L. T.	...	... Madras Law Times.
L. W. or M. L. W.	...	... Madras Law Weekly.
M. W. N.	...	... Madras Weekly Notes.
A. I. R. 1927 Mad.	...	... All India Reporter, 1927 Madras.
N. L. J.	...	... Nagpur Law Journal.
N. L. R.	...	... Nagpur Law Reports.
A. I. R. 1927 Nag.	...	... All India Reporter, 1927 Nagpur.
O. C.	...	... Oudh Cases.
A. I. R. 1927 Oudh.	...	... All India Reporter, 1927 Oudh.
O. L. J.	...	... Oudh Law Journal.
O. W. N.	...	... Oudh Weekly Notes.
P. R.	...	... Punjab Record.
P. L. R.	...	... Punjab Law Reporter.
P. W. R.	...	... Punjab Weekly Reporter.
Pat. or P.	...	... Indian Law Reports, Patna Series.
P. H. C. C.	...	... Patna High Court Cases (Supplt, to C. W. N.)
A. I. R. 1927 Pat.	...	... All India Reporter, 1927 Patna.
A. I. R. 1927 P. C.	...	... All India Reporter, 1927 Privy Council.
Pat. L. R.	...	... Patna Law Reporter.
Pat. L. J.	...	... Patna Law Journal.
Pat. L. T.	...	... Patna Law Times.
Pat. L. W.	...	... Patna Law Weekly.
R. or Rang.	...	... Indian Law Reports. Rangoon Series.
A. I. R. 1927 Rang.	...	... All India Reporter, 1927 Rangoon.
Sar.	...	... Saraswati's P. C. Judgments.
S. L. R.	...	... Sind Law Reporter.
Suther.	...	... Sutherland's P. C. Judgments.
A. I. R. 1927 Sind	...	... All India Reporter, 1927 Sind.
U. B. R.	...	... Upper Burma Rulings.
U. P. L. R.	...	... U. P. Law Reporter.
A. I. R. 1921 U. B.	...	... All India Reporter, 1921 Upper Burma.

OTHER ABBREVIATIONS.

Appl.	... Applied.	Disc.	... Discussed.	F. B.	... Full Bench.
Appr.	... Approved.	Diss. from	... Dissented from.	P. C.	... Privy Council.
Cons.	... Considered.	Expl.	... Explained.	Ref.	... Referred to.
Dist.	... Distinguished.	Foll.	... Followed.	S. B.	... Special Bench.

THE

ALL INDIA REPORTER

1927

LAHORE HIGH COURT

* A. I. R. 1927 Lahore 1

MARTINEAU AND DALIP SINGH, JJ.

Obedur Rahman and *others*—Plaintiffs —Appellants.

v.

Darbari Lal and *others*—Defendants—Respondents.

First Appeal No. 845 of 1923, Decided on 4th March 1926, from the decree of the 1st Cl. Sub-J., Delhi, D/- 28th February 1923.

* (*a*) *Civil P. C., S.* 11—*Appeal filed from the first decision.— Abatement of appeal does not amount to final decision and second suit is not barred.*

Where there has been an appeal the matter is no longer res judicata but res sub judice and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be res judicata. [P 1 C 2]

(*b*) *Landlord and tenant—Attornment—Sub-lessee attorning to original lessee — Subsequent attornment to third person is void.*

A sub-tenant having once attorned to his lessors is not at liberty to attorn to some other party. Such an attornment as regards a third party would be wholly null and void : 14 *P. R.* 1898, *Rel. on* ; 1918 *M.W.N.* 38 and *A. I. R.* 1925 *Mad.* 143, *Dist.* [P 3 C 2]

(*c*) *Landlord and tenant—Landlord entering into possession before expiry of tenancy—Tenancy does not terminate.*

A landlord who before the tenancy has expired enters on his tenant's property does not ipso facto cause the lease to terminate unless a forfeiture of the tenancy has accrued. [P 4 C 1]

(*d*) *Limitation Act, Art.* 116 — *Lessee's suit for compensation for breach of the term of the lease—Art.* 116 *applies.*

A suit by lessee for damages by way of compensation for breach of the term of the lease, namely, the implied term for quiet possession, is governed by Art. 116 ; 32 *I. C.* 245 and 44 *Cal.* 759 (*P. C.*), *Rel. on.* [P 5 C 1]

Tek Chand and *Ghulam Mohy-Ud-Din* —for Appellants.

Moti Sagar, Sardha Ram, Mehr Chand Mahajan and *Jagan Nath Bhandari*—for Respondents.

Dalip Singh, J.—This judgment will dispose of Civil Appeals Nos. 845 and 847 of 1923. The connected appeals Nos. 1239 of 1918 and 844 and 846 of 1923 have already been held to have abated and have been dismissed. These appeals are all connected and Mr. Moti Sagar has raised a preliminary objection that the abatement of the other appeals makes the decision of the trial Court final in those appeals, and as the point at issue, namely, whether a certain lease had expired or not, has been decided in those cases against the present appellants and as the same question is involved in the decision of these appeals, the matter is res judicata between the parties. I am unable to accept this contention. It is clear that where there has been an appeal the matter is no longer res judicata but sub-judice and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be res judicata. I would, therefore, overrule the preliminary objection.

I turn, therefore, to deal with the appeals on the merits. The relevant documents are all printed in the paper-book which is marked B for the purposes of these appeals and is First Appeal No. 844 of 1923. References to pages in the paper-book must be taken therefore to be references to the paper-book B, unless otherwise indicated.

It seems that seven persons whose pedigree table is given at page 13 gave a lease, or rather accepted a qabuliat from certain persons of nine shops on the 17th April 1909. The shops belonged originally to one Karim Ullah. The five persons mentioned in the pedigree table whose names do not figure in the document have, however, been held bound by the acts of the seven others by the judgment of the Chief Court dated the 27th March 1912, and it has not been seriously contended before us that as a matter of fact those persons were not so bound. It may be taken, therefore, that all the descendants of Karim Ullah joined in giving these nine shops on lease to the persons mentioned in the document. The plaintiffs-appellants in Appeal No. 845 of 1923 are the original lessees or their representatives-in-interest. The defendants-appellants in Appeal No. 847 of 1923 are the same persons. The respondents in both appeals are the original lessors or assignees of their interest either by purchase or by inheritance. The lessees claim that the lease has never come into operation because of the clause in the lease which states thet the term of the lease will be considered to run from the day of taking over possession of the entire property.

Appeal No. 845 of 1923 is for ejectment of the defendants from Shop No. 7 and about one-half of Shop No. 6 and for damages by way of mesne profits from the 16th December 1915 to the 15th November 1918, from Defendants Nos. 1 to 6, for the wrongful possession of shops Nos. 8 and 9. Appeal No. 847 of 1923 is from the suit by Rai Bahadur Sultan Singh and 20 others, plaintiffs and defendants-respondents, for a declaration that the lease had expired, and for possession of Shop No. 8 by ejectment.

The main point arising in both appeals is really the same, namely, whether the lease has or has not expired, and the decision of this issue practically decides the main question in dispute between the parties. Now, to see whether the lease has or has not expired we have to turn to the lease itself and to construe that document. Cl. (1) of that lease makes the term of the lease run from the day of taking over possession of the entire property for a period of five years. The counsel for the appellants has contended that this means that all the nine shops had to be handed over to the lessees either at the same time or at different times, but that the lease was not to commence until the day when all the nine shops came into possession of the lessees. As a matter of fact the nine shops were at the time in the possession of other tenants located by the lessors. They were also under mortgage with possession to certain mortgagees, but as the right to locate tenants had been reserved to the mortgagors, this last fact does not really make any difference in this appeal.

Now, it is clear from Cl. 6 of the lease, which is printed at page 32, that the parties contemplated that possession of the shops would not be taken at once because certain shops were in the possession of tenants-at-will on monthly tenancy, namely, Shops Nos. 7, 8 and 9, and Shops Nos. 1 to 6 were in possession of tenants whose prior leases were not to expire till a day which is not very clear on the record, but which, counsel for both sides agree may be taken as the 9th July 1910. Cl. 6 states that the lessees will now take possession of such shops of the nine shops occupied by the present tenants, the terms of the leases whereof had expired, and will take possession of those, the terms of which have not yet expired, after expiration of the term of the previous lease. Receipts for possession were also to be executed by the lessees. It is clear, therefore, that the parties contemplated that the possession would be given piecemeal so to speak. Three shops could be taken possession of immediately, and six shops could not be taken possession of at that time. (His Lordship then examined the history of certain shops in order to see what the real question in dispute between the parties was and proceeded.) On these facts the contention of the appellants is that they never at any time had possession of all the nine shops and that, therefore, the term of the lease, which was only to commence when all the nine shops were in their possession, had never commenced to run at all. It is, therefore, necessary to examine the nature of the possession that was contemplated to be given by the lease.

From Cl. 6 it is clear that the possession of shops whose lease had expired was to be taken immediately by the lessees and of shops whose lease had not expired possession was to be taken after expiration of the term of the previous

lease. From Cls. 3 and 4 it is clear that the lessees were at liberty to locate tenants, either the existing ones or others, and were liable for the expenses of suits brought for the ejectment of the present tenants or any other tenants.

It seems to me clear from these clauses, firstly, that both parties knew that the shops were actually in possession of various tenants. Therefore it is clear that both parties contemplated that only constructive possession would or indeed could be given of the shops. Secondly, it is clear that it was the duty of the lessees to eject even the existing tenants. Therefore if through any tenant asserting an adverse right against them they were unable to get immediate actual possession, it would not follow from that that the possession contemplated by the lease had not been transferred to them. Further it is clear that the possession of the various shops was evidently intended to be given at different times and it seems to me that having regard to all these facts the proper construction of the meaning of the words in Cl. 1 of the lease is that the term of the lease would run when all the shops had been handed over to the appellants. It was not necessary that on the date that the last shop came to be handed over to the appellants the other eight shops should also on that date be in their possession. If this construction is correct then the case of the lessees must fail because it was the duty of the lessees to take possession of Shops Nos. 7, 8 and 9 immediately and they did actually get possession of Shop No. 7 and later on of Shops Nos. 8 and 9. As regards Shops Nos. 1 to 6 they could get possession only after the 9th of July 1910, and as regards Shop No. 6 they did get possession, and as regards Shops Nos. 1 to 5 they got rent decrees against the existing sub-tenants who had refused to give up actual possession. All that the lessor could possibly be expected to do in the circumstances of the case was to execute the lease deed and to give notice to the existing tenants of the execution of the lease deed. It is clear from page 83 of the paper-book that the lessees admitted that the proprietors had informed the mortgagees as well as the tenants of Shops Nos. 1 to 6 of the lease, and from page 91 that the lessees did actually sue for the rent of Shops Nos. 1 to 6, though they unfortunately had allowed certain rent to have become time-barred. They took the date 9th July 1910 to be the date from which their right to receive rent accrued : see also the statement of Iltaf-ul-Rahman at page 98. In the circumstances, therefore, it seems to me that the constructive possession which was contemplated by the lease had been duly given to the lessees, and the lease commenced to run at the latest from the 9th July 1910. From this it would, therefore, follow that from the 9th July 1915 the lease had expired.

But even if this construction is incorrect it remains to be considered whether as a matter of fact on the crucial date, namely, 9th July 1910, the lessees were or were not in possession of all the nine shops. Stress has been laid by counsel for the appellants in this connexion chiefly on Shop No. 7. The contention of the appellants is that, though possession of Shop No. 7 was acquired by the lessees, on the 9th March 1910, after the purchase by Parmeshri Das of the interest of certain lessors, and on the 9th April 1910 when Agha Jan, the existing tenant, attorned to Parmeshri Das, the lessees must be considered to have lost possession of Shop No. 7. I do not think that this contention can be sustained. Agha Jan having once attorned to the lessees was not at liberty to attorn to some other party. Such an attornment as regards a third party would be wholly null and void : *Abdul Kadir* v. *Nur-ud-Din* (1). It is contended, however, for the lessees that as Parmeshri Das was an assignee of the original lessors, the eviction by Parmeshri Das was an eviction by title paramount and that, therefore, the action of Agha Jan was not null and void and did dispossess the lessees. *Ramaswami Thevan* v. *Alaga Pillai* (2), *Ammu Ammal* v. *Puthiaparambath Moidin* (3) and *Ram Chandra Chatterjee* v. *Pramanatha Nath Chatterjee* (4), have been cited in support of these propositions, but those cases only lay down the principle that, where a tenant has leased a portion of the whole of his tenancy to a sub-tenant and subsequently the original landlord by entry on the land, causes a cessor of the tenant's title, then the sub-tenant is not bound to pay any

(1) [1898] 14 P.R. 1898.
(2) A.I.R. 1925 Mad. 143.
(3) [1918] M.W.N. 38=43 I.C. 677.
(4) [1921] 63 I.C. 754.

further rent to his own landlord because of the eviction by title paramount. But in those cases it was the defeasible nature of the tenancy which enabled the landlord to put an end to the tenancy by entry on the land. A landlord who before the tenancy has expired enters on his tenant's property does not ipso facto cause the lease to terminate unless a forfeiture of the tenancy has accrued. In the circumstances of this case Parmeshri Das had no right to terminate the five years' lease granted by his predecessor-in-interest, and therefore an entry by him was the same as an entry by a trespasser, and, though it might suspend the rent due from the tenant, it could not suspend the currency of the lease or alter the nature of the possession already obtained by the lessees.

As regards Shops Nos. 8 and 9, the lessees admittedly filed suits for ejectment and for rent on the 19th July 1909 and got decrees and therefore must be taken to have got constructive possession of these shops from the 9th July 1910. It is significant that in their suits for rents and ejectment they did not make the original proprietors parties to the suits. I would, therefore, hold that on the 9th July 1910 the lessees were in possession of all the nine shops and that, therefore, even if the construction put upon the words of the lease by the lessees be accepted, the lease commenced to run from the 9th July 1910, and therefore expired on the 9th July 1915.

In this connexion, however, stress has also been laid on the judgment of the Chief Court printed at page 41, in which it was held on an admission by either Parmeshri Das or Sultan Singh that the lessees had not had possession of the whole of the property leased, and that the lease had, therefore, not expired on the 1st of August 1918. Now, what was really being decided in that case was whether the interpretation on the lease put by the learned Subordinate Judge was correct or not. The learned Subordinate Judge had held that the term of the lease commenced to run separately whenever possession of any one shop was given to the lessees. It has been conceded before us by counsel for the respondents that this was an incorrect interpretation of the lease. It was, however, necessary to decide the point about the expiry of the lease, because the learned Subordinate Judge had made that a ground for not giving possession to the lessees. The Chief Court only decided that question on the admission of the respondents in that case that the lease had not begun to run because the lessees had not obtained possession of the whole of the property. The Chief Court did not decide what the construction of the lease was, except that the construction of the learned Subordinate Judge was incorrect. It is admitted that that judgment is not res judicata within the meaning of S. 11 of the Civil P. C., because the Court trying that suit was not competent to try this suit, but it is urged that the general principles of res judicata should apply and the respondents are therefore bound by the decision in that case. I do not see that the general principles of res judicata apply to the case, but, having regard to the conduct of the lessors and their assignees throughout, I do not consider that it would be equitable to allow them to resile from the admission of fact which was then made on their behalf. It has been contended by counsel for the respondents that at any rate that admission only binds Parmeshri Das and not Sultan Singh, because Sultan Singh was a defendant in that suit ; but it is clear that though Sultan Singh was only a defendant his interest so far as this point was concerned was exactly the same as that of Parmeshri Das, and he had throughout admitted the claim of Parmeshri Das. He cannot, therefore, be said to have been a pro forma respondent in that case. His interest as a defendant was contrary to the interest of his co-defendants, the lessees, and it is clear that he did actually move in the matter of the petition of review of this judgment against the admission of fact. In other words he denied that he had made any such admission of fact, but the learned Judges held that he had made the admission and rejected the review petition. No distinction, therefore, can be drawn between Parmeshri Das and Sultan Singh, and I consider that he should be held equally bound like Parmeshri Das by that admission.

It follows, therefore, that qua the present parties, namely, Sultan Singh and Parmeshri Das, it must be held that the lease had admittedly not expired on the 1st of August 1918. Therefore the question arises to what mesne profits are the

lessees entitled in this suit qua Shops Nos. 8 and 9. The lessees have sued for mesne profits from the 16th December 1915 to the 15th of November 1918, i. e., for profits for three years less one month. The accounts of Parmeshri Das, which are not printed, but of which a certified copy has been shown to us, show that Rs. 5,770 were received by him as rents from these shops during that period. I consider, therefore, that the lessees are entitled to estimate their damages at this sum.

The only point then left to be decided is, whether the suit is barred by limitation, or rather what article is applicable to the suit for damages. The learned Subordinate Judge has held that Art. 109 applies. It is clear, however, from a perusal of the plaint as a whole that the lessees' suit was for damages by way of compensation for breach of the term of the lease, namely, the implied term for quiet possession. In these circumstances it seems to me that Art. 116 would apply to the case: see *Kodialbail Rymond* v. *Kodialbail Devu* (5) and *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (6) and the commentary of Mr. Rustomji at page 452. It is admitted by counsel for the respondents that if Art. 116 applies the lessees would be entitled to damages for the whole of the period claimed.

I would, therefore, accept the Appeal No. 845 of 1923 so far as to give the lessees a decree for Rs. 5,770 for damages by way of mesne profits for Shops Nos. 8 and 9 and would dismiss the appeal qua the ejectment of defendants from Shop No. 7 and about one-half of Shop No. 6.

It follows that the cross-objections of the respondents would also be dismissed with costs. Appeal No. 847 of 1923 would be dismissed. In the circumstances of the case I would leave the parties to bear their own costs throughout.

Martineau, J.—I concur.

Appeal No. 845 partly allowed;
Appeal No. 847 dismissed.

(5) [1915] 32 I.C. 245.
(6) [1916] 44 Cal. 759=38 I.C. 156=44 I.A. 65 (P.C.).

* A. I. R. 1927 Lahore 5

BROADWAY AND ZAFAR ALI, JJ.

N. D. Radha Kishan and Sons—Petitioners.

v.

Commissioner of Income-tax, Punjab—Respondent.

Misc. Civil Case No. 242 of 1926, Decided on 8th October 1926, against the decision of the Assistant Commissioner, Rawalpindi, on 30th May 1925, in Income-tax Appeal No. 230 of 1925.

* *Income-tax Act, S. 22 (4)— Cl. 4 gives very wide powers.*

Sub-Clause (4) is very wide and gives the Income-tax Officer very wide pewers. Where profits were received at Rawalpindi from business in Kashmir (Native State):

Held: it was competent for Income-tax Officer at Rawalpindi to ask the assessee to produce account book relating to Kashmir business. [P 6, C 2]

(*b*) *Income-tax Act, S. 23 (4)—Appeal—Assistant Commissioner must satisfy himself that the Income-tax officer's action under S. 23 (4) was in order.*

It is the duty of the Assistant Commissioner to satisfy himself that the proceedings of the Income-tax Officer were in order and the mere fact that he professes to act under S. 23 (4) would not be enough to prevent the Assistant Commissioner from satisfying himself that the Income-tax Officer's claim was correct. [P 6, C 2]

Deo Raj Sawhney—for Petitioners.

Jagan Nath Aggarwal — for Respondent.

Order.—This is an application under S. 66 (3) of the Income-tax Act asking for a mandamus to issue to the Commissioner of Income-tax directing him to refer certain questions to this Court for opinion.

It appears that the applicant carried on business in Rawalpindi and Kashmir. The Income-tax Officer, Rawalpindi, acting under S. 22 (2) of the Income-tax Act called upon the applicant to furnish a return of his income. A notice under S. 22 (4) was also issued to the applicant requiring him to produce, or cause to be produced his accounts. The applicant furnished the return of his income and produced the account books relating to his business at Rawalpindi but did not produce the account books relating to the business at Sri Nagar in Kashmir. The Income-tax Officer thereupon specifically called upon him to produce those account books, but the applicant through his agent refused to do so.

The Income-tax Officer then passed an order assessing the applicant at a certain figure. This assessment, was however, stated in the order to be a provisional one subject to reconsideration should the applicant comply with the notice and show that the provisional assessment was wrong. As the applicant took no steps to do so the provisional assessment was confirmed and made a regular assessment. The Income-tax Officer avowedly assessed the income of the applicant acting under S. 23 (4).

Against this assessment the applicant preferred an appeal to the Assistant Commissioner of Income-tax who on the 30th May 1925 dismissed the appeal holding that

> it was clear from the file that the Income-tax Officer had passed his order under S. 23 (4) and that he had applied his mind at that time to the fact that he was doing so.

At the conclusion of his order the Assistant Commissioner pointed out that the correct remedy was for the applicant to take action under S. 27 of the Income-tax Act. It appears that an application under S. 27 had been made and that in that application the applicant stated that he was prepared to produce the account books in question, namely, those relating to the business at Srinagar in Kashmir. This application apparently was dismissed and it was not pressed again.

The applicant then moved the Commissioner of Income-tax asking him to (a) review the orders passed by his subordinates, and (b) refer the question to this Court under S. 66 (2). The Commissioner held that the orders passed by his subordinates were legal and reasonable. He declined to refer the question to this Court.

The question which were asked to be referred are : (1) whether under S. 22 (4) the Income-tax Officer had power to call upon the applicant to produce his account books relating to the business in Srinagar in Kashmir; and (2) whether the Assistant Commissioner ought to have examined the proceedings in order to satisfy himself that the action of the Income-tax Officer was correct and that his order had been properly passed under S. 23 (4).

With regard to the first question S. 22 (4) runs as follows:

> The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-S. (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require.

There is a proviso to this sub-clause with which we are not at present concerned.

In my judgment this sub-Cl. (4) is a very wide one and gives the Income-tax Officer very wide powers. We are not concerned with the advisability or otherwise of giving the Income-tax Officer such wide powers. We have only to interpret the section and in my judgment the interpretation involves a finding that in the present case the Income-tax Officer had the power to call upon the applicant to produce all his account books, including the account books relating to the Sringar business, for admittedly profits were received from the Srinagar business at Rawalpindi. This being so in my judgment the Commissioner of Income-tax rightly refused to refer this question to this Court.

With regard to the second question I think that having regard to my opinion relating to the first question the Income-tax Commissioner was obviously right in not moving this Court. I think that ordinarily it would be the duty of the Assistant Commissioner to satisfy himself that the proceedings of the Income-tax Officer were in order and the mere fact that he professes to act under S. 23 (4) would not be enough to prevent the Assistant Commissioner from satisfying himself that the Income-tax Officer's claim was correct. In the present case, however, it appears that the Assistant Commissioner was satisfied that the Income-tax Officer had, as a matter of fact, acted within his powers in this connexion. I would, therefore, dismiss this application with costs.

Application dismissed.

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* A. I. R. 1927 Lahore 6

HARRISON AND JAI LAL, JJ.

Begam Jan—Defendant—Appellant.

v.

Jannat Bibi and *others*—Plaintiffs—Respondents.

First Appeal No. 1171 of 1921, Decided on 10th March 1926, from the decree of the Senior Sub-J., Rawalpindi, D/- 8th March 1921.

** Civil P. C., O. 22, R. 4—" Legal representative " does not mean all legal representatives—If all representatives known after due diligence are impleaded R. 4 is sufficiently complied with.*

The words " legal representative " in O. 22, R. 4 do not mean all legal representatives. A sufficient compliance has been made with the directions there laid down if the applicant makes a bona fide application to bring on the record all the legal representatives known to him so far as he could ascertain them after the exercise of due care and industry : 30 *All.* 117, *not Foll.* ; 23 *Mad.* 125, *A. I. R.* 1925 *Patna* 551 and *A. I. R.* 1925 *Patna* 123, *Foll.*

[P. 7, C. 2, P. 8, C. 1]

Aziz Ahmad and *Mohsin Shah*—for Appellant.

Ghulam Rasul and *Ghulam Mohi-ud-din*, and *Anant Ram* and *Din Dayal Kapur* for *Ghulam Hussain*—for Respondents.

Judgment.—In this appeal a preliminary objection is taken that the appeal has abated as all the legal representatives of the deceased plaintiff-respondent were not brought on the record within time. The facts are that the appellant applied to have the mother of this respondent, Mt. Jannat Bibi, substituted for him, and this was done " subject to all just exceptions." One Begam Jan then appeared on the scene and claimed to be the widow of the deceased respondent and she was also impleaded and brought upon the record. At the hearing of the appeal one Ghulam Hussain presented an application that he was the paternal great-uncle of the deceased respondent and as such entitled to be brought on the record. The appellant and both the respondents, who had already been impleaded, denied all knowledge of this man and it was, therefore, necessary to order an enquiry to be held by the trial Court as to whether he really was what he represented himself to be. After hearing evidence the trial Court held that he was in fact the paternal great-uncle of Haji Muhammad, the later plaintiff, and after the question had been argued before us we agreed with the trial Court. The question then arose whether at that late stage he could be impleaded and whether the failure to implead him at an earlier stage necessitated the abatement of the appeal. On this question there is a very distinct conflict of authority, it having been held in *Haidar Husain* v. *Abdul Ahad* (1) that the words 'legal representative' as used in O. 22, R. 4 mean all the legal representatives, and that if anyone be omitted the provisions of this rule have not been complied with and the natural consequence follows that the appeal abates. On the other hand it has been held in *Musala Reddi* v. *Ramayya* (2) and this view has been accepted in *Lilo Sonar* v. *Jhagru Sahu* (3) and *Shib Dutta Singh* v. *Karim Bakhsh* (4) that the requirements of the law are sufficiently complied with if all the representatives known to the applicant at the time of making his application be brought upon the record and the application be bona fide. *Abdul Rahman* v. *Shahabuddin* (5) has some bearing on the question though the facts are not precisely the same. It appeared to us at first sight that the words 'legal representative' mean all the legal representatives who, taken together, represent the estate of the deceased, but, after studying the reasoning contained in *Musala Reddi* v. *Ramayya* (2) we are satisfied that it is impossible to carry out the directions contained in O. 22 R. 4, that is to say, cases must arise in which it is impossible, in the words of the rule, to cause the legal representative of the deceased defendant to be made a party. The words are not 'to be impleaded' but 'to be made a party' and to make some of the representatives appellants and some respondents is not strictly speaking, to make the representatives " a party." This is recognized in *Haidar Husain* v. *Abdul Ahad* (1). The view there taken appears to be that all that can be done must be done and where it is an impossibility to make all the representatives " a party " because all are not willing to be impleaded on the same side the best alternative possible must be adopted and they must all be impleaded on one side or the other. As explained at page 132 of the Madras ruling since the rule cannot always be literally followed and it is necessary in practice to relax the terms, it is not unduly straining the words of the rule to hold that a sufficient compliance has been made with the directions there laid down if the applicant makes a bona fide application to bring on the record all the legal representa-

(1) [1908] 30 All. 117=5 A. L. J. 62=(1908) A. W. N. 41.

(2) [1900] 23 Mad. 125=9 M. L. J. 313.
(3) A. I. R. 1925 Pat. 123=3 Pat. 853.
(4) A. I. R. 1925 Pat. 551=4 Pat. 320.
(5) [1920] 1 Lah. 481=55 I. C. 883.

tives, known to him so far as he could ascertain them after the exercise of due care and industry. We find, therefore, in this case that the appeal does not abate because Ghulam Hussain, the paternal great-uncle, was not brought upon the record within time. We find that the application was bona fide and that the appellant cannot be held responsible for the omission to enter Ghulam Husain in her application. We order that his name be now brought on the record. (The judgment then dealt with the case on merits and dismissed the appeal.)

Appeal dismissed.

A. I. R. 1927 Lahore 8

BROADWAY AND FFORDE, JJ.

Joint Hindu family Chaman Ram and *another*—Appellants.

v.

Sabal and *another*—Respondents.

Miscellaneous First Appeal No. 3163 of 1925, Decided on 16th April 1926, from the order of the Dist. J., Dera Ghazi Khan, D/- 13th August 1925.

Custom (Punjab)—Debts by father—Father's property in daughter's hand is liable.

Where a male proprietor governed by customary rules has contracted a just debt and dies leaving ancestral property, such property is not liable in the hands of the next holder in respect of such debt unless the debt has been expressly charged on the property. 4 *P. R.* 1913 and 17 *P. R.* 1919, *Rel. on.* But a daughter is not an agnate and does not derive her title from a common ancestor. She, therefor, represents her father, and his estate in her hands is liable for his debts: 12 *P. R.* 1918, *Foll.*; 39 *P. R.* 1915, *Appr.*

[P. 8, C. 2, P. 9, C. 1]

Fakir Chand—for Appellants.

Broadway, J.—One Fazal died leaving him surviving his mother Mt. Hajani, a widow Mt. Sabal and a daughter Mt. Gullan, but no male collaterals. After his death, on the 21st August 1923, Chaman Ram and Lal Ram, etc., obtained a simple money decree for Rs. 2,800 and Rs. 334 costs against the said mother, widow and Mt. Gullan, the money being payable out of Fazal's estate in their hands. On the 21st May 1924 the decree-holders asked in execution of their decree for the attachment and sale of certain ancestral land which had belonged to Fazal. The matter was referred to the Collector and 11-18ths of the land sought to be attached was leased for a term of eight years for the satisfaction of 11/18ths of the debt. It appears that some time before the property was attached a dispute had arisen between Mt. Hajani, Mt. Sabal and Mt. Gullan which had ended in a compromise on the 7th December 1923 according to which Mt. Hajani took 11/18ths of Fazal's estate and Mt. Gullan, the daughter, the remaining 7/18ths, Mt. Sabal getting nothing. The lands referred to above, as having been leased by order of the Collector, were those which had fallen to Hajani and represented her 11/18ths share in Fazal's estate. When it was sought to attach the remaining 7/18ths which had fallen to Mt. Gullan's share objection was taken, on 13th May 1925, to the attachment of this land on the ground that it was ancestral and was not liable for the debt having regard to the decision in *Bawa Jagdip Singh* v. *Bawa Narain Singh* (1). This objection was given effect to by an order dated the 13th August 1925 and the property was released. Against this order the decree-holders have preferred this appeal through Mr. Fakir Chand. The respondents, although served, are neither present nor represented.

The question for decision is whether the present case falls within the principles laid down in *Jagdip Singh* v. *Bawa Narain Singh* (1) which were accepted as correct in *Mt. Mikor* v. *Chhaju Ram* (2). The principles enunciated in these two rulings were that where a male proprietor governed by customary rules has contracted a just debt and dies leaving ancestral property, such property is not liable in the hands of the next holder in respect of such debt, unless the debt has been expressly charged on the property. The question therefore is whether a daughter can be regarded as a 'next holder' within the meaning of these two cases. In *Mt. Bhambul Devi* v. *Narain Singh* (3) it was held by a Division Bench of this Court that a widow's estate was the continuation of her deceased husband's and that therefore his property, so long as it remains in her

(1) [1912] 4 P. R. 1913=173 P. L. R. 1912=15 I. C. 866=160 P. W. R. 1912.
(2) [1919] 17 P. R. 1919=49 I. C. 281=6 P. W. R. 1919 (F. B.).
(3) [1915] 39 P. R. 1915=103 P. W. R. 1915=29 I. C. 572=8 P. L. R. 1916.

hands, is liable to satisfy his debts. In the same way it was held by LeRossignol, J., in *Kishan Singh* v. *Mt. Rahmat Bibi* (4) that the daughter was not an agnate and derived her title from her father and not from the common ancestor, and, therefore, represented him (her father), and his estate in her hands was liable for his debts. This case is practically on all fours with the one now before us. Fazal has died and the property sought to be brought to sale in execution of a decree for a debt incurred by him is in the hands of his daughter. In my judgment the view taken by the Court below is wrong and *Kishan Singh* v. *Mt. Rahmat Bibi* (4) is applicable. A daughter is not an agnate and does not derive her title from a common ancestor. She, therefore, represents her father and his estate in her hands is liable for his debts. I would, therefore, accept this appeal with costs and remand the case to the Court below for such further action as may be necessary.

Appeal accepted.

(4) [1918] 12 P. R. 1918=44 I. C. 561.

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* A. I. R. 1927 Lahore 9

HARRISON AND JAI LAL, JJ.

Radha Kishan and *others*—Defendants—Appellants.

v.

Radha Kishan and *another*—Plaintiffs—Respondents.

Second Appeal No. 291 of 1922' Decided on 1st March 1926, from the decree of the Dist. J., Shahpur, D/- 29th August 1921.

* *Civil P. C., O. 34, R. 8—Redemption suit—Decree passed—Provisions of the Code not observed—Second redemption suit is competent and mortgagee cannot sue for declaration and possession.*

When a decree on a redemption suit has been given, and the provisions of the Code have not been observed, and an application under R. 8 has not been made, a second suit for redemption is competent and the title does not pass automatically to the mortgagee, and therefore a suit by mortgagee for declaration of title and possession is not competent: *A. I. R.* 1925 *Lah.* 31 and *A. I. R.* 1923 *Lah.* 680, *Foll.* [P. 9, C. 2]

Jagan Nath Aggarwal—for Appellants.

Ram Chand Manchanda and *Jagan Nath Bhandari*—for Respondents.

Harrison, J.—The relevant facts necessary for the decision of this appeal are that on the 23rd October 1915 Devi Ditta, deceased, the mortgagor of the property, instituted a suit for redemption against the mortgagee and a decree was given on appeal directing redemption on payment of Rs. 1,636 this sum to be paid within five months from November 1916. The money was not paid and no application was made under O. 34, R. 8. Execution for costs was taken and a part of the mortgaged property was attached. An objection regarding this property was made by the widow of the mortgagor and allowed, and a suit was then instituted, which abated on payment of the costs awarded. The mortgagee then filed the present suit for a declaration of title and for possession of that portion of the mortgaged property which had not been transferred to him. His suit has been decreed by the District Judge of Shahpur and on second appeal counsel urges that the view taken by the learned District Judge regarding the finality of the decree in the redemption suit is not correct. He relies on *Sunka* v. *Jaru* (*A. I. R.* 1923 *Lah.* 680) and *Arura* v. *Bur Singh* (1), both being judgments of this Court.

The question before us is the same question with a slight variation as arose in both those cases, namely, whether when a decree on a redemption suit has been given, and the provisions of the Code have not been observed, and an application under O. 34, R. 8 has not been made, a second suit for redemption is competent or whether title passes automatically to the mortgagee. For the reasons given in *Arura* v. *Bur Singh* (1), it is clear that, as the provisions of the Law have not been complied with, the preliminary decree has not become a final decree and it is still open to the mortgagor to bring a suit for redemption. The only possible distinction between this case and those reported in the above two rulings is that here a period was fixed for payment of the money and the spirit, if not the letter, of O. 34, R. 7 was complied with by the original trial Court. Even so, before the mortgage can come to an end, it is necessary for the mortgagee to take the final step under O. 34, R. 8, and this final step is the most important of all. As he has not seen fit to take the

(1) A. I. R. 1925 Lah. 31=5 Lah. 371.

prescribed action the natural consequence follows that the mortgage still survives.

We accept the appeal and dismiss the plaintiffs' suit with costs throughout and leave the parties to take any further action which they may think advisable.

Appeal accepted.

A. I. R. 1927 Lahore 10

SHADI LAL, C. J., AND JAI LAL, J.

Kattu—Accused—Appellant.

v.

Emperor—Opposite party.

Criminal Appeal No. 59 of 1926, Decided on 3rd June 1926, from the order of the S. J., Ludhiana, D/- 19th December 1925.

Evidence Act, S. 133 — Approver's testimony must connect the prisoner with the offence.

It is not sufficient that the approver's testimony is confirmed as to the circumstances of the felony, but it must be proved that the testimony is corroborated in some material circumstances, such circumstance connecting and identifying the prisoner with the offence.

[P 10, C 1]

M. M. Tofail—for Appellant.

Carden Noad—for the Crown.

Judgment.—The appellant Kattu of the village Chaoki in the district of Ludhiana has been convicted of the murder of one Phuman, and has been sentenced, under S. 302, Indian Penal Code, to the penalty of death.

There is ample evidence on the record, and indeed it is not disputed by the learned counsel for the appellant, that the deceased Phuman left his village on the morning of the 14th September 1925, and went with his camel to Rampur Mandi. It is also beyond dispute that he sold the camel for Rs. 48 to one Chetu, and that he was done to death on the night between the 14th and 15th September, while he was returning to his village with the money.

The story for the prosecution is that the murder was committed by four persons who were actuated by a desire to rob the deceased of the money which he was carrying on his person. One of these four persons, namely, Katti, has turned King's evidence and deposes that the crime was committed by him along with the prisoner Kattu, and two other persons, Bachna and Mohna, who have been acquitted by the learned Sessions Judge. Now, it may be that the approver participated in the assault which resulted in the death of Phuman, but the question for determination is whether his testimony has received confirmation in some fact which goes to prove the guilt of the prisoner. It is not sufficient that the approver's testimony is confirmed as to the circumstances of the felony which would only show that he was present at the commission of the offence, but it must be proved that the testimony is corroborated in some material circumstance, such circumstance connecting and identifying the prisoner with the offence.

We have examined the record in order to see whether there is any independent evidence connecting the prisoner with the commission of the murder, and we have reached the conclusion that the circumstances relied upon by the learned Sessions Judge do not satisfy the test laid down above. It is true that on the 6th October 1925, the appellant dug out Rs. 13 from a place in the compound of his house, and this was the exact amount which, according to the approver, was given to him as his share of the booty. The money, however, is not earmarked, and there is no evidence on the record beyond the testimony of the approver that the rupees recovered from the compound of the prisoner formed part of the price which the deceased had received for his camel. Nor can we attach any great value to the recovery of the blade of a takwa from the witness Dalu in consequence of the information supplied by the prisoner. The blade does not bear any mark of blood and here again there is no evidence outside the deposition of the approver which would show that this was the weapon with which injuries were caused to Phuman.

These are the only two circumstances relied upon by the Sessions Judge in corroboration of the testimony of the approver, and neither of them connects the prisoner with the commission of the murder. There may be a strong suspicion against him, but suspicion, however grave, can never be regarded as a substitute for proof. We accordingly hold that the guilt of the appellant has not been established, and accepting his appeal, and setting aside the conviction and the sentence, we direct that he be released forthwith.

Appeal allowed.

A. I. R. 1927 Lahore 11

SHADI LAL, C. J., AND COLDSTREAM, J.

Labh Singh and *others*—Plaintiffs—Appellants.

v.

Ahmad Shah and *others*—Defendants Respondents.

First Appeal No. 26 of 1922, Decided on 4th June 1926, from a decree of the Senior Sub-J., Gurdaspur, D/- 29th August 1921.

(a) *Civil P. C., O. 41, R. 27—Discovery of fresh evidence is no ground for admission of it.*

The legitimate occasion for the application for the rule allowing tbe production of additional evidence is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it : 31 *Bom.* 381, *Foll.*

[P 12 C 1]

(b) *Custom—Punjab— Ala and adna Maliks—Ala malik levying no dues from occupiers of land and owning only a small portion of land in the village is not entitled to succeed to adna malik when his line becomes extinct—Mode of creation of ala and adna maliks explained.*

There are two ways in which the classes of ala maliks and adna maliks are created in a village. First, where the ala maliks so called are mere taluqdars whose ancestors have been farmers of revenue or conquerors who have been content to leave all the management, etc., of the land to the conquered peasantry and to take quit-rents. Secondly, where the ala maliks, originally, the sole proprietors of the soil of the village, have called in outsiders and settled them on some or all of the lands : 175 *P. R.* 1888, *Foll.*

An ala malik belonging to the latter category usually levies a customary rent from the person who actually occupies the land, and it is only in cases of this class that an ala malik is entitled to the right of reversion on the death of the adna malik without heirs, and in no other case. A taluqdar who levies no dues from the persons who actually occupied the land and whose connexion with the village is confined to his ownership of a small holding in respect of which he pays no revenue, whether he is called a taluqdar or ala malik, does not succeed to the land when the line of the adna malik, who was in occupation thereof, becomes extinct.

[P 13 C 1 2]

(c) *Custom—Deceased's line extinct—Being a member of deceased's* got *is not sufficient for inheritance.*

The mere fact of a person belonging to the *got* of the deceased will not sustain his claim to the inheritance on failure of deceased's heirs.

[P 14 C 1]

(d) *Custom—Punjab—Deceased's line becoming extinct—Community of interests maintained in the village — Co-proprietors will succeed as against Crown.*

In villages where a complete community of interests is maintained, the co-proprietors are entitled to get the estate of a deceased proprietor as against the Crown. [P 14 C 1]

(e) *Ejectment—English principle—Possession is good title against all but true owner is applied in India—Possession.*

The principle of the English Law to the effect that possession is a good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him has been adopted in India. [P 14 C 2]

Tirath Ram—for Appellants.

Niaz Muhammad, Muhammad Monier and *Mool Chand*—for Respondents.

Judgment.—The property, which is the bone of contention in this appeal, as well as in Civil Appeal No. 2748 of 1921, is situate in the village Mastkot of the Gurdaspur District. The estate belonged to one Hansu, a Jat of the Bhangu got, who died in 1916 without leaving any issue or any other relative who could ordinarily be regarded as his heir. Three sets of persons laid claim to the estate :

(1) The proprietors of the village Mastkot ;

(2) the Jats of the got to which the deceased belonged ; and

(3) Sayad Muhammad Shah, now represented by his son Sayad Ahmad Shah, who is described as the taluqdar of the village.

The Revenue Authorities, after first holding that the estate had escheated to the Crown, subsequently ordered mutation to be effected in favour of Muhammad Shah, with the result that the first two sets of claimants have brought two separate actions, each claiming the property against the taluqdar. The plaintiffs in each case deny the title of the taluqdar and assert their own rights of succession. Relying upon the admitted fact that taluqdar is not in possession of the estate they ask for a decree declaring them to be the owners of the land in their possession.

The Subordinate Judge has dismissed both the suits, but the correctness of his decision has been impeached before us. For the determination of the rights of the taluqdar we have been asked to examine the history of the foundation of the village, and our attention has been invited by the learned counsel for the respondent to certain ancient documents which are contained in supplementary paper-book printed on the 12th March 1925. Mr. Tirath Ram for the appellants points out that these documents were never produced before the trial Judge in either of the two cases

with which we are dealing, and objects to the reception of additional evidence in the appellate Court. It appears that the documents formed part of a file prepared by the Revenue Officers at the time of the mutation proceeding in respect of the estate, but were never tendered in evidence at the trial. They were printed as a separate paper-book during the pendency of the appeal in the High Court, but the opposite party was not given an opportunity to show cause against the reception of fresh evidence in the Court of Appeal. Moreover, it is clear that the production of additional evidence at this late stage of the case would transgress the rule enunciated by the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). As observed by their Lordships in that case, the legitimate occasion for the application of the rule allowing the production of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. These documents, authenticity of which may be open to doubt, must, therefore, be excluded from consideration.

Confining our attention to the evidence properly produced by the parties at the trial, we find from the history of the foundation of the village, as recorded at the foot of the pedigree-table prepared during the Settlement operations of 1865, that one Kaula, the common ancestor of Bhangus (wrongly called Phangus in the printed paper-book), founded the village and that subsequently the Sayads of Kalanaur got it as their jagir and called it Fazilpur. This name was, however, altered, during the Sikh rule, to Mastkot. The Sayads subsequently became poor (nadar) and members of other tribes obtained possession of the village. After reciting these ancient matters the chronicler gives a narrative of the events which took place after annexation of the Province by the British Settlement (which took place in 1852), the various tribes enumerated therein were declared to be the proprietors of the land in their possession; and that Amir Ali Shah, one of the Sayads who claimed to be the owner of the whole of the village, was successful only to the extent of getting three ghumaons of land which was given to him by way of taluqdari. It appears that Amir Ali Shah Was hereafter recorded not only the proprietor of this small plot of land, but also the taluqdar of the whole village, and that the land revenue assessed on the plot was paid not by him, but by all the other persons who were at that time held to be the proprietors of the rest of the village. The defendant, Ahmad Shah, is not a descendant of Amir Ali Shah, but claims to be his successor-in-interest by virtue of a sale in favour of his father Muhammad Shah by Mt. Tabi, the widow of Amir Ali Shah. Now the deed which was executed by her in 1880 after the death of her husband, and during the minority of her son Lal Hussain, purported to convey, for a consideration of Rs. 100, the plot of the land granted to her husband at the time of the Settlement of 1852, and Mr. Tirath Ram for the appellants urges that the instrument, which required compulsory registration under S. 17 of the Indian Registration Act, is inadmissible in evidence to prove the contents of the documents. It is further urged that the deed of sale purported to convey only the land and did not affect the rights, if any, possessed by Amir Ali Shah in his capacity as the taluqdar of the village. There is considerable force in these contentions, but we find that Muhammad Shah was, after the transfer, entered in the Revenue Records as the owner of the land as well as the taluqdar of the village, and it is only these entries which have been relied upon by the defendant in support of the claim.

The qusstion, however, arises whether Muhammad Shah, even if he was rightly treated as the taluqdar of the village in succession to Amir Ali Shah had any interest in the property owned by the other proprietors of the village. Now, it is admitted by the learned counsel for the respondent that neither his client nor any of his predecessors-in-interest has levied any dues, either in cash or in kind, from the other proprietors of the village at least since 1852; nor has any of them exercised any other right in respect of the property owned by those proprietors. The only matter, which distinguishes the respondent and his predecessors-in-inter-

(1) [1907] 31 Bom. 381=34 I. A. 115=9 Bom. L. R. 671 (P. C.).

est from the remaining proprietors of the village, is that the former have enjoyed immunity from the payment of the land revenue on their holding, which land revenue has been distributed among the rest of the proprietors. It is true that Amir Ali Shah and his successors have been recorded as taluqdars of the village, but whatever meaning may be attached to that expression, there can be little doubt that it did not in practice connote any interest in the land belonging to the rest of the proprietary body who enjoyed the plenary rights of ownership including the power of alienation. It appears that in the Revenue Records neither Amir Ali Shah nor of his successors was described even as ala malik, except that in the Settlement Record of 1910 Muhammad Shah was entered for the first time in the column bearing in print the heading ala malik, but even there the actual designation immediately following his name is that of taluqdar.

Now the expression 'ala malik', as used in this province, gives no clear indication of the attributes of the person to whom the phrase is applied unless we know the origin of the tenure and the nature of the rights enjoyed by a claimant which determines his position vis a vis the person who occupies the land. As observed in *Hira* v. *Chahnnu* (2) there are two ways in which the classes ala maliks and adna maliks are created in a village. First, where the ala maliks so called are mere taluqdars whose ancestors have been farmers of revenue or conquerors who have been content to leave all the management, etc., of the land to the conquered peasantry and to take quit-rents. Secondly, where the ala maliks, originally the sole proprietors of the soil of the village, have called in outsiders and settled them on some or all of the lands.

An ala malik belonging to the latter category usually levies a customary rent from the person who actually occupies the land and it is only in cases of this class that an ala malik is entitled to the right of reversion on the death of the adna malik without heirs, and in no other case. Now, as stated above, the taluqdar in the present case levied no dues from the persons who actually occupied the land, and his connexion with the village was confined to his ownership of a small holding in respect of which he paid no revenue. It has been repeatedly held that such a person, whether called a taluqdar or ala malik, does not succeed to the land when the line of the adna malik, who was in occupation thereof becomes extinct. The case dealt with in *Surjan* v. *Lalu* (3) which has been relied upon by the respondent related to an ala malik of the second class described above, while the judgments in *Sardar Sarup Singh* v. *Sundar* (4) and *Dal Singh* v. *Pluiman* (5) belong to the category where the ala malik is not entitled to the right of reversion on the death of the adna malik. The latest case on the subject is *Khurshaid Alam* v. *Choudhri Phangu* (6) where a Division Bench of this Court held that in the villages, where the adna maliks are the real proprietors, the ala malik being merely a taluqdar receiving a certain percentage on the revenue, the latter does not succeed to the adna malikat when the line of the adna malikhas bacome extinct, in the absence of a provision to that effect in the wajib-ul-arz or any other evidence in proof of such a custom.

Now, whatever may have been the state of affairs prior to the Settlement of 1852, there can be no doubt that at the time of that settlement there was a contest between Amir Ali Shah on the one side and the occupiers of the soil on the other, and it was definitely decided that the former was entitled only to a small plot of 3 ghumaons, and that the latter were full proprietors of their holding. It is true that Amir Ali Shah was not required to pay the land revenue assessed on his land which the other proprietors agreed to pay on his behalf, but it was a trifling amount and can at best be treated as equivalent to a certain percentage on the land revenue which is ordinarily received by a taluqdar but which does not give him the right of reversion to the estate of an adna malik. Nor has the respondent attempted to cite any custom or wajib-ul-arz which could sustain the claim set-up by him.

The taluqdar has not succeeded in establishing his title to the estate of

(2) [1912] 129 P. L. R. 1912=16 I. C. 116= 99 P. W. R. 1912.

(3) [1888] 175 P. R. 1888.
(4) [1898] 9 P. R. 1898 (F. B.).
(5) A. I. R. 1923 Lah. 626.
(6) A. I. R. 1925 Lah. 34=5 Lah. 382.

Hansu, and the same remarks apply to the claim of the members of the got residing in the village. Our attention has been invited to three instances from this village, in each of which, on the death of an adna malik, his property was inherited by the members of his got, vide P. C. (along with the intermediate orders not printed, which explain the final mutation order), P. E. (to be read with the deposition of Radha Ram, Special Kanungo, printed at page 40), and P. 5 (printed at page 30 of the paper-book) ; and it is argued that the taluqdar though residing in Kalanaur which is admittedly situate at a distance of only three miles from the village, offered no opposition to the claim of the members of the got in these cases. Nor has he produced any evidence in rebuttal. We have not, however, been referred to any decided case, and are aware of none, in which the mere fact of a person belonging to the got of the deceased has sustained his claim to the inheritance ; and we do not think that these instances, unrebutted though they are, are sufficient to establish the custom invoked by the plaintiffs.

The claim of the proprietary body stands on a different footing. There is authority in support of the proposition that in villages, where a complete community of interests is maintained, the co-proprietors are entitled to get the estate of a deceased proprietor as against the Crown. But this condition is not satisfied in the present case. The proprietors in this village belong to various tribes and are not united by any community of interest except the obvious fact that they all own land in the same village and are jointly responsible for the payment of the entire land revenue. They are unable to cite any instance from their own village in support of their right of succession but rest their claim upon five instances from other villages in this district. We have examined the documentary evidence on the subject, but are unable to decide upon the information placed before us whether the property of the deceased Mast Singh referred to in Ex. P-4, devolved upon his co-sharers or the proprietors of the village. The remaining four cases evidenced by Exs. 2 P-3, P-5 and P-6, show that the property of a proprietor dying without leaving any heirs was declared to be the shamilat of the taraf or of the villages in which it was situate. The record, however, does not show whether in those villages the proprietors maintained a complete community of interest, and in the absence of any information on this important matter we are unable to uphold the claim of the proprietary body.

It is also urged on behalf of the proprietors of the village that, as they are admittedly in possession of the estate of the deceased, they should be given a decree recognizing their possessory title. The principle of the English Law is no doubt to the effect that possession is a good title against all but the true owner and entitled the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him. The principle has been adopted by several High Courts in India and also by the Chief Court of the Punjab. No such claim was, however, set up in the plaint, and we cannot adjudicate upon a matter which formed neither the ground of attack in the plaint nor the subject of an issue for trial.

The result is that none of the claimants are entitled to the estate of the deceased, and that both the appeals must be dismissed with costs.

Appeals dismissed.

A. I. R. 1927 Lahore 14

JAI LAL, J.

Burma Oil Co., Ltd.—Defendants—Petitioners.

v.

K. B. Adamji Mamoonji and Sons, Rawalpindi—Plaintiffs—Respondents.

Civil Revision No. 247 of 1926, Decided on 25th June 1926, for transfer of the case from 1st Class Sub-J., Rawalpindi, to Karachi.

(a) *Government of India Act, S. 107—Powers are to be exercised rarely.*

The powers vested in High Court under S. 107 should be exercised very rarely and in exceptional circumstances to prevent real hardship or injustice. [P. 15, C. 2]

(b) *Civil P. C., Ss. 22 and 20—Plaintiff is to choose Court—Transfer.*

Ordinarily it is for the plaintiff to choose the Court in which he should institute the suit and an order for transfer should be made only if the preponderance of convenience necessitates such a course. [P. 15, C. 2]

M. S. Bhagat—for Petitioners.

Aziz Ahmad—for Respondents.

Order.—The plaintiff instituted a suit for the recovery of Rs. 5,416-9-0 in the Court of the Subordinate Judge of Rawalpindi against three defendants. A preliminary objection was taken on their behalf that the civil Courts at Rawalpindi had no jurisdiction to entertain the suit. This objection was decided against them by the Subordinate Judge. This is an application by the defendants under S. 22 of the Civil P. C., praying that the case be transferred from the Court of the Subordinate Judge at Rawalpindi to Karachi, or in the alternative that the order of the Subordinate Judge holding that he had jurisdiction to hear the suit be set aside under S. 107 of the Government of India Act and the plaint be returned for presentation to the proper Court. On behalf of the respondents a preliminary objection is taken that an application under S. 22 of the Civil P. C. does not lie, because that section applies to cases where the Court in which the suit sought to be transferred is pending has jurisdiction to entertain the suit. As the petitioners denied the jurisdiction of that Court it is contended that an application for transfer under S. 22 of the Civil P. C., does not lie. Reliance is placed in support of this contention on *Ledgard* v. *Bull* (1); *Ram Kumar Sheo Chand Rai* v. *Firm Tula Ram-Nathu Ram* (2); *Askaram Baid* v. *Bhola Nath* (3), and *National Engineering Co., Karachi* v. *Rattun Engineering Co., Lahore* (4). Another objection raised on behalf of the respondents is that no revision against the decision of the Subordinate Judge of the defendants' objection as to jurisdiction lies to this Court. *Firm Lal Chand-Mangal Sen* v. *Firm Behari Lal-Mehr Chand* (5) is cited as authority in support of this objection. The Counsel for the petitioner cites *Sivaprosad Ram* v. *Tricomdas Coverje Bhoja* (6) and *Bishun Mohan Sahay* v. *Narayan Prasad Asthana* (7) in support of his contention that this Court can interfere under S. 107 of the Government of India Act.

I have carefully considered the respective arguments of the learned counsel and am of opinion that I should not interfere at this stage with the order of the Subordinate Judge holding that he has jurisdiction to entertain the suit even if I have power to do so under S. 107 of the Government of India Act. It is quite clear that the powers vested in this Court under S. 107 should be exercised very rarely and in exceptional circumstances to prevent real hardship or injustice. I am not satisfied that these conditions exist in this case.

Similarly as regards the application for transfer of the case, I am of opinion that no good case has been made out for such transfer. Ordinarily it is for the plaintiff to choose the Court in which he should institute the suit and an order for transfer should be made only if the preponderance of convenience necessitates such a course. An examination of the affidavits filed by both the parties show that this condition has not been fulfilled in this case. The consequence is that this petition is dismissed with costs.

Petition dismissed.

(1) [1887] 9 All. 191=13 I. A. 134=4 Sar. 741 (P.C.).
(2) [1920] 1 P. L. T. 277=56 I. C. 920=(1920) P. H. C. C. 235.
(3) [1918] 21 O. C. 217=48 I. C. 105.
(4) A. I. R. 1923 Lah. 288.
(5) A. I. R. 1924 Lah. 425=5 Lah. 238 (F.B.).
(6) [1915] 42 Cal. 926=27 I. C. 917.
(7) A. I. R. 1924 Patna 434.

A. I. R. 1927 Lahore 15

SHADI LAL, C. J.

Muhammad Naim —Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 623 of 1926, Decided on 25th June 1926, reported by the S. J., Karnal, on 12th April 1926.

(a) *Punjab Police Act, S. 29—Police officer really ill choosing to be treated by private practitioner should not be convicted under S. 29.*

There is nothing in the law to require a police Officer to enter a Civil Hospital and not place himself under the treatment of a private practitioner when he is ill and, therefore, he should not be convicted under S. 29 if he chooses to be treated by a private practitioner. [P 16 C 1]

(b) *Punjab Police Act, S. 29 — Police officer really ill—Section does not apply.*

Where a police officer who is really ill and is on leave fails to report himself for duty on the expiration of his leave, his failure to report is not without reasonable cause. [P 16 C 1]

Mathra Das—for Petitioner.

Facts.— The petitioner Muhammad Naim is a Police Head Constable of the Karnal Police. He obtained four days'

casual leave on the 10th of June and extended it for a further period of four days by telegraphic application. After that he did not attend till the 7th of September. His plea is that he was unable to attend owing to sickness and that he had forwarded several applications but did not receive any reply. This excuse has been accepted by the Magistrate who admits in his judgment that the Head Constable suffered from piles, liver trouble and malaria, but the Magistrate has convicted him because he thinks that the accused shold have got himself admitted into some Civil Hospital and recourse to a private practitioner was not justifiable. Muhammad Naim was, therefore, convicted under S. 29 of the Police Act and sentenced to pay a fine of Rs. 30 or one month's pay. He has applied for revision.

Grounds.—The evidence of Dr. Ram Saran (D. W. No. 8) shows that the applicant was unfit for duty from the 15th of June to the 30th of August when he was under the treatment of the doctor and even on the 30th August the doctor was of opinion that the petitioner would be fit to attend to duty after a week. As I have already stated above, the Magistrate does not disbelieve the doctor and thinks that the Head Constable was prevented from attending to duty owing to his illness. There is nothing in the law to require a police officer to enter a Civil Hospital and not to place himself under the treatment of a private practitioner, and the Magistrate is wrong in thinking that it was the duty of the petitioner to present himself at head-quarters and enter himself in a Police Hospital or other Civil Hospital. S. 29 lays down that a police officer who is on leave, and fails without reasonable cause to report himself for duty on the expiration of his leave, is liable to be penalized under that section. It is in evidence that the man was unfit to resume duty. The section does not say that a man, even though unfit for duty, should report himself to obtain a certificate for leave at head-quarters. I am, therefore, of opinion that the section is not applicable to the petitioner's case. In *Jagadish Chandra Bose* v. *Emperor* (1) a police constable, after the expiry of his leave, had applied for an extension of his leave on which he was asked to submit a medical certificate. He represented that he was not ill but was detained to settle his affairs in a Bank. It was held that in the circumstances of the case the petitioner did not fail without reasonable cause to report himself to duty on the expiration of his leave and that his conviction was not sustainable. The present case appears to be much stronger.

It is recommended, therefore, that the conviction of the applicant may be set aside and the fine, which has been paid, be refunded.

Order.—For the reasons recorded by the learned Sessions Judge I set aside the conviction and direct that the fine, if realized, be refunded to the accused.

Conviction set aside.

(1) [1921] 25 C. W. N. 408=23 Cr. L. J. 227.

A. I. R. 1927 Lahore 16

SHADI LAL, C. J.

Hari Kishen—Accused—Petitioner.

Polo Ram—Complainant—Respondent.

Criminal Revision No. 31 of 1924, Decided on 25th April 1924, for transfer of the case from the Court of 1st Cl. Hony. Mag., Kharar.

Criminal P. C., S. 526—Proceedings dilatory—Transfer is desirable.

Where the proceedings of the Magistrate were dilatory and he issued a warrant against the accused's wife who was a pardanashin lady:

Held: that a transfer was desirable. [P 16 C 2]

Sagar Chand—for Petitioner.

R. C. Soni—for Respondent.

Order.—The proceedings of the Honorary Magistrate have been dilatory, and his order for issuing a warrant against the accused's wife, who is a pardanashin lady, was wholly improper.

Both the complainant and the accused reside at Rupar, and it is desirable that the case should be tried by a stipendiary Magistrate at that place. I accordingly transfer the case from the Court of the Honorary Magistrate at Kharar to that of the Sub-Divisional Magistrate at Rupar; but this order is made on the distinct understanding that the accused will not ask for a trial de novo and that the evidence already recorded by the Honorary Magistrate shall continue to be the evidence in the case.

Appeal accepted.

A. I. R. 1927 Lahore 17

ADDISON, J.

Bishambar Das and *another*—Accused —Petitioners.

v.

Emperor — Complainant— Opposite Party.

Criminal Revision No. 763 of 1926, Decided on 15th July 1926, reported by the S. J., Hoshiarpur.

Criminal P. C., S. 561A—Pending Civil suit —Subject matter same in both—Criminal case should be stayed—Civil P. C., S. 151—Criminal trial.

Where the subject-matter of both a criminal case and a civil suit pending in another Court is the same, the criminal case should be stayed. [P 18 C 2]

Nand Lal—for Petitioners.

Fakir Chand—for the Crown

Facts.—The complainant, Sant Ram, entered into certain transactions with the petitioner's firm Hemraj-Bishambar Das of Jullundur and Bishambar Das-Bodhraj of Bombay. Both these firms of Jullundur and Bombay are said to belong to Bishambar Das, the managiag proprietor at Jullundur, and Mul Raj, son of Bishambar Das, who is managing proprietor in Bombay. The complainant, Sant Ram, instituted a complaint under S. 420 of the I. P. C. against both Bishamhar Das and his son Mul Raj alleging that the defendants had no intention to fulfil those contracts and therefore, had cheated the complainant. The contracts on the basis of which charge has been laid on Bishambar Das and his son Mulraj were not the first dealings between the parties but were some of the transactions in the course of a number of other dealings which are not impugned.

On behalf of the persons accused before the Magistrate, objection was raised that a civil suit was pending in the Bombay High Court on its Original Side with regard to all the transactions between the parties. The complainant's counsel admits before me at the hearing of this petition that this is true, although the learned Magistrate has remarked in his order, now under revision, that copies of the pleadings in the Bombay Court had not been put in. This objection has been disallowed by the Magistrate, who had ordered proceedings to take their course, and on behalf of the accused persons, the present petition for revision has been instituted.

Sardar Gurdial Singh Kapur, exercising the powers of a Magistrate of the 1st Class in the Hoshiarpur District, by order dated 4th January 1926, refused to stay proceedings in this case under Ss. 420/426, Indian Penal Code.

Grounds.—It is now admitted before me that a civil suit is pending in the High Court of Bombay, and it includes a consideration of all the transactions, which are the subject-matter of the present accusation. That the matter could not be very much different is also evident from an application, dated the 7th December 1925, by the complainant himself before the Magistrate, in which he alleges that he wanted certain documents in the possession of the firm of the accused persons in Bombay which would in all probability be produced before the Bombay Court, and the Magistrate has been asked in this petition to send for those documents from the High Court of Bombay, if and when they were produced before it. The Magistrate has passed an order accordingly and in the order, now under revision, it is noted that two sealed envelopes containing documents had been received from Bombay and others should be sent for from there. Thus there seems to be no reason whatsoever to suppose that the subject-matter of contention between the parties is different. As remarked above, before me it is not denied by the learned counsel for the complainant. It has been held in *Emperor* v. *Bishen Das* (1) that it is a very sound general principle that parties should not be enconraged to resort to the criminal Courts, in a case in which the point at issue is one which can more appropriately be decided by a civil Court. It was remarked in that judgment that there was unfortunately a tendency on the part of persons, who considered themselves, aggrieved to rush to the criminal Courts either for purpose of obtaining at small cost, to themselves, a decision on matters, which ought in the ordinary course of things to be adjudicated upon by the civil Courts or of prejudicing the course of proceedings already instituted, or about to be instituted in a civil Court by the other side. This tendency, the Chief Court declared should be checked and criminal Courts should be on their guard not to lend their aid in cases of this kind.

(1) [1910] 33 P. R. 1910 Cr.=8 I. C. 1161=57 P. L. R. 1911.

These remarks were recently approved by the High Court, Lahore, in *Ladha Shah* v. *Zaman Ali* (2). The complainant's counsel has urged before me that as the matter now under discussion was entirely within the discretion of the Magistrate who had refused to stay the criminal proceedings, the High Court would not on revision interfere with that exercise of discretion. Discretion vested in the Courts, however, is one which has got to be judicially exercised and there are reported cases showing that the High Courts have interfered on revision when interlocutory orders were passed in criminal cases, which amounted to abuse of the process of Court. Recently, the Lahore High Court itself has interfered with the issue of process by a Magistrate of Jhang in what is known as the 'Chiniot Riot Case.' There can be no manner of doubt that the powers of the High Court in preventing abuse of powers by a criminal Court are very extensive. The discussion about the powers of the High Court in *Emperor* v. *Bishen Das* (1), at pages 112 and 113 (of P. R.) of the report is instructive. Even if there were any doubt on the subject under the provision of the Criminal P. C. as they stood before the amendments of it by Act 18 of 1923, that doubt is, in my opinion, finally set at rest by the enactment of S. 561 A which runs as follows :

> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Before the Magistrate the complainant's counsel had referred to *Taj-ud-din* v. *Taj Muhammad Nasir* (3), in support of the contention that the criminal proceedings could continue. That case, however, proceeded upon peculiar facts of its own, and the learned Judge who delivered that judgment, distinctly pointed out that the decision involved in the civil suit could possibly have no effect upon the trial of the question that had been raised in the criminal case, with regard to the cases in which civil and criminal praceedings were based on one and the same document. In the present case, the transactions beween the parties which are complained against, are evidenced by documents, upon the basis of which, among others the civil suit in Bombay is instituted, and which documents indeed the complainanant himself has asked the Court to send from that Court.

For reasons stated above, I am of opinion that the continuance of the Criminal proceedings before the Magistrate, in the present case, would amount to abuse of the powers of a Magistrate, and would considerably hamper the decision of the civil suit in Bombay.

I, therefore, submit the records of the case to the High Court for the order of the Magistrate, refusing to stay the proceedings, being set aside, and for stay of the proceedings.

Order.—For reasons given by the learned Sessions Judge I direct that the criminal proceedings in question will be stayed pending the decision of the civil suit in Bombay.

Revision allowed.

(2) A. I. R. 1925 Lah. 289.
(3) [1921] 23 Cr. L. J. 3=69 I. C. 380.

A. I. R. 1927 Lahore 18

HARRISON AND DALIP SINGH, JJ.

Abdul Rahman—Plaintiff—Appellant.

v.

Ghulam Muhammad and *others*—Defendants—Respondents.

Second Appeal No. 1421 of 1922, Decided on 10th May 1926, from the decree of the Addl. Dist. J., Lahore, D/- 2nd May 1922.

Contract Act, S. 23—Transfer to Patwari is against public policy—Punjab Land Revenue Act (1887), *S. 28—Rules under.*

A transfer of land to a Patwari in contravention of rules framed by the Financial Commissioner under S. 28 of the Punjab Land Revenue Act 18 of 1887, is void under S. 23 of the Contract Act, being opposed to public policy : 39 *All.* 51 (*F. B.*), *Dissented from.* [P 19 C 1]

Tirath Ram and *Asghar Beg*—for Appellant.

Tara Singh—for Respondents.

Judgment.—The facts of this appeal are briefly as follows : The land in this suit was originally owned by one Khushi Ram jointly with other. He is alleged to have sold his share for Rs. 600 to Muhammad Hussain, the then Patwari in the village, and his brother Hassan Muhammad. The mutation was refused by the revenue authorities. Subsequently Muhammad Hussain sold

his share to the present plaintiff-appellant and the revenue authorities sanctioned this mutation. Thereafter the present plaintiff brought this suit for possession of the land alleging that the defendants had taken forcible possession of a portion of the land sold to him. The trial Court dismissed the suit holding that, under the rules framed by the Financial Commissioner under S. 28 of the Punjab Land Revenue Act XVIII of 1887, a Patwari was debarred from acquiring land in the village to which he is appointed: vide Standing Order No. 15, paragraph 9. It held that this rule had the force of law and the sale in favour of the Patwari was, therefore, forbidden by law, and the sale itself was, therefore, void under S. 23 of the Indian Contract Act.

The trial Court further held that there was no consideration for the sale to the Patwari and that it had been effected with the object of winning the Patwari's favour. It relied on two rulings, *Shiam Lal* v. *Chhaki Lal* (1) and *Sheo Narain* v. *Mata Prasad* (2).

The lower appellate Court dismissed the appeal holding that the rules had the force of law and that, even if they had not the force of law, the contract was opposed to public policy under S. 23 of the Indian Coutract Act. The lower appellate Court also relied on the Allahabad rulings quoted above. No other point was decided. In second appeal the appellant has contended that the two Allahabad rulings have been overruled by a Full Bench decision of the same High Court reported in *Bhagwan Devi* v. *Murari Lal* (3). He has also referred to *Kamala Devi* v. *Gurdayal* (4) another Full Bench decision, to *Dhirendra Kumar* v. *Chandrkanta* (5) a Calcutta ruling, and *Balkisken* v. *Debi Singh* (6), a ruling of the Nagpur Judicial Commissioner. The respondent has relied on *Kerakoose* v. *Serle* (7) and on various other rulings which, however, need not be mentioned as the facts in those rulings were quite different.

(1) [1900] 22 All. 220=(1900) A. W. N. 30.
(2) [1905] 27 All. 73=1 A. L. J. 412.
(3) [1917] 39 All. 51=36 I. C. 259=14 A. L. J. 962 (F. B.).
(4) [1917] 39 All. 58=36 I.C. 319=14 A.L.J.969.
(5) A. I. R. 1923 Cal. 154.
(6) [1919] 16 N. L. R. 25=52 I. C. 153.
(7) [1841-46] 3 M. I. A. 329=4 Moo. P. C. 459 =1 Sar. 286 (P. C.).

It is unnecessary for us to decide whether the rules framed under S. 28 are ultra vires or intra vires of the Financial Commissioner or whether they have the force of law or not as we consider that the appeal can be disposed of on the ground that the contract is opposed to public policy. It is obvious that it would be most detrimental to the due performance of the duties of a Patwari if he were allowed to become a landlord in the circle in which he is serving. The Patwari is concerned with maintaining a true and accurate record of right of agricultural land in that circle and also in maintaining an accurate record of the fact of possession of agricultural land. It follows, therefore, that if he himself is an owner of land in that circle it is likely that his interest may conflict with his duties.

With all respect to the Full Bench decision in *Bhagwan Devi* v. *Murari Lal* (3) we are unable to agree with the reasoning thereof. Mr. Justice Walsh in that ruling points out that there is a distinction between the subject-matter of the contract and the conduct of the party entering into the contract and that it is only the former question which should be considered in applying S. 23 of the Indian Contract Act. In *Kerakoose* v. *Serle* (7) the Privy Council held that it was contrary to public policy to appoint the Registrar of the High Court to present bills on behalf of infants for account of their estates on the sole ground that such an appointment was likely to conflict with the duties of the Registrar because the Registrar derived a benefit from all money paid into Court. Counsel for the appellant contends that this ruling can be distinguished because the commission paid to the Registrar was a secret one, and he concedes that unless this is so the ruling is not distinguishable. The commission as a matter of fact was paid according to the practice of the Supreme Court as pointed out in that ruling. There was, therefore, no question of secrecy about it.

Now, as pointed out by the Privy Council in that case, the object of appointing the Registrar was a laudable one, but it was the fact that the Registrar was an official of the Court which made the appointment a bad one. Therefore the distinction drawn by Mr. Justice Walsh in the Allahabad case

seems not to have been approved of by the Privy Council. In *Dhirendra Kumar* v. *Chandrakanta* (5) the question arose under the Government Servants Conduct Rules. In our opinion that is a totally different matter, because a Government servant is not absolutely prohibited from aquiring land nor does it necessarily follow that if he does so acquire land his duties will conflict with his interest. The case of a Patwari acquiring agricultural land in his own circle stands, it seems to us, on a wholly different footing. We hold that the only object of the agreement was the acquisition of land by the Patwari and in the nature of things this would tend to injure the public service.

We, therefore, dismiss this appeal, but in view of the fact that the appellant had some justification in filing his second appeal and, as pointed out in the Calcutta ruling, the matter has been the subject of conflict of authority, we do not allow respondent his costs.

Appeal dismissed.

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* A. I. R. 1927 Lahore 20

FFRODE AND CAMPBELL, J.

Khair-ud-Din—Plaintiff—Appellant.

v.

Tara Singh and *another*—Defendants—Respondents.

First Appeal No. 1639 of 1924, Decided on 18th June 1926, from the decree of the 1st Cl. Sub-J., Lahore, D/- 5th May 1924.

* (a) *Tort—Defamation — Libel suit — Imputation rendering plaintiff liable to criminal prosecution—Benefit of doubt as to truth of allegations must be given to plaintiff and not to defence.*

When a newspaper publishes a defamatory statement charging a person with conduct which, if true, would render him liable to a criminal prosecution, and subsequently attempts to justify such a charge, the facts charged must be proved with the same degree of precision as would be required in a prosecution on foot of such a charge. In other words in a libel suit imputing conduct to the plaintiff which would render him liable to criminal proceedings, the benefit of any doubt as to the truth of the allegations complained of must be given, not to the defence but to the plaintiff. [P 22, C 1]

* (b) *Tort—Defamation—Journalist publishing defamatory statement is not specially privileged—On the contrary he has greater responsibility.*

A journalist who publishes a defamatory statement, which is not true, about a Government servant is in the eyes of the law precisely in the same position as any other person. He is not specially privileged as to what he must say. But on the other hand he has a greater responsibility to guard against untruths, for the simple reason that his utterances have a far larger publication than have the utterances of the individual, and they are more likely to be believed by the ignorant by reason of their appearing in print. [P 23, C 1]

* (c) *Tort—Defamation — Plea of justification—Defendant must prove truth—Two persons alleged to be beaten—Proof as to beating one only is not enough.*

In order to succeed upon the plea of justification the defendants have to prove that the whole of the defamatory matter is substantially true. It is not enough under the plea of justification of all the matters set out in a libellous publication to prove that some of them are true. When two persons are alleged to have been savagely beaten, it is not enough to prove that one person was in fact so beaten. [P 23, C 1, 2]

(d) *Damages—Measure of—Libel suit—Tort—Defamation.*

In a libel suit no rule can be laid down for measuring damages. Each case must depend upon its own particular facts. [P 23, C 2]

* (e) *Tort—Defamation—Statement defaming Government servant, even though published in the most contemptible journal—Plaintiff is entitled to substantial damages if statement not proved to be true.*

A statement defaming a Government servant even when published in the most contemptible journal will most certainly come to the knowledge of the authorities, and the position of the person defamed must necessarily be imperilled unless he can secure either a complete retraction of the libel or establish his innocence in an action at law, and the plaintiff is entitled to substantial damages, if the libellous matter is not proved to be true. [P 23, C 2]

Carden Noad and *Anant Ram Khosla*—for Appellant.

G. C. Narang and *Man Singh*—for Respondents.

Fforde, J.—This is an appeal against the judgment and decree of the trial Judge dismissing the plaintiff's suit with costs. The plaintiff-appellant is the Darogha, or Head Jailor, of the Central Jail at Lahore. The respondent Sardar Tara Singh was, at the time of the publication complained of, the proprietor and editor, and the respondent Chanchal Singh was the printer, of a vernacular newspaper known as the Pardesi Khalsa. The suit was brought for damages for a defamatory statement published on the 15th of February 1922, in the respon-

dents' newspaper. The paragraph complained of is as follows:—

Lawlessness in the Central Jail at Lahore.

Bhai Megh Singh Ji of Pind Nathoke, district Lahore, was sentenced to seven years' rigorous imprisonment in the case in connexion with the possession of Gurdwara Piple Sahib. He is kept in the Central Jail, Lahore, among ordinary prisoners. On the evening of the 9th he uttered shouts of 'Sat Sri Akal' after performing his Rah Ras (evening prayers). All the prisoners had been confined in their cells. Bhai Megh Singh Ji and another Sikh prisoner were taken out of their cells, and were caused to be beaten by Pathan Warders; that they passed stool and urine in their trousers. The Darogha dragged them (by catching hold of their keshas, long hair of the head) and pulled out their hair (keshas).

The above news has been received through a reliable source. The underlings of bureaucracy for the sake of rewards practise so much tyranny on their Indian brethren, that one shudders to hear of it. The Shromani Gurdwara Committee should at the earliest possible date, send this news in the form of a communique to the newspapers for publication, and should take notice of the matter.

It is obvious that this paragraph is, if not true, of a highly defamatory nature, inasmuch as it accuses the appellant of ordering two defenceless prisoners to be savagely beaten merely because one of them shouted out a religious phrase in the performance of his customary devotions. The charge is manifestly one of the gravest character, imputing to the appellant as it does, conduct which forms the subject of criminal proceedings, and which would certainly, if true, warrant his dismissal from the Government service.

The only defence to the suit is that the words complained of are true in substance and in fact. That was the sole issue which was tried, and upon that issue the trial Judge found in favour of the respondents, holding that the story of the beating of Megh Singh, as published, was substantially true. The onus of proving this issue was quite correctly placed on the respondents.

The only questions which arise, therefore, for determination in this appeal are, firstly, whether the finding of the trial Judge is warranted by the evidence on the record, and secondly if not warranted to what damages is the appellant entitled. The only direct evidence in the case is that of Megh Singh, one of the persons referred to in the paragraph complained of. (Then after stating the material part of Megh Singh's evidence as given in his examination-in-chief his Lordship proceeded.) Before dealing with the evidence of the other witnesses it is necessary in order to make their statements intelligible to refer to certain incidents which admittedly took place in the Jail between the 9th of February and the end of that month. There is no doubt that at the end of February a hunger-strike of political prisoners took place in this Jail. According to the plaintiffs this strike started on the evening of the 24th of February and continued till noon of the 26th. This strike was due to two causes. One was owing to the belief amongst the prisoners that Megh Singh had been given gunny clothing and a prison cap to wear. The other reason was that the political Sikh prisoners demanded that certain military prisoners, who had just been brought to the Jail, should be confined with them as political prisoners and given black turbans to wear instead of the ordinary Jail clothing and cap.

The date of the strike is also fixed by Abdul Ghani, a Deputy Jailor, who likewise says that it commenced on the evening of the 24th and terminated at noon of the 26th February. Autar Singh, a Bar-at-Law of Gujranwala, who was examined for the defence, fixed the hunger-strike as having taken place either towards the end of February or the beginning of March, which is in accordance with the dates given by the two Jailors. In point of fact the time at which this hunger-strike took place does not appear to have been disputed in the Court below; but the significance of these dates becomes apparent when one tests the evidence of Megh Singh with that of the other defence witnesses. The trial Judge states in his judgment that the dates are quite immaterial in the case, but why he makes this statement I find it hard to understand. The witnesses attempt to fix the time of the alleged assault by reference to the time of the strike. One can quite understand their not knowing the actual dates of these events, but they are bound to know whether the strike took place before, immediately after, or at some lapse of time after the cruelty alleged to have been perpetrated on Megh Singh, more especially as this strike is alleged by the defence to have been organized as a

protest against the ill-treatment of Megh Singh. Taken in this sense the times when the various matters took place are of the highest importance. (Then his Lordship after examining the whole of the evidence held that no jury could reasonably come to the conclusion that the statement published in the respondent's newspaper has been proved to be true.) It is to be observed that when a newspaper publishes a defamatory statement charging a person with conduct which, if true, would render him liable to a criminal prosecution, and subsequently attempts to justify such a charge, the facts charged must be proved with the same degree of precision as would be required in a prosecution on foot of such a charge. In other words, in a libel suit such as this, imputing conduct to the plaintiff which would render him liable to criminal proceedings, the benefit of any doubt as to the truth of the allegations complained of must be given not to the defence but to the plaintiff. The trial Judge has taken the exact opposite course. Having admitted every kind of hearsay evidence to prove the cause of the strike in the jail, he concludes that the reason alleged to have been given by the strikers for the strike is sufficient to establish the fact that Megh Singh had been beaten for shouting Sat Sri Akal.

He has given no weight whatsoever to the glaring inconsistencies in the statements of the different witnesses. The fact that the witness Tara Singh admitted in cross-examination that before the strike the darogha raised no objection to such shouts, is entirely overlooked by the trial Judge. It is unnecessary to compare the many discrepancies in the stories told by the different defence witnesses. But it seems to me a very strange thing that the Judge who heard the witnesses does not appear to have allowed such discrepancies to affect his conclusion. He comments on the fact that the appellant and his witness Abdul Ghani did not produce any documentary evidence in corroboration of the evidence as to the date when the strike took place. But surely the Judge must know that when the onus of establishing the truth of certain facts is put upon the defence it is for them to call for documents in support of their story. Had the defence required the production of any documents from the jail they could easily have obtained them by an order from the Court.

In point of fact, as I have already said, the date of the strike does not appear to have been disputed. If any facts can be said to be clearly established by the evidence in this case they are these: The publication complained of took place on the 15th of February. In that publication it was alleged that Megh Singh was cruelly treated on the 9th February. The strike which took place in the jail occurred not earlier than the 24th of February. These facts the trial Judge seems to have wilfully ignored, or, rather, when they come in conflict with the evidence of the defence witnesses he prefers the statements of those witnesses though they are in absolute contradiction to these three salient facts.

The frame of mind of the trial Judge is best shown by some observations which appear towards the close of his judgment. The plaintiff, he says, could have produced documentary evidence to discredit the defence story. He also says that the plaintiff could have produced evidence to show when Gurdit Singh was transferred from Lahore jail during the strike. He further states that the plaintiff could easily have produced evidence as to the admission of certain prisoners to the jail during the strike. All these matters of evidence would have established when the strike took place. That no doubt is perfectly true, but the Judge entirely forgets that it was for the defence to prove their case, and in view of the fact that neither the plaintiff nor the Deputy Jailor Abdul Ghani were asked one word in cross-examination suggesting any doubt as to the accuracy of the date fixed by them for the strike, I fail to understand why the Judge seems to think it necessary that they should have produced a whole heap more evidence to establish this uncontradicted fact. Following this criticism the trial Judge continues: "Non-production of best evidence in possession of the plaintiff raises presumption against him." and then he goes on to say that

> the dates are quite immaterial in the case. The story of the beating of the prisoner is substantially true.

To this I need only say that the plaintiff has produced not only the best but

the only proper evidence in the case, namely, his own oral statement on oath in Court and the oral statements of his witnesses upon oath in Court. If there were any documents available to contradict this evidence it was for the defence to demand them. But why a witness whose own testimony upon a particular point has not even been challenged should be required to produce documents to corroborate that piece of testimony, I quite fail to understand. The trial Judge concludes his judgment with these words:

> The defendants published what news they got. It is the duty of a journalist to bring to the notice of the Government such complaints against their servants. I have not referred to the statement of Malik Lal Khan to the effect that plaintiff hesitated to bring this suit. I need not say anything about it. To publish true facts against a person in the interests of the public and of Government is not defamation.

With regard to these observations I may say that it is the duty of a journalist only to publish complaints which he is satisfied are true. If he publishes complaints of a defamatory nature which are not true he must suffer the consequences. A journalist who publishes a statement about an individual is in the eyes of law precisely in the same position as any other person. He is not specially privileged as to what he may say. But on the other hand he undoubtedly has a greater responsibility to guard against untruths; for the simple reason that his utterances have a far larger publication than have the utterances of the individual and they are more likely to be believed by the ignorant by reason of their appearing in print.

Having heard the entire evidence minutely dissected by counsel on both sides it is perfectly clear to my mind that the respondents have signally failed to prove that the defamatory words are true and accordingly the plea of justification has failed. And in this regard I may point out that even if it has been established that the plaintiff had caused the prisoner Megh Singh to be beaten in the manner alleged by Megh Singh himself, this would not establish the plea of justification and entitle the respondents to a verdict. In order to succeed upon the plea of justification the defendants have to prove that the whole of the defamatory matter is substantially true. It is not enough under the plea of justification of all the matters set out in a libellous publication to prove that some of them are true. When two persons are alleged to have been savagely beaten, it is not enough to prove that one person was in fact so beaten. And accordingly, if in the present case it had in fact been proved that Megh Singh had been ill-treated in the manner alleged in the offending newspaper paragraph that would not be sufficient to establish the plea of justification, and the appellant would even on that finding be entitled to a verdict. Such a verdict, however, would hardly entitle him to more than contemptuous damages. But in the present case, in my opinion, the respondents have wholly failed to prove that any of the libellous matter is true, and accordingly the appellant is entitled to substantial damages.

No rule can be laid down for measuring these damages. Dr. Narang has cited a number of cases in some of which only a small sum was awarded for gross libels, but such cases are not of the slightest use as a guide. The cases in question were only reported because of some principle of law which they were supposed to establish. There have been countless trials for libel in which substantial sums have been awarded to the plaintiff, which have never been reported in the law reports. Obviously each case must depend upon its own particular facts. In the present case the libel complained of is a savage, gross and vindictive one and, has been persisted in up to the present moment. Although the respondents deliberately pleaded the dangerous plea of justification, they never attempted to go into the witness-box and support that plea under oath.

It may be true, as Dr. Narang declares, that the respondents' newspaper is an insignificant journal of no consequence. That may be so, but nevertheless a statement defaming a Government servant, even when published in the most contemptible journal will most certainly come to the knowledge of the authorities, and the position of the person defamed must necessarily be imperilled unless he can secure either a complete retraction of the libel or establish his innocence in an action at law.

I am of opinion that the smallest sum which should be awarded to the appellant as damages is a sum of Rs. 2,000

and I would accordingly set aside the judgment and decree of the trial Judge and enter judgment for the appellant for the sum of Rs. 2,000 with costs throughout.

Campbell, J.—I agree. So far from the dates being "quite immaterial" as declared by the trial Judge they are the most important feature of the case. The assault upon Megh Singh is stated in the offending article to have occurred upon the 9th. The article was published on the 15th. The hunger-strike commenced on the 24th. Megh Singh was produced by the defence to prove that he was beaten and another prisoner, Tara Singh, was produced to corroborate him by describing an interview which took place between them on the morning after the beating. Read together, and if believed the two statements would prove nothing more than a beating, which took place after the 24th, the date of the commencement of the hunger-strike, and which if it did take place, is quite irrelevant to the present proceedings.

The trial Judge appears to have believed the story of certain witnesses that a rumour of Megh Singh having been beaten was prevalent at the commencement of the strike, and to have regarded the existence of the rumour as corroborative evidence of Megh Singh's statement. In any case the existence of a rumour can never be any proof whatsoever of its correctness, and in the present instance the trial Judge has disregarded the fact that the publication of the defendants' article on the 15th would be quite enough to account for the currency of the rumour on the 24th.

The only thing on the record from which the defence can claim any support is Megh Singh's statement with all references to an interview with Tara Singh eliminated from it, and this is quite inadequate to establish their case. I concur in holding that the plaintiff should have a decree for Rs. 2,000 with costs on this amount throughout.

Appeal accepted.

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* A. I. R. 1927 Lahore 24

BROADWAY AND ZAFAR ALI, JJ.

Firm Bhola Ram-Harbans Lal and *another*—Appellants.

v.

Bhagat Ram and *others*—Plaintiffs—Respondents.

First Appeal No. 966 of 1922, Decided on 2nd November 1926, from the decree of the Senior Sub-J., Rawalpindi, D/- 14th January 1922.

* (*a*) *Contract Act, S. 25—Minor's agreement is void and cannot be a valid consideration for subsequent contract.*

It is settled law that a minor's agreement is void, and what is void is obviously a nullity and has no existence in the eye of the law. [P. 25, C. 1 & 2]

A void contract which is a dead letter entails no liability, cannot be revived and cannot constitute a valid consideration for a subsequent contract: 11 *C. W. N.* 135; 2 *Lah.* 263 and 31 *P. R.* 1911, *Diss. from*; 37 *Mad.* 38; 46 *I. C.* 765; and 16 *M. L. J.* 422, *Rel. on.* [P 26, C 1]

(*b*) *Minor—Contract by—Contract in favour of minor for valuable consideration can be enforced by him.*

A minor can enforce a contract made in his favour for a valuable consideration, as while no liability can be incurred by a minor he is not debarred from acquiring a title to anything valuable: 30 *Cal.* 539 (*P. C.*), *Rel. on*; 33 *All.* 657; 38 *All.* 62; 38 *All.* 154; 30 *All.* 63; 37 *Mad.* 390 and 4 *Pat. L. J.* 682, *Ref.* [P 27, C 1]

Sheo Narain and *Badri Dass*—for Appellants.

Shamair Chand and *Dev Raj Sawhney*—for Respondents.

Zafar Ali, J.—This first appeal arises out of an action to recover Rs. 9,324-12-9. The plaintiffs who figure as respondents in this Court are the two brothers Bhagat Ram and Jagat Ram of whom the latter is a minor. Their father Mast Ram, who kept a shop and carried on business in Rawalpindi in the name and style of Mast Ram Bhagat Ram, died in December 1914, and after his death Bhagat Ram, the elder of his two sons who too was then a minor, stepped into his shoes and continued his business under the old name and style. His dealings with the defendants who are also shopkeepers of Rawalpindi commenced in about June 1916, and his case was that the moneys paid and the value of goods supplied by him to the defendants aggregated Rs. 20,022-11-3, that the defendants repaid Rs. 11,024-5-3 and that they owed him the balance Rs. 8,818-6-0

plus Rs. 506-6-9 interest, Rs. 9,324-12-9 in all. The defendant's reply was that on the account sued on they owed to the plaintiffs Rs. 8,179 0-9 but that the plaintiffs had four other separate accounts with them and owed them thereon Rs. 10,155-14-3. Deducting from this amount the sum due by them on the first account they made a counter-claim for the balance Rs. 1,728-7-0 plus Rs. 37-13-0 interest and paid the necessary Court-fee thereon.

Bhagat Ram pleaded minority with regard to the said four accounts and on that ground denied his liability in respect thereof. He further asserted that one Sant Ram, who was once a servant of his father but had after his death taken up service with the defendants, had inveigled him to deal with them and that it was Sant Ram who had induced him to shift his place of business to a shop near that of the defendants in order to be within easy reach of them. This however was not established ; and as regards his plea of minority the defendants' answer was that he was of age from the very commencement of his dealings with them and that even if he was not, he was estopped from setting up minority because he had led them to believe that he was a major. The Court below came to the conclusion :

(1) That Bhagat Ram, plaintiff, was born on the 13th October 1899 and was consequently a minor when he began to deal with the defendants and opened three out of the four subsequent accounts, but that he said or did nothing to make the defendants believe that he was a major ; (2) that on the original account sued on the defendants owed to the plaintiff Rs. 8,179-0-9 (which was the amount that had been acknowledged by the former as due by them on that account) ; (3) that Bhagat Ram, plaintiff, had attained majority before the commencement of the last account and that Rs. 106-5-0 was due to the defendants thereon ; and (4) that Bhagat Ram was a minor when the rest of the four accounts were opened, and so could not be held liable thereon.

In accordance with the above findings a decree for Rs. 8,072-11-9 was granted to the plaintiffs against the defendants.

The defendants have appealed against this decree and also against the order disallowing their counter-claim. Their learned counsel frankly confessed that he could not successfully contest the finding of the Court below that Bhagat Ram was born on the 13th October 1899. That finding is based on documentary evidence which could not be impeached. But the learned counsel contended that the said plaintiff had after attaining majority ratified all the earlier transactions and was responsible therefor ; (2) that he was estopped by his conduct from pleading minority ; and (3) that if the dealings between the parties were void because of the minority of the plaintiffs, no liability in respect thereof could fall on the defendants and the plaintiffs were therefore not entitled to recover anything from them even on the account on which the suit was based.

We will consider these contentions one by one, but it may be stated here that there is no direct evidence on the record in support of the pleas of ratification and estoppel and that ratification was not even alleged in the Court below.

With regard to the question whether ratification or estoppel can be successfully pleaded against a quondam minor there is a hopeless conflict of judicial opinion in India, but the rulings relied upon by the appellants' counsel related to cases where the quondam minor had given a bond or a promisssory note for the debts contracted during his minority. In the present case there is no evidence, documentary or oral, to establish either ratification or estoppel, and this being so it does not seem necessary to discuss here at great length the applicability of the principle of ratification and estoppel to quondam minors. It is now settled law that a minor's agreement is void, and what is void is obviously a nullity and has no existence in the eye of the law. It would therefore be a contradiction in terms to say that a void contract can be ratified. But in the Calcutta case *Kundan Bibi* v. *Sree Narayan* (1)

a bond was executed by S after attaining majority promising to pay within a year Rs. 7,000 being the price of piecegoods sold to him during his minority and also to repay Rs. 76 advanced to him for necessaries. The obligee sued S on the bond and it was held by Mr. Justice Harington who tried the case on the original side that S was liable.

This ruling was considered by a Division Bench of the Calcutta High Court in

(1) [1906] 11 C. W. N. 135.

Raja Narindra Lal Khan v. *Hrishi Kesh Mukerjee* (2) and was dissented from. The learned Judges cited with approval the following comment of Pollock and Mulla on Mr. Justice Harrington's decision :

> We fail to see how either the forbearance to sue or the advance for necessaries could be regarded as a new consideration and we are of opinion that the decree, so far as it awarded to the plaintiff the price of the goods sold, was erroneous in law.

But more recently in *Ram Rattan* v. *Basant Rai* (3), *Kundan Bibi* v. *Sree Narayan* was followed by a Division Bench of our own High Court (Abdul Raoof and Moti Sagar, JJ)., and they also cited with approval the ruling of the Punjab Chief Court in *Karam Chand* v. *Mt. Basant Kaur* (4), where it was held that S. 25 (2) of the Indian Contract Act was intended to give effect to minors' agreements which would otherwise be void as being without consideration. But the comment of Pollock and Mulla on *Karam Chand* v. *Basant Kaur* (4) is that it is not sound law. *Narindra Lal* v. *Hrishi Kesh* (2) was not brought to the notice of the Judges responsible for *Ram Rattan* v. *Basant Rai* (3) and the comment of Pollock and Mulla on *Karam Chand* v. *Basant Kaur* (4), was also not referred to. Further *Indran Ramaswami* v. *Anthappa Chettiar* (5) and *Arumugan* v. *Duraisinga* (6) were not referred to. In the former it was held that

> a promissory note given by a person on attaining majority in settlement of an earlier one signed by him, while a minor in consideration of money then received from the obligee cannot be enforced in law and that such a note is void for want of consideration.

Similarly in *Arumugan* v. *Duraisinga* (6) it was held that

> there can be no ratification of transaction which is void owing to the promisor possessing no contractual capacity at the time nor can a void deed form a good transaction for a fresh contract made by the minor on attaining majority.

These rulings appear to us to be in accord with the general principle that a void contract which is a dead letter and entails no liability cannot be revived and cannot constitute a valid consideration for a subsequent contract. We, therefore, are of opinion that the plaintiffs in the present case incurred no liabilities in respect of the transactions entered into with them, during their minority, and that those transactions could not be ratified.

The conflicting rulings on the question of estoppel are referred to in *Wasinda Ram* v. *Sita Ram* (7) where it was held after review thereof that S. 115 of the Evidence Act was applicable to minors also. We need not consider these authorities here because there is no evidence on the record in support of the plea of estoppel.

The third contention of the appellants learned counsel is also untenable. There is no conflict of opinion with regard to the competency ef a minor to enforce a contract made in his favour for a valuable consideration and it has been held that

> though a sale or mortgage of his property by a minor is void, *Mohiri Bibi* v. *Dhamodas* (8), a duly executed transfer by way of sale or mortgage in favour of a minor who has paid the consideration money is not void and it is enforceable by him or by any other person on his behalf :

Ulfat Rai v. *Gauri Shankar* (9); *Munni Kunwar* v. *Madan Gopal* (10); and *Narain Das* v. *Mt. Dhania* (11); *Meghan Dube* v. *Pran Singh* (12); *Munia Konan* v. *Perumal Konan* (13); *Raghava* v. *Srinivasa* (14); and *Madhah Koeri* v. *Baikuntha* (15). It is a matter of common knowledge that a minor can make purchases in the bazar and no trader after receiving money from him can refuse to deliver the goods purchased or to return the money. In *Raghava* v. *Srinivasa* (8) a Full Bench of the High Court held that a mortgage executed in favour of a

(2) [1918] 46 I. C. 765.
(3) [1921] 2 Lah. 263.
(4) [1911] 31 P. R. 1911=192 P. L. R. 1911=11 I. C. 321=236 P. W. R. 1911.
(5) [1906] 16 M. L. J. 422.
(6) [1914] 37 Mad. 38=21 M. L. J. 1077=12 I. C. 568=(1911) 2 M. W. N. 461.
(7) [1920] 1 Lah. 389=59 I. C. 393=51 P. W. R. 1920.
(8) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441 (P. C.).
(9) [1911] 33 All. 657=11 I. C. 20=8 A. L. J. 670.
(10) [1916] 38 All. 62=31 I. C. 792=13 A. L. J. 1084.
(11) [1916] 38 All. 154=35 I. C. 23=14 A. L. J. 65.
(12) [1908] 30 All. 63=5 A. L. J. 14=(1908) A. W. N. 10.
(13) [1914] 37 Mad. 390=26 I. C. 195.
(14) [1917] 40 Mad. 308=20 M. L. J. 575=36 I. C. 921=(1916) 2 M. W. N. 363.
(15) [1919] 4 Pat. L. J. 682=52 I. C. 338=(1919) P. H. C. C. 343.

minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf. It has also been held that a promissory note executed in favour of a minor is not void and can be sued upon by him : vide *Rangarazu* v. *Madura Basappa* (16). The principle underlying is that while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable. In the present case therefore the defendants are liable to repay on account for the moneys and goods that they received from Bhagat Ram, plaintiff. According to their own showing they owe to plaintiffs Rs. 8,179-0-9 in respect of advances received from them. As regards the other accounts which were started when Bhagat Ram was a minor, he did not incur any liability for any of the dealings which took place before he had attained majority ; but he is decidedly liable to be called to account for all the transactions that he entered into afterwards. The argument of the plaintiffs' counsel that all the different transactions of any one of the accounts should be taken as a whole as one transaction is obviously unsound.

The result is that we accept the appeal and remand the case to the Court below for deciding what amount if any is payable by the plaintiffs in respect of the transactions of the three accounts (a, b and d) during the periods from the 13th October 1917 onwards for which they were continued. The amount, if any so found, should be deducted from the sum that has already been found due to them by the defendants and a decree should be passed in their favour for the balance. Parties will bear their own costs in this Court. In the Court below the plaintiffs shall get costs in proportion to the amount that will be decreed to them.

Appeal aceepted.

(16) [1918] 24 M. L. J. 363=18 I. C. 968=(1918) M. W. N. 415.

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DALIP SINGH, J.

Ganeshi Lal—Plaintiff—Appellant.

v.

Dwarka Ram — Defendant — Respondent.

Appeal No. 84 of 1925, Decided on 28th October 1926, from the decree of the Dist. Judge, Karnal, D/- 2nd November 1925.

(a) *Provincial Insolvency Act* (1920), *S.* 10—*Failure to keep account books is not a disqualification.*

It cannot be held that the failure to keep account books must ipso facto disqualify a man from being declared an insolvent. [P 27 C 2]

(b) *Provincial Insolvency Act* (1920), *S.* 25—*Adjudication — Prima facie case need only be made out.*

A person has only to make out a prima facie case in order to be declared insolvent and if there be any fraudulent concealment of assets the matter can be gone into by the Insolvency Court later on. [P 27 C 2]

Sham ir Chand—for Appellant.

Parkash Chandra—for Respondent.

Judgment.—These are two connected appeals by petitioners asking to be declared insolvent from an order of the learned District Judge dismissing their applications. The petitioners alleged in one case that their debts amounted to Rs. 95,024 and assets to Rs. 603-8-0. In the other case the liabilities were asserted to be Rs. 6,269 and the assets were worth Rs. 566-8-0. The liabilities were not contested but the creditors asserted that the petitioners had assets. The evidence on both sides is very meagre, but the main fact on which the learned District Judge relies is the non-production of account books by the applicants.

Now, it appears that the applicants father and grandfather respectively and the applicants themselves carried on business of some kind and the applicant in one case has sworn that his father had no account books. There is no rebuttal of this testimony and therefore no great importance can be attached to the absence of these account books. It cannot be held that the failure to keep account books must ipso facto disqualify a man from being declared an insolvent. I consider that the applicants have made out a prima facie case and if there has been any fraudulent concealment of assets he matter can be gone into by the Insol-

vency Court later on. I, therefore, accept the appeals, declare the applicants insolvent and return the record to the learned District Judge to proceed with the applicants according to law.

Appeal accepted.

A. I. R. 1927 Lahore 28

ZAFAR ALI AND ADDISION, JJ.

Kala Singh and *another*—Defendants—Appellants.

v.

Havil and *others*—Plaintiffs — Defendants—Respondents.

Second Appeal No. 1455 of 1922, Decided on 28th April 1926, from a decree of the Dist. J., Sialkot, D/- 28th March 1922.

Civil P. C., O. 22, R. 9 — Partial or complete abatement depends upon consequence following abatement against deceased.

Whether an appeal has abated in whole or only in part, depends upon the nature of the consequences that follow the abatement as against the deceased party.

Where some respondents in an appeal from a declaratory decree die, and their representatives are not brought on record, the appeal abates in toto. [P 28 C 2]

Ghulam Rasul—for Appellants.

Mehr Chand—for Respondents.

Judgment. — The subject-matter of this litigation is agricultural land which once belonged to two brothers Arjan and Surjan of village Kot Dhodu in the Sialkot District. They gifted it to their sister's son Diala and the latter's line became extinct on the death of his son and the successer Jiwan. Some of the reversioners of the donors were already in possession of this land as mortgagees, and they as well as all others with the exception of three who figure as Defendants Nos. 11—13 sued for a declaration that they were entitled to succeed to the land in preference to Defendants Nos. 1—10, the collaterals of Jiwan. The suit was dismissed by the trial Court, but on appeal by the plaintiffs the lower appellate Court decreed their claim. Two out of the said ten defendants appeared in this Court with this second appeal which was admitted. But they failed to apply within time to bring on the record the legal representatives of three of the plaintiffs-respondents who died after the appeal had been filed. Each deceased plaintiff has left a son and in the application now made to make the sons parties it is stated that their fathers died 18 months ago.

It is conceded that the appeal as against the deceased plaintiffs abated on the expiration of 90 days from the date of their death and that the application for setting aside the abatement also is time-barred, but it is urged that this is a fit case for extending the time under S. 5 of the Limitation Act because the defendants-appellants had migrated to a distant village in the Lyallpur District and so did not become aware earlier of the death of the said three plaintiffs. But we are not prepared to believe that the defendants-appellants never paid a visit to their homes during these 18 months. It is matter of common knowledge that people who acquire lands in the new colonies keep visiting their original villages, and it is significant that the defendants appellants in their memorandum of appeal as well as in their subsequent application dated the 10th November 1924 gave their original village as the place of their residence. Moreover the plaintiffs-respondents have filed a counter-affidavit to the effect that the appellants had been living in their original village. We, therefore, find no justification for extending the time.

The next question is whether the appeal has abated in whole or only in part. The answer depends upon the nature of the consequences that follow the abatement as against the deceased plaintiffs. Though the sons and successors of those plaintiffs will succeed to their own shares in the land which at present have not been specified they will be entitled by virtue of the decree in their favour to succeed to the share of any of the remaining plaintiffs also whose line may die out in future. They will evidently lose that future right of succession if the defendants should succeed in their appeal. Furthermore the right to the declaration sought for cannot be split up so as to recognize it in the case of some of the plaintiffs and to refuse it to the rest. We are, therefore, of opinion that the whole appeal has abated, and we find accordingly.

The appellants to pay respondents' costs in this Court.

Order accordingly.

A. I. R. 1927 Lahore 29

ADDISON, J.

Abdul Majid Khan and *others*—Plaintiffs—Appellants.

v.

Mt. Sahib Jan and *others*—Defendants—Respondents.

Second Appeal No. 1373 of 1925, Decided on 8th December 1925, from the decree of the Dist. J., Jullundhur, D/-. 16th February 1925.

Custom (Punjab)—Dower—Property transferred in lieu of dower without objections by collaterals is absolute property of widow.

Where property is tranferred in lieu of dower without objection by the husband's collaterals, it bcomes the self-acquired property of the widow and any sale effected by the widow cannot be challenged by the collaterals : 154 *P. W. R.* 1912, *Appr.* [P. 29, C. 2]

Badri Das and *Sagar Chand*—for Appellants.

Fakir Chand—for Respondents.

Addison, J.—In 1890 one Ghulam Murtza made over certain land and houses to his wife, Mt. Sahib Jan, as her dower. Some time after this he left and finally died in Java. It is alleged that Ghulam Murtza's son, Hamid Ullah, made over in lieu of dower four-fifths of his property and some houses to his wife Mt. Nabi Begam in 1915 and that when he died about the beginning of 1918 his wife inherited the remaining one-fifth in that year. Then on the 31st January 1921 the widows sold certain specific field numbers which were in their possession, out of the joint holding to Defendants 3 and 4 for Rs. 1,600. Abdul Majid, brother of Ghulam Murtza, and the minor sons of another brother brought a suit for a declaration that this sale should not affect their reversionary rights and in the alternative they claimed possession by pre-emption. The trial Court dismissed the suit, holding : (1) that the plaintiffs had not established that any part of the land was included in the portion or share inherited by Mt. Nabi Begam, when Hamid Ullah died ; (2) that the alienations to the wives were in lieu of dower and were absolute, the property becoming self-acquired property in the hands of the wives ; (3) that Abdul Majid, the major plaintiff, attested as a witness the transfer to Mt. Nabi Begam and also signed the mortgage-deed forming the bulk of the consideration for the sale in dispute and that it was for this reason that he had joined his minor nephew with him in the suit : and (4) that the plaintiffs were not entitled to pre-empt the sale. On appeal the learned District Judge held, following *Sohaura* v. *Mt. Sahib* (1) that if the land had been transferred in lieu of dower without objection by the husband's collaterals, it became the self-acquired property of the widows and the sale in dispute could not be challenged. He held further that the transfers were made without objection by the collaterals and that they were validly made in lieu of dower which was not excessive. He, therefore, dismissed the suit for a declaration, but, disagreeing with the trial Court on the alternative claim, granted plaintiffs a decree for pre-emption on payment of Rs. 1,600. Against this decision the plaintiffs filed a further appeal in this Court, whereupon the defendants filed cross-objections attacking the pre-emption decree given to the plaintiffs by the learned District Judge.

Before me the next friend of the minor plaintiffs-appellants applied for permission to withdraw from the appeal so far as they were concerned as he had been advised that the appeal could not succeed and he did not wish to be burdened with costs. This was not objected to by the major appellant or the respondents and was allowed by me, because if the appeal were accepted the minors were bound to benefit as it would have to be accepted as a whole.

It was argued by appellants' counsel that the learned District Judge was wrong in stating that there could not be a benami transaction unless there was a purchase. This may be conceded, but that does not appear to have influenced the District Judge in coming to his finding of fact that the transfers were in lieu of dower. His remarks were by way of introduction to his finding on this question. This finding is in clear and unmistakable terms and cannot be challenged in second appeal. Besides, it negatives the contention of the plaintiffs that these transfers were family arrangements in order to prevent the father and son from alienating their property, and plaintiffs cannot get this question recon-

(1) [1911] 154 P. W. R 1912=11 I. C. 513=225 P. L. R. 1911.

sidered merely because the District Judge misdirected himself as to what a benami transaction was; for his undoubted finding that the transfers were in lieu of dower (which was not influenced by the remarks complained of) negatives the family arrangements put forward by the plaintiffs. It was conceded that the transfers would be valid and would pass an absolute estate if they were in lieu of dower.

The only other point argued was that some of the fields alienated by the widows were part of the one-fifth inherited by Mt. Nabi Begam from her husband, Hamid Ullah. It was found by the trial Court that this had not been established. It was not mentioned by the District Judge for the reason that before him the main point argued was the question as to what the transfers to the wives were. The learned counsel for the appellants was unable to show me what portion was inherited. Further, the holding is jointly held by the widows and the plaintiffs and the widows alienated certain field numbers in their possession and they were entitled to do so. There is thus no force in this contention.

The cross-objections were not pressed when it was pointed out that the holding of the widows and the plaintiffs is joint.

In the result I dismiss both the appeal and the cross-objections, leaving parties to bear their own costs here.

Appeal dismissed.

A. I. R. 1927 Lahore 30

BROADWAY, J.

Gulab Khan, deceased, through Karam Khan—Petitioner.

v.

Ghulam Muhammad Khan and *others*—Respondents.

Criminal Revision No. 774 of 1926, Decided on 17th October 1926, from the order of the S. J., Attock, D/- 30th November 1925.

(a) *Criminal P. C., S. 202—Magistrate is empowered to inquire into a complaint to ascertain its truth.*

A Magistrate is empowered to hold an enquiry into a complaint of an offence in order to ascertain whether there is sufficient foundation for it to issue process against the person or persons complained against under S. 202. [P. 31, C. 2]

(b) *Criminal P. C., S. 174—Proceedings under, should be kept distinct from those on complaint.*

The proceedings under S. 174 should be kept quite distinct from the proceedings taken on the complaint regarding the same death. [P. 31, C. 2]

B. R. Puri—for Petitioner.

Abdul Rashid for *the Crown* and *Shamair Chand* and *Din Dayal*—for Respondents.

Broadway, J.—On the 4th of August 1925 three persons were murdered in the village of Dandi in the district of Attock. These murders were of a daring character and it is said that the persons responsible for them had intended to murder Subedar Ghulam Mohammad Khan as well. They had searched for him, but the Subedar succeeded in hiding himself in his own house and thus escaped. The murderers were known, and among them was one Gulab Khan son of Karam Khan. A guard of two constables was placed on Subedar Ghulam Mohammad Khan's house as Gulab Khan and his accomplices had absconded. On the 21st of August 1925 it was rumoured that Gulab Khan and Nawab Khan, absconders, had returned to the village Dandi. Information of this fact was sent to the police station Pindigheb and steps taken to effect their arrest. During the night when it was said that Gulab Khan and Nawab Khan were sitting in the house of Gulab Khan's father Karam Khan, the police went to the house, but did not find Gulab Khan or Nawab Khan. On the following day, i. e., the 22nd August 1925, search parties were formed to scour the countryside for these two men. These parties consisted of three or four persons each and the Subedar was accompanied by the two constables who were joined later by one Fatta, son of Nur Muhammad. Proceeding in their search the two constables separated going towards the west leaving the Subedar, who was armed with a revolver, and Fatta to examine a small portion of the Bela. While doing this the Subedar and Fatta took different paths. Fatta happened to catch sight of Gulab Khan sitting under a group of small shisham trees with a hatchet beside him. Fatta promptly retraced his steps and finding the Subedar standing at a little distance pointed in the direction whence he had come but refused to accompany the Subedar in to the trees. Thereupon the Subedar star-

ted off, in the direction indicated by Fatta, by himself. According to the Subedar he had not proceeded far when all of a sudden he saw Gulab Khan flourishing a hatchet and coming towards him. Gulab Khan is said to have called out: "O Subedar I was looking for you in heaven and I have found you on earth; now be ready." The Subedar seeing himself thus attacked by Gulab Khan promptly fired at him with his revolver and hit him six times. He says he only fired five shots, but according to the medical evidence there were six bullet wounds. The other people searching collected on hearing the sound of firing and Gulab Khan was picked up dead.

For some reason or other the police very negligently failed to report this matter in the proper manner to the Sub-Divisional Officer, Pindigheb. That officer, however, came to know what had happened and sent a report of the occurrence to the District Magistrate which reached him on the 25th August 1925. The District Magistrate upon that suggested that proceedings under S. 174 of the Criminal P. C. should be taken in order to ascertain the circumstances in which Gulab Khan met his death. The Sub-Divisional Officer (Shah Nawaz Khan) thereupon instituted and carried out an inquest under S. 174 of the Criminal P. C. He examined the doctor and other persons and also examined the Subedar.

On the 1st September 1925 Karam Khan had instituted a complaint against the Subedar and two other persons charging them with the murder of his son Gulab Khan. This complaint was sent to the Sub-Divisional Officer for disposal. Acting under S. 202 of the Criminal P. C. he proceeded to examine three witnesses tendered by Karam Khan, but in the absence of the Subedar and the other persons accused. Having done this, on the 27th October 1925 he proceeded to record what he calls a "verdict" in which he discusses the circumstances under which Gulab Khan met his death and finds that the Subedar acted in the exercise of his right of self-defence when he killed him. He then proceeds to consider in the same "verdict" or order the case as presented by Karam Khan, discusses the evidence of the three witnesses examined by him and then concludes as follows:

> With these facts I hold that Gulab Khan was not killed when he was asleep. On the other hand he was killed when he made a preparation to assault and kill the Subedar. In other words my verdict is that the Subedar was justified in killing Gulab Khan and he has therefore committed no offence.

Although wrongly described as a 'verdict' this may be regarded as an order dismissing the complaint under S. 203 of the Criminal P. C. Treating it as such Karam Khan moved the Sessions Court on the revision side praying that the order of discharge be set aside and the present accused tried before a competent Court. This application was filed on the 25th November 1925 and rejected by the learned Sessions Judge on the 30th November 1925. Karam Khan then, on the 6th of May 1926 moved this Court under S. 439 of the Criminal P. C., objecting to the procedure adopted and praying that the order of discharge should be set aside.

Now a Magistrate is empowered to hold an enquiry into a complaint of an offence in order to ascertain whether there is sufficient foundation for it to issue process against the person or persons complained against. In the present case the Magistrate clearly acted in the exercise of these powers under S. 202, Criminal P. C. He allowed the complainant to produce such evidence in support of his complaint as he wished to produce, and after a consideration of that evidence came to the conclusion that that evidence was so wholly worthy of credence as to warrant his taking no further action in the matter. Where the Magistrate erred was in not keeping the proceedings under S. 174, Criminal P. C. more distinct from the proceedings taken on the complaint; and had less time elapsed before this Court was moved, I might have considered it advisable to direct a fresh enquiry under S. 202, Criminal P. C.

As has been pointed out above, however, it will be seen that after the refusal of the learned Sessions Judge, on the 30th November 1925, to interfere with the Magistrate's order, no steps were taken till the 6th May 1926 when this petition was presented. No doubt this lapse of time alone would not be necessarily sufficient to refuse to take action, but there are certain other considera-

tions that cannot be ignored. The story set out in the complaint has been considered and has been disbelieved by the Magistrate; indeed so strong a view was taken by the Magistrate that he did not consider it necessary to issue process to obtain the presence of the persons complained against in his Court. The story itself as set out is most unconvincing and it is clear that the deceased did not meet his death in the manner alleged by the complainant. The fact too that proceedings were taken properly under S. 174 Criminal P. C., cannot be lost sight of. After careful consideration of all the circumstances, therefore, I do not aee that any good purpose would be served by re-opening of this matter at this stage and I therefore decline to interfere and dismiss this petition.

Appeal dismissed.

A. I. R. 1927 Lahore 32

ABDUL RAOOF, J.

Santa Singh and *others*—Defendants—Appellants.

v.

Narain Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1032 of 1920, Decided on 22nd October 1924, from a decree of the District Judge, Amritsar, D/- 2nd February 1920.

Adverse possession—Suit for ejectment by plaintiff alleging defendant to be tenant—Tenant denying tenancy and pleading adverse possession—Plaintiffs' title established—Defendant must prove his possession for 12 *years—Plaintiff need not prove his possession within* 12 *years of suit.*

Where in a suit for ejectment on the ground that the defendant was a tenant, the defendant denies that he is a tenant and pleads adverse possession, but plaintiff's title is established, it is for the defendant to prove adverse possession for 12 years and if he fails to prove that, the plaintiff will succeed merely on his prima facie title as landlord. It is not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit : 41 *All.* 669, *Foll.* [P 32 C 2]

Niaz Muhammad—for Appellants.

Harcharan Das Bhalla and *Anant Ram* for *Mehr Chand*—for Respondents.

Judgment.—Upon the findings recorded by the lower appellate Court the facts stand as follows : That the plaintiff is the owner of the house in dispute, that Ghasita did not take possession of the house as plaintiff's tenant, and that the appellants were not the sub-tenants of Ghasita. The result is that the plaintiff's allegation as to the tenancy of Ghasita and the sub-tenancy of the appellants has not been made good. The appellants consequently must be treated as trespassers. The lower appellate Court has returned no finding on the third issue. That issue was remitted because I was then of the opinion that if the tenancy of Ghasita was not established the plaintiff would have to prove possession within 12 years. That view appears to be wrong. The law on the subject has been laid down in the case of *Jai Chand* v. *Girwar Singh* (1), in which the various rulings bearing on the point have been considered and it has been held that, under the circumstances similar to those of the present case, if a plaintiff has established his title it lies upon the defendant who alleges adverse possession to establish his possession for more than 12 years. The rule is thus summed up in the head-note of the Allahabad case.

The plaintiff who was the zemindar, sued to eject the defendant from certain land within the ambit of the plaintiff's zemindari, alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee, and claimed that he had acquired a title to the land in suit by adverse possession. The defendant, however, failed to prove that he had been in adverse possession of the land for more than 12 years. *Held*, that the plaintiff was entitled to succeed simply on the strength of his prima facie title as a zemindar. It was not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit.

On the question of defendants' possession both the Courts below have concurrently held that the defendants had admitted the title of the plaintiff in 1915, and that it was not open to them to claim title by adverse possession.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1919] 41 All. 669=52 I. C. 360=17 A.L.J 814.

A. I. R. 1927 Lahore 33

BROADWAY AND FFORDE, J.J.

Karman—Defendant—Appellant.

v.

Fazal Hussain and *others*—Plaintiffs—Respondents.

Second Appeal No. 690 of 1922, Decided on 23rd March 1926, from a decree of the Addl. Dist. J., Jhelum, D/- 14th November 1921.

Minor—Alienation by guardian—Alienation to pay time-barred debts of minor is not justified.

The payment of the barred debts on behalf of minors cannot be regarded as being beneficial to the minors and will not justify an alienation of minors' property to pay off those debts.

[P. 33, C. 2]

Niaz Muhammad—for Appellant.

Nanak Chand—for Respondents.

Judgment.—In April 1914 one Karman bought one kanal of land. At the time of mutation a man of the name of Muhammad Khan was present and assented to the sale on behalf of the vendor.

In 1919 Fazal Hussain, Karamat Hussain and their minor brother Sardar Khan instituted a suit against the said Karman and Muhammad Khan for possession of that one kanal of land. It was averred that Muhammad Khan had purported to sell the land which belonged to the plaintiffs and that Muhammad Khan had no authority to do so. The defendants pleaded that the sale had been effected by Fazal Hussain himself on behalf of himself and his two brothers who were minors and that owing to Fazal Hussain's absence Muhammad Khan had represented him at the time of mutation. It was further pleaded that the sale in question had been effected to pay off certain debts due to the vendee Karman himself as he had paid off certain other debts due by the estate of the plaintiffs' father and that this sale was, therefore, for the benefit of the minors.

The trial Court found that Fazal Hussain had actually sold the land for himself and his two minor brothers and that the sale was not for the benefit of the minors who were granted a decree for possession of their share of the land on payment of Rs. 190. Against this decree both parties preferred appeals, Karman urging that the sale transaction was for the benefit of the minors and that, therefore, should be upheld in its entirety, and the plaintiffs urging in their appeal that the sale had really been effected by Muhammad Khan and not by them. The lower appellate Court found against the plaintiffs and in agreement with the trial Court held that the sale had been effected by Fazal Hussain. It was held, however, that the sale was not for the benefit of the minors and that, therefore, they were entitled to possession of their respective shares without any payment whatever. A decree in those terms was granted to them. Against this decree both sides have again appealed. In the appeal by the plaintiffs Mr. Nanak Chand has frankly and properly admitted that the question is purely one of fact and it is, therefore, dismissed.

In the appeal by Karman it has been contended by Mr. Niaz Muhammad that the learned District Judge has taken an erroneous view as to the admissibility of a certain mortgage. It appears that in 1906 about 15 kanals of land, including the land now in question, had been mortgaged with possession to Karman and the money advanced by Karman had been utilized to pay off certain debts due by the father of the plaintiffs. The learned District Judge has found that inasmuch as this mortgage had not been duly registered it was inadmissible for any purpose whatsoever and could not be admitted as creating any charge on the property. This view is clearly correct. The document in question not having been registered could not create any charge on the land which it purported to mortgage. Mr. Niaz Muhammad, however, contended that it could be used in order to prove the existence of a debt and that, therefore, the sale should have been held for the benefit of the minors as the money raised by the sale was used for the payment of this mortgage debt. Now, inasmuch as the mortgage could not be proved as a mortgage it is perfectly clear to my mind that at the date of the sale there was no debt due by the estate of the plaintiffs' father which could be enforced against the minors. In my opinion the payment of the barred debt on behalf of minors cannot be regarded as being beneficial to the minors and, therefore, agreeing with the view taken by the learned District Judge, I would dismiss this appeal. In the circumstances I would leave the parties to bear their own costs in this Court.

Appeal dismissed.

A. I. R. 1927 Lahore 34

SHADI LAL, C. J.

Emperor

v.

Tej Ram—Accused—Respondent.

Criminal Reference No. 1673 of 1925, Decided on 23rd December 1925, made by the Dist. Mag., Gurgaon, on 8th October 1925.

Criminal P.C., as amended by Act, 18 of 1923, S. 439, sub-S. (6)—High Court is converted into Court of appeal against conviction.

The effect of the enactment of this sub-section is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of appeal against conviction. [P 34, C 2]

C. H. Carden Noad—for the Crown.

Shamair Chand—for Respondent.

Shadi Lal, C. J.—On the 15th August 1924, two boxes containing various articles of merchandise were consigned from Delhi to Rewari, and, when the consignment arrived at Rewari, the consignee Tej Ram represented to the stationmaster that one of the boxes had been tampered with. Thereupon, the latter asked Tej Ram to produce the original beejak (invoice) to enable him to give an "open delivery" of the consignment. The invoice Ex. P. C., was accordingly produced by Tej Ram, and the goods were delivered to him. A list of the articles alleged to have been lost was prepared by the stationmaster, and on the strength of that list the consignee made a claim for the recovery of their value. The railway authorities, however, considered the claim to be false, with the result that Tej Ram was prosecuted for an attempt to cheat the Railway Company and also for using as genuine a forged document. The trial Magistrate has acquitted the accused of an attempt to cheat, but has convicted him under S. 471 read with S. 468, Indian Penal Code, and sentenced him to imprisonment till the rising of the Court and a fine of Rs. 150.

The District Magistrate has made a belated reference to this Court recommending that the sentence be enhanced, and Mr. Shamair Chand who has appeared for the accused to show cause against enhancement, urges that his client has been wrongly convicted and that the conviction should be set aside.

Now, sub-S. (6) which has been added to S. 439, Criminal Procedure Code, by the Criminal Procedure Code Amendment Act 18 of 1923, provides that

> notwithstanding anything contained in this section, any convicted person, to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction.

The effect of the enactment of this sub-section is that the High Court, when adjudicating upon an application for enhancement of sentence is converted into a Court of appeal against conviction. I must, however, administer the law as I find it.

In view of this express provision of the law, I have heard arguments on the merits and reached the conclusion that there is no satisfactory evidence to show that Ex. P. C., the genuineness of which has been impeached, is a forged document. It is to be observed that this document which is written in Urdu purports to be a list of the articles purchased by the accused at Delhi and bears the signature of Sheikh Karam Ilahi-Rahm Ilahi. Now Karam Ilahi, who was also prosecuted in this case but was subsequently discharged, has appeared as a witness for the prosecution, and he admits that he has a shop bearing the aforesaid name. Another witness for the prosecution, namely Sub-Inspector Gian Chand, who investigated the case, deposes that he was told by Karam Ilahi that the invoice Ex. P. C., was written by his servant Ram Chand. This witness, when answering a question put by the Court at the end of his examination tried to modify the effect of his admission by stating that Karam Ilahi subsequently denied that Ram Chand had written the document. Karam Ilahi himself as a witness for the prosecution disclaims the responsibility of his firm for preparing it, but considering that he was himself prosecuted as an offender and appeared as a witness after his discharge (a somewhat unusual and objectionable procedure) I am not prepared to attach any value to his evidence.

It may, therefore, be taken as proved that Ex. P.C., was written by Ram Chand on behalf of Karam Ilahi-Rahm Ilahi and the evidence also shows that this document consolidates several invoices representing goods purchased by the accused from various shops at Delhi. Karam Ilahi himself admits that Ex. P. M. is

the list of the goods purchased from his own shop, and this list is embodied in Ex. P. C. Now, Ex. P. M., contains all the articles which were alleged to have been lost while the boxes were in the custody of the railway, and it cannot, therefore, be seriously contended that the accused was claiming certain goods which he had never purchased.

The evidence for the prosecution shows that the articles in dispute were purchased by the accused from Karam Ilahi and were correctly entered in Ex. P. C., which was written by Karam Ilahi's servant Ram Chand. These articles have apparently disappeared but the question of the responsibility for their disappearance is a debatable one. One thing, however, is reasonably clear that the document, upon which the charge under S. 471 is founded, has not been proved to be a forged document.

The result of this finding is that the conviction cannot be sustained. Accordingly I set aside the conviction and the sentence and acquit the accused. The fine, if realized, shall be refunded to him.

Conviction set aside.

A. I. R. 1927 Lahore 35

COLDSTREAM, J.

Hari Shankar and *another*—Plaintiffs—Petitioners.

v.

Nazir Khan and *others*—Defendants—Respondents.

Civil Reference No. 18 of 1926, Decided on 4th October 1926, made by the Senior Sub-J., Rohtak, D/- 19th and 20th May 1926.

(a) Punjab Tenancy Act, Ss. 4 (5) and 50—"Tenant" in S. 50 means tenant who having been tenant, has been dispossessed.

Whatever be the meaning of "tenant" elsewhere in the Act the word "tenant" in S. 50 means a person who having been a tenant has been dispossessed. [P. 35, C. 2]

(b) Punjab Tenancy Act, S. 77 (3), Pro.—Jurisdiction.

Where one of the claims in the suit can be determined only by the revenue Court the suit as a whole should be heard by a revenue Court. [P. 36, C. 1]

Shamair Chand—for Petitioners.
Ghulam Rasul—for Respondents.

Order.—The plaintiffs in this suit from which this reference arises were tenants of some land under the defendants and were ejected on 19th May 1924, after service of notice under S. 45 of the Punjab Tenancy Act effected in 1923, no suit having been brought by them to contest their liability to ejectment. On 29th May 1924 they instituted a suit for possession of the land on the grounds, (1) that they were permanent lessees and (2) that they were owners. The suit was tried by the Subordinate Judge, Third Class, Rohtak, and dismissed on the merits. The plaintiffs appealed to the Senior Subordinate Judge who took up the question of jurisdiction and held that the suit was triable by a revenue Court under S. 77 (3), second group (g), so far as it was based on the plea of tenancy, and was also so triable (for reasons not clearly or convincingly stated) so far as the claim was bassed on the plea of ownership. He has accordingly submitted the case to this Court under S. 100 of the Punjab Tenancy Act.

In this Court Mr. Shamair Chand has opposed the registration of the civil Court's decree in a revenue court. He relies on the Full Bench ruling in *Parman* v. *Lhassu* (1) and contends that a person who has been dispossessed cannot be said to "hold land" as a person must do in order to be a tenant within the meaning of the definition in S. 4 (5) of the Tenancy Act. The full circumstances of the case dealt with in the ruling cited are not stated in the judgment, but it would appear that the suit in that case was not one which could have been brought under S. 50 of the Tenancy Act. As regards the arguments based on the definition of "tenant" in the Act it is clear from the opening words of S. 4 that the definition in Cl. (5) of the section is not applicable where there is something repugnant in the context. Whatever be the meaning of "tenant" elsewhere in the Act there is no doubt in my mind that "tenant" in S. 50 means a person who having been a tenant has been dispossessed, etc. The suit in this case was brought within a year from the date of dispossession and whether it was expressly stated to be "under S. 50" or not, was clearly such a suit as was excluded from the jurisdiction of the civil

(1) [1919] 49 P. R. 1919=51 I. C. 443.

Court by S. 77 (3) (g). I have examined numerous other rulings to which learned counsel on both sides have referred dealing with the question of jurisdiction under the provisions of S. 77: but none of these appears to me to deal with a case like the present which falls, as explained above, clearly within the express scope of S. 50.

So much for the claim based on tenancy. As regards the plea of ownership the proviso in S. 77 (3) appears to be clear to the effect that as, in view of the provisions of S. 77 (3) (g), one of the claims in the suit could be determined only by the revenue Court, the suit as a whole, had the question of jurisdiction been considered and dealt with properly, should have been heard by a revenue Court.

A perusal of the record shows that there has been no prejudice by the mistake as to jurisdiction nor does Mr. Shamair Chand object to the registration of the decree in a revenue Court on the ground of prejudice. The suit was obviously determined in good faith. I order, accordingly, that the submitted decree dated 2nd January 1926, be registered in the Court of an Assistant Collector, First Grade, and the memorandum of appeal be returned to the appellants for presentation to the proper Court.

Order accordingly.

A. I. R. 1927 Lahore 36

CAMPBELL, J.

Lal Din and *others*—Defendants—Appellants.

v.

Abdul Ghani and *another*—Plaintiffs—Respondents.

Second Appeal No. 1393 of 1926, Decided on 8th October 1926, from the decree of the Dist. J., Rawalpindi, D/- 5th March 1926.

Practice—Pleadings—Relief—Plaintiff claiming right on an easement—Court cannot make out a new case and give relief on the ground of easement of necessity.

It is not open to a Court to make a new case for a plaintiff which does not arise in the pleadings and give him relief on the basis of an easement of necessity when he fails to establish his claim as to a right on an easement. [P 36, C 2]

Nand Lal—for Appellants.

Aziz Ahmed—for Respondents.

Judgment.—The suit was by Hayat for a permanent injunction against Lal Din and Gaman requiring them to demolish a wall built in front of the plaintiff's door and to allow the plaintiff his former facilities for entrance by the door. The allegation of the plaint was that the plaintiff for 30 years had used the way marked C D on the plan Ex. X to enter his house marked M by the door marked A, and that the defendant had closed this means of entry by erecting a wall immediately in front of the door A.

The trial Court found that the land on which the wall was constructed belonged to the defendants, and that the plaintiff had proved no right of easement in respect of the ground over which he alleged his right of passage. The Court held that the plaintiff was not entitled to the injunction asked for in the plaint, but on the strength of a statement made by one of the witnesses Sultan, that formerly the plaintiff had a door at the point marked P on the plan X and had closed it up eight or nine years before the suit on opening the door at A, the Court held that the plaintiff should be allowed to open a fresh door at P as an easement of necessity. The plaintiff was given a decree for an injunction that the defendants should not prohibit the plaintiff, going to his house along C D to the width of five feet up to the point P, and should not interfere with the opening of a new door at the point P, and it was ordered further that the plaintiff should close his present door at A.

This decree was upheld on appeal by the District Court. On second appeal it is objected that the Court should not have entered into the question of another door for the plaintiff, and should merely have dismissed the suit, when he failed to establish the claim which he made.

This contention has force. The question of another door opening on to the defendant's land did not arise out of the pleadings, and no decree should be passed in respect of it. The plaintiff should be left to take what steps he may desire to take to provide himself with another entrance, and if a question relating to a new entrance should come before a Court hereafter, it will be decided on its own peculiar merits. The plaintiff asked for nothing in his plaint except an injunction regarding the wall and the door at A, and when he failed in respect of these

matters, the suit should have been dismissed without any further order being passed.

I accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

A. I. R. 1927 Lahore 37

BROADWAY AND ZAFAR ALI, JJ.

Narain Singh and *others*—Judgment-debtors—Appellants.

v.

Bachan Singh and *others*—Decree-holders—Respondents.

Second Appeal No. 891 of 1926, Decided on 26th October 1926, from the order of the Addl. Dist. J., Ferozepur, D/- 21st December 1925.

Civil P. C., S. 144—*Decree-holder obtaining possession otherwise than executing the decree but under colour thereof—Decree reversed on appeal—S.* 144 *applies.*

Where a decree-holder under a decree gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof, and that decree is set aside on appeal, the opposite party is clearly entitled to be replaced in possession; 42 *All.* 568, *Foll.*; *A. I. R.* 1924 *Cal.* 769, *Dist.* [P 38, C 1]

Abdul Aziz for *Nand Lal*—for Appellants.

Jagan Nath Bhandari—for Respondents.

Broadway, J.—One Mt. Narain Kaur instituted a suit against Bachan Singh and Mt. Harnam Kaur for possession of 242 kanals, 11 marlas of land. While the suit was pending Mt. Narain Kaur died, on the 25th August 1920, and Narain Singh and others were brought on to the record as her legal representatives. A decree for possession was granted to the plaintiffs whereupon Bachan Singh and Mt. Harnam Kaur preferred an appeal subsequent to the passing of the decree and while the appeal was pending, the plaintiffs obtained possession of the land in suit from Bachan Singh and Mt. Harnam Kaur but not through the intervention of the Court by way of execution of the decree in their favour. On the 1st June 1922 the appeal referred to above was compromised. Narain Singh, etc., decree-holders were given a decree for possession of half the land in suit and Bachan Singh and Mt. Harnam Kaur were to be given the other half.

The appellate decree was drawn up accordingly in the terms of the compromise. On the 9th January 1925 Bachan Singh and Mt. Harnam Kaur moved the Court under S. 144 of the Civil Procedure Code and asked that they should be replaced in possession of that half of the land in question to which they were entitled and possession of which had been taken from them by Narain Singh and his co-decree-holders. Objection was taken to the applicability of S. 144 of the Civil Procedure Code, it being urged that inasmuch as possession of the land had not been taken from Bachan Singh and Mt. Harnam Kaur through the intervention of the Court, the Court had no power to grant restitution of possession. This contention was given effect to by the first Court, but an appeal by Bachan Singh and Mt. Harnam Kaur was successful in the Court of the Additional District Judge. Narain Singh etc., have now come up in second appeal to this Court and on their behalf we have heard Mr. Abdul Aziz. It has been urged that on a proper interpretation of S. 144 the view of the Court of first instance is correct. S. 144 of the Civil Procedure Code runs as follows:

> Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will, so far as may be, place the parties in the position to which they would have occupied, but for such decree or such part thereof as has been varied or reversed; and for this purpose . . .

In my judgment the interpretation placed on this section by the learned Additional District Judge is correct. On the facts as stated above it would appear that Bachan Singh and Mt. Harnam Kaur surrendered possession of the land in suit because of the decree which had been passed against them. That decree being in existence they apparently thought it unnecessary to oppose any demand made by the decree-holders for possession in accordance with the decree. There can be no doubt that but for the decree Bachan Singh and Mt. Harnam Kaur would not have surrendered possession for which they had been so strenuously fighting. This being the case it seems to me that the Court had power to grant restitution in the present case. In this

view I am supported inter alia by *Surya Dat* v. *Jamna Datt* (1). The learned Judges who decided that case say as follows:

> The Court below has disallowed the application on the sole ground that as Jamna Dat did not take possession in execution of the decree through the Court, the opposite party is not entitled to restitution under S. 144, Civil Procedure Code. It is obvious that under the terms of S. 144, where a decree-holder under a decree gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof, and that decree is set aside on appeal the opposite party is clearly entitled to be replaced in possession.

This is precisely the position in the present case and *Baikuntha Nath Chattoraj* v. *Prosannamayi Debi* (2) referred to by Mr. Abdul Aziz is not in point. There certain articles in the possession of X were taken into the custody of a commissioner appointed by a Court and were later delivered back to X under orders of the Court. Later, the judgment of the High Court having been reversed by His Majesty's Privy Council one Y who was not in possession of the articles before the Commissioner took charge of them applied for restitution of the property to him. It was there held that the properties not being taken out of Y's possession under any decree or order of Court, Y was not entitled to claim restitution.

Next it was urged that as a matter of fact the plaintiffs-appellants had been in posssession of the land in suit even before the decree had been passed in their favour. If this indeed were the case it is obvious that the position would be quite different. This aspect of the case, however, does not appear to have been placed before the Courts below or present in their minds and prima facie, it would appear untenable as there appears to be no reason to doubt that Bachan Singh and Mt. Harnam Kaur were in possession of the entire land in suit during the lifetime of Mt. Narain Kaur; for, as the plaint in the suit clearly shows, Mt. Narain Kaur averred this to be a fact and claimed a decree for possession and this was the suit that was carried on after Mt. Narain Kaur's death by the present plaintiffs-appellants. I would therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) [1920] 42 All. 568=57 I. C. 148=18 A.L.J. 729.

(2) A. I. R. 1924 Cal. 769=51 Cal. 324.

* A. I. R 1927 Lahore 38

JAI LAL, J.

Dit Mal—Applicant—Appellant.

v.

Saudagar Mal and *others*—Defendants—Respondents.

Misc. First Appeal No. 1604 of 1926. Decided on 1st November 1926, from the order of the Dist. J., Gujranwala, D - 21st May 1926.

* *Provincial Insolvency Act* (1920), *S.* 10—*Subsequent arrest will not give right to continue an application made when not under arrest.*

Subsequent arrest of the petitioner does not give him a right to continue an application which did not lie when it was presented, the petitioner not being under arrest at that date.

[P. 38, C. 2]

Parkash Chandra—for Appellant.

Amar Nath Chopra—for Respondents.

Judgment.—Dit Mal, appellant, applied to be adjudicated an insolvent on the ground that his debts amounted to more than Rs. 500 and that he was unable to pay them. The learned District Judge has dismissed his application holding that the debts of the petitioner did not amount to Rs. 500 or more and that he had not satisfied the learned Judge that he was unable to pay them.

This order of the District Judge is attacked on two grounds; (1) that on the evidence produced before him the learned Judge should have held that the debts amounted to more than Rs. 500 and that the applicant was unable to pay them, and (2) that in any case there was an additional ground in support of the petitioner's application at the time when it was dismissed, e. g., that he had been arrested by a civil Court in execution of a decree. It is admitted that on the date of the application the petitioner was not under arrest. His subsequent arrest does not give him a right to continue an application which did not lie when it was presented.

As regards the first objection, the learned Judge held that two of the seven liabilities menticned in the schedule attached to the application for adjudication were fictitious, a matter on which I express no opinion. He gave no definite finding as to the debts alleged to be due to Kalu Mal, Girdhari Lal and Bhag Mal. The petitioner stated that these debts were due, but was not fur-

ther questioned in detail about them. If these debts are added to the debts admittedly due to Saudagar Mal, the total comes to more than Rs. 500. The fact, even if held to be proved, that the petitioner earns Rs. 4 or Rs. 5 a day, does not debar him from being adjudicated an insolvent, as there is no evidence as to his expenses. I hold that a prima facie case has been made out by the petitioner for being adjudicated an insolvent.

I accept the appeal, set aside the order of the District Judge and adjudicate Dit Mal an insolvent. The District Judge will proceed with the further insolvency proceedings in accordance with law. No order as to costs.

Appeal allowed.

A. I. R. 1927 Lahore 39

DALIP SINGH, J.

Sohela and *others*—Plaintiffs—Appellants.

v.

Baggu Singh—Defendant — Respondent.

Second Appeal No. 1100 of 1926, Decided on 12th October 1926, from a decree of the Addl. Dist., J., Ferozepur, D/- 19th January 1926.

Punjab Courts Act, S. 41—Error in law.

Deducing adverse possession from the mere factum of physical possession unaccompanied by any proof of a claim to hold as of right as proprietor is an error in law. [P. 39, C. 2]

G. S. Salariya—for Appellants.

Balwant Rai for *Badri Das*—for Respondent.

Judgment.—In this appeal the plaintiffs sued for possession of a certain land, claiming that this land had been held in occupancy tenancy by one Fateh Singh, the brother of the defendant. Fateh Singh died some 14 years back. His widow has recently re-married and, therefore, lost her rights, and the revenue authorities had wrongly mutated the land in the name of the present defendant. The defendant pleaded that the suit was barred by time, because Mt. Sobhi had got herself married some fifteen years back. The defendant admitted that he was not an heir to Fateh Singh. He asserted, however, adverse possession as a proprietor for more than twelve years. Now it has been found that Mt. Sobhi re-married in 1911. Her own statement at the time of the mutation in favour of the defendant shows that she alleged that she had no connexion whatsoever with the land after her re-marriage. The revenue authorities showed the defendant as a tenant under Mt. Sobhi in 1911-12.

In 1921 the defendant applied to the revenue authorities, asking for a mutation in his favour as occupancy tenant as Mt. Sobhi had not been heard of for fifteen years and he himself was in possession and had been paying the land revenue. The application was rejected by the revenue authorities. In 1924 the defendant again applied to be mutated as an occupancy tenant asserting the re-marriage of Mt. Sobhi. This application was granted and hence the suit. The learned District Judge decided alternatively that either Mt. Sobhi had acquired ownership by adverse possession against the proprietors because when she re-married her right as occupancy tenant ceased to exist and, therefore, her possession must be deemed to be adverse to the proprietors after that date. In view of Mt. Sobhi's own statement that she had had no connexion whatsoever with the land after 1911, I fail to see how this alternative can possibly be said to arise. Secondly, the learned Judge held that if Mt. Sobhi could be held to have abandoned the land since 1911 then the entries in the revenue papers recording the defendant as her tenant up till 1924 were fictitious and, therefore, the defendant had himself acquired adverse possession as a proprietor.

It seems to me that the learned District Judge has erred in law in deducing adverse possession from the mere factum of physical possession unaccompanied by any proof of a claim to hold as of right as proprietor. The entries and the applications taken together show at the most that the defendant, if he asserted anything at all, asserted only a claim to be an occupancy tenant. The earliest application, viz., that of 1921, shows that this claim was made for the first time in 1921. No doubt, in that application the defendant asserted that he had all along been holding as an occupancy tenant, but there is nothing to show that this assertion was correct, and I consider that it is insufficient to rebut

the presumption of truth attaching to the Revenue Records. As for as I can make out it seems that all trace of Mt. Sobhi was lost some time after her re-marriage or shortly before it, and the defendant continued for some time to hold as a tenant under her, and thereafter, when a certain period of time had elapsed, he thought that he could claim as an occupancy tenant because, as his application of 1924 shows, he ascertained that he and Fateh Singh had jointly acquired the land. This claim has, however, been given up in the present suit. In view of this I am unable to hold that the defendant had acquired title of adverse possession whether as proprietor or as an occupancy tenant.

I, therefore, accept the appeal, set aside the order of the learned District Judge and restore the decree of the first Court. The plaintiffs have been somewhat remiss in bringing this action and I, therefore, direct that the parties shall bear their own costs throughout.

Appeal accepted.

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* A. I. R. 1927 Lahore 40

COLDSTREAM, J.

Amin Chand—Judgment-debtor —Appellant.

v.

Karam Chand and *another* — Decree-holders—Respondents.

Miscellaneous Second Appeal No. 2674 of 1925, Decided on 6th October 1925, from an order of the Dist. J., Lyallpur, D/- 5th June 1925.

* *Civil P. C., O. 9, R. 9 — Late arrival of train is a sufficient cause.*

Late arrival of a train, which prevented a party from appearing in Court, which in ordinary circumstances would have arrived in time, is a sufficient cause within R. 9. [P 41 C 1]

Jai Gopal Sethi—for Appellant.
Joti Sarup—for Respondents.

Judgment.—In execution of a decree obtained by Karam Chand some land belonging to Amin Chand was put to sale. The sale was confirmed by the Senior Sub-Judge, Sheikhupura, on the 12th November 1924. Amin Chand filed an appeal in the District Judge's Court at Lyallpur against this order of confirmation. He did not appear on the date fixed, and the appeal was dismissed in default on 16th March 1924. Amin Chand on the next day presented an application for restoration of the appeal stating that the train which he took on the afternoon of the 15th March from Pattoki to Lahore in order to catch the train leaving Lahore for Lyallpur on the same evening was late, and missed connexion with the Lyallpur train at Lahore. The hearing of this application was adjourned from time to time but took place on 5th June 1925, when without recording any statement of parties or calling any evidence, the District Judge rejected the petition with costs.

Amin Chand has filed an appeal in this Court which has been argued by Mr. J. G. Sethi and opposed by Mr. Joti Sarup. The memorandum of appeal is accompanied by an affidavit made by Amin Chand affirming that the Pattoki train which he took missed the Lahore-Lyallpur train at Lahore. The next train for Lyallpur left at 9-30 on the morning of the 16th. The train was due at Lyallpur at 13-55, but according to the memorandum of appeal this did not reach Lyallpur until 3 p. m. The affidavit declares that Amin Chand sent a telegram from Lahore to the District Judge on the 15th asking for his case to be placed late on the list.

The learned District Judge rejected the application on the ground that Amin Chand's pleader should have appeared, that the plea that the appellant missed the connexion has not been made out, that even if he did miss the train, he could have appeared in Court and that he should not have chosen the last train on the 15th from Pattoki. Now it was a perfectly reasonable proceeding for Amin Chand to rely on the 5-59 train from Pattoki on 15th. This train should have arrived in Lahore at 8-5 and given him time until 10-5 to catch Lyallpur train. As regards evidence, apparently no date was fixed for proof, and if the Lahore-Lyallpur train was 1¼ hours late at Lyallpur on the 16th, it was probable enough that Amin Chand could not arrive at the Courts much before 3 p. m.

As regards appearance by the pleader it is stated in the affidavit that the pleader engaged by Amin Chand was engaged only to write the appeal and to conduct the case at Sheikhupura, where

it might have been heard and not to appear at Lyallpur.

In the circumstances I think it will be right to allow Amin Chand an opportunity to prove the truth of his allegations that owing to (1) the lateness of the Pattoki-Lahore train causing him to miss the Lahore-Lyallpur train, and (2) the lateness of the Lahore-Lyallpur train's arrival at Lyallpur, he was prevented from appearing in Court before his appeal had been dismissed and that he had engaged no pleader at Lyallpur. The respondent will, of course, have an opportunity to rebut this evidence.

I think that in the circumstances the respondent should get some costs, if the District Judge's order is set aside and in accepting this appeal, I accordingly make the following order: If the appellant pays into the District Judge's Court at Lyallpur, for payment to Karam Chand, fifty rupees within fifteen days of the date on which the appellant receives notice from the District Judge that the record has been received by the District Judge, then the order appealed against will be considered set aside and the District Judge will hear such evidence as may be produced in support of and against the appellant's application for restoration and pass such order as may be proper and according to law.

The District Judge is directed to inform parties without delay of the date on which he receives this order and the record.

Order accordingly.

A. I. R. 1927 Lahore 41

DALIP SINGH, J.

Sardar Alam and *others*—Defendants—Appellants.

v.

Muhammad Alam and *others*—Plaintiffs—Respondents.

Second Appeal No. 385 of 1926, Decided on 8th October 1926, from the decree of the Dist. J., Jhelum, D/- 3rd November 1925.

Custom (Punjab)—Gift to nephew for services rendered to the exclusion of other nephew—Donee brought up by donor from infancy—Gift was upheld.

A Gujar of Tahsil Kharian, District Gujrat, is entitled to make a gift of his property in favour of one nephew to the exclusion of the other nephew when the donee has been brought up by him from his infancy, and the gift is in lieu of services: 33 *P. R.* 1905, *Rel. on.* [P. 41, C. 2]

M. L. Puri—for Appellants.

N. C. Mehra for *Devi Dial*—for Respondents.

Dalip Singh, J.—The question to be decided in this appeal is whether a Gujar of Tahsil Kharian, District Gujrat, is by custom entitled to make a gift of his property in favour of one nephew to the exclusion of the other nephew when the donee has been brought up by him from his infancy, and the gift is in lieu of services. The trial Court dismissed the suit of the plaintiff asking for a declaration that the alienation would not affect his reversionary rights. The learned District Judge reversed the decision without giving any distinct finding as to whether the donee had been brought up by the donor from his infancy, and whether the gift was in lieu of services or not. I have been through the evidence in the case. It is clear that the donee was brought up from his infancy by the donor who had married his mother, and the donor being lame it is clear that the donee has been rendering him services as deposed to by the witnesses for the defendants. The learned District Judge granted a certificate.

It is true that the onus to justify a gift lies on the donee, but in Rattigan's Customary Law, para 59, Exception 3, it is stated that where the donee is an agnate with a special association with the donor, and the gift is in lieu of services, the custom of allowing such a gift is frequently recognized. In the present case the defendants produced two instances of such gifts, which had remained unchallenged, and in *Sukha* v. *Amira* (1) it is laid down that "even in the case of a gift to donee of the class above mentioned the assent of the heirs is necessary to a valid gift. The principle has less strength, that is to say, is more likely to be rebutted in the case of donees of these classes, but it is not the less an existing principle because it is liable to be rebutted." In this case bearing in mind the general custom and the four instances and *Nur Hasan* v. *Ali Sher* (2) and Exhibit D 1, which is a case in which the onus being put on the donee's con-

(1) [1893] 81 P. R. 1893.
(2) [1905] 33 P. R. 1905.

tending reversioners, it was held that they had failed to discharge this onus, I think it is sufficiently proved that such a gift is valid by custom. I therefore accept the appeal, set aside the decree of the learned District Judge and restore the decree of the trial Court dismissing the plaintiff's suit. There will be no order as to costs throughout.

Appeal accepted.

A. I. R. 1927 Lahore 42

ADDISON, J.

Narain Das—Defendant—Appellant.

v.

Narain Das and *others*—Plaintiffs—Respondents.

Second Appeal No. 662 of 1926, Decided on 12th October 1926, from an order of the Addl. J., Lahore, D. 4th December 1925.

Civil P. C., O. 41, R. 23—Issues framed by trial Court covering all pleadings—Appellate Court should not set up a new case on remand.

Where the issues framed by the trial Court covered all the pleadings and there is no alternative relief prayed, it is not competent for the appellate Court to make a new case for the parties and remand the case. [P. 43, C. 2]

Mehr Chand—for Appellant.

Tirath Ram—for Respondents.

Judgment.—The three plaintiffs sued Narain Das of Wan Radha Ram for Rs. 1,100 due on book accounts. It was alleged that the plaintiffs carried on a firm at Sher-Garh under the name of Dogar Mal-Lachhman Das. That firm had dissolved and the plaintiffs who were the partners thereof, therefore, brought the present suit as individuals. It was stated that the defendant had dealt with the above firm for a long period and had been striking balances in its favour. The last balance was for Rs. 467, which the defendant struck at Sher-Garh on the 24th September 1916. That sum with interest, amounted to Rs. 1,100 for which they sued. The plaintiffs further alleged that they had lost all the bahis, containing the previous accounts of the defendant, and had reported to that effect at the police station. The bahi they produced contained the last balance for Rs. 467 only.

The defendant, Narain Das, stated that he had no knowledge of the existence of any firm called Dogar Mal-Lachhman Das nor did he know whether the plaintiffs were once the partners of the firm. He never dealt with any such firm nor struck any balance in their favour. He had had dealings with Jagu Ram, the son-in-law of Jowala Singh. He pleaded that he had struck the balance in dispute for Rs. 467 not at Sher-Garh as alleged but at Wan Radha Ram in favour of Jagu Ram.

One of the plaintiffs stated before issues were framed that Jowala Singh the father-in-law of Jagu Ram, was his uncle and partner in the firm of Dogar Mal-Lachhman Das, and that they were his heirs. He still asserted that the first entry against the defendant for Rs. 300 in 1911 was made in his favour by the defendant but he admitted that this was done at Wan Radha Ram and not at Sher-Garh as alleged in the plaint.

The two principal issues struck were:

(1) Whether the defendant took upon himself to pay Rs. 300 to the firm Dogar Mal-Lachhman Das on behalf of Nasir-ud-Din and made an entry to that effect in their bahi and has the defendant after that been striking off and on balances within time in plaintiffs' bahis?

(2) Whether the plaintiffs have lost their bahis? If so, what is its effect on the present suit?

The Subordinate Judge found as regards the second issue that the plaintiffs came into Court with a deliberately false story as regards the loss of the bahis. They never had possession of bahis in which the previous accounts were entered and they were produced in Court by Nanak Chand, son of Jagu Ram. In the bahi produced by the plaintiffs it was stated that the account was carried forward from page 24 of the previous bahi and that the previous bahi was produced by Nanak Chand. There was thus never any loss of the previous bahis by the plaintiffs, and their case, as brought to this extent, as also the report at the police station, were false. The plaintiffs were the nephews of Jowala Singh and managed to get possession of one bahi in some way or other, and then concocted the tale about losing the other. This was also held to be the case by the learned District Judge on appeal.

As regards the first issue, the Subordinate Judge held that the first entry for Rs. 300 was made in favour of Jowala

Singh who used to carry on business at Wan Radha Ram and not at Sher-Garh. Subsequently, the balances were struck in 1970 and 1971 and the scribes of those balances deposed that they were in favour of Jagu Ram or Nath, the son-in-law of Jowala Singh. Similarly the scribe of the balance for Rs. 467, in the bahi produced by the plaintiffs, stated, and this balance was also struck by the defendant in favour of Jagu Ram or Nath. The trial Judge further held that Jowala Singh and Jagu Ram or Nath, his son-in-law, worked jointly and that Jowala Singh had nothing to do with the firm of Dogar Mal-Lachhman Das. No outside witness stated that any such firm ever existed. The plaintiffs' own first witness, Muhammad Shafi, gave evidence that the sum of Rs. 300, which the defendant took upon himself to pay on behalf of Nasir-ud-Din was due to Jowala Singh and that the transaction was entered into at Wan Radha Ram. It may be noted that the defendant has paid off the amount in question to Jagu Ram. On these findings the trial Judge dismissed the suit with costs.

On appeal the District Judge agreed with the trial Court as regards the loss of the bahis not having taken place. He further held that the amount of Rs. 300, which Narain Das, defendant, took upon himself to pay on behalf ol Nasir-ud-Din was due to Jowala Singh and not to the firm Dogar Mal-Lachhman Das. He then went on to state :

It was in evidence that Jowala Singh had been living separately from the plaintiffs for a long time, but possibly he might have joined them in the business of the firm. The amount of Rs. 467 in question was due to him. Though in the plaint the plaintiffs alleged that they were the partners of the firm Dogar Mal-Lachhman Das, in his statement before the issues Narain Das alleged that Jowala Singh was also a partner. The question that remains to be determined is whether the plaintiffs were joint in business with Jowala Singh when the liability of this item of Rs. 300 was taken upon himself by the defendant or whether they were separate and whether the plaintiffs were entitled to it in presence of Nanak Chand, Jowala Singh's daughter's son, if they were separate. Consequently, I accept the appeal, and setting aside the lower Court's decree remand the suit for decision on the merits.

The following issues were determined by the lower Court :

(1) Whether Jowala Singh was a partner with the plaintiffs when the liability of the amount of Rs. 300 was taken by the defendant upon himself on behalf of Nasir-ud-Din.

(2) If not are plaintiffs still entitled to the amount claimed ?

(3) If Issue No. 1 goes in plaintiffs' favour is defendant absolved if he paid the debt to Jagan Nath ?

Against this decision the defendant has appealed on the ground that the issues raised in the pleadings had been decided and that a remand under O. 41, R. 23, Civil. P. C., was not legal. Another ground taken was that the District Judge set up a new case for the plaintiffs, which is quite distinct from the one given in the plaint.

It is quite clear that on the pleadings no remand was possible. The issues framed by the trial Court covered all the pleadings. There was no alternative relief prayed for on the ground that the debt was due to Jowala Singh and that the plaintiffs were his heirs. The plaintiffs came into Court on the allegations that the money was due to the firm Dogar Mal-Lachhman Das. They failed to establish on issues properly framed that this was the case and in fact they came into Court on a false allegation as regards the loss of the bahis. It has now been held that the first liability of the defendant was in favour of Jowala Singh and there is no evidence to establish that he has anything to do with the alleged firm. That disposed of the case. I, therefore, accept the appeal and setting aside the order of the learned District Judge, dismiss the suit with costs throughout.

Appeal allowed.

A. I. R. 1927 Lahore 43

DALIP SINGH, J.

Jagan Nath—Petitioner.

v.

Munna Lal and *others*—Respondents.

Civil Revision No. 193 of 1926, Decided on 21st October 1926, from a decree of the Dist. J., Delhi, D/- 16th December 1925.

(*a*) *Limitation Act, S. 5—Two remedies allowed by law—Prosecution of one is good ground for extension of time* (*Obiter*).

When the Code gives two remedies to a person, his prosecution of the one would be a very good ground for extending time for the other. [P. 44, C. 2]

(b) *Civil P. C., S. 115—Refusal to extend time in a fit case for extension—No revision lies—Limitation Act, S. 5.*

No revision lies against an order refusing extension of time under S. 5 where it ought to be extended as at the best it amounts to an error of law: 24 *I. C.* 872, *Foll.* [P. 44, C. 2]

Sardha Ram—for Petitioner.

Shamair Chand—for Respondents.

Judgment.— In this case the petitioner obtanied a decree on a mortgage.

Thereafter a declaratory suit was brought by the respondent alleging that he was the real owner of the mortgaged property. The suit was decreed ex parte and thereafter the present petitioner applied for the setting aside of the ex-parte decree. On the 10th August 1925 this application was dismissed in default under O. 9, R. 8 of the Civil P. C. The plaintiff applied to restore the suit on the same day and put in an affidavit stating that he had been present when the case was called, that he obtained the permission of the Court to call his pleader, that within a few minutes the pleader came, but it was found that in the interval the application had been dismissed in default. The Court dismissed this application in a short order dated the 4th November 1925, holding that he had waited till the last moment for the applicant and his counsel.

The order shows that it was past 3 p. m. when the application was dismissed in default. It was not past 4 p.m. It is not very clear to me what the Court meant by saying that he had waited till the last moment. The order had also not dealt with the specific facts alleged in the affidavit. Thereafter, the plaintiff appealed on the 4th December 1925, to the Court of the District Judge. The learned Judge held that no appeal lay against the order of 4th November 1925, refusing to restore the case. He held that the appealable order, if any, was that of 10th August 1925. But he further held that as the appeal was instituted on 4th December 1925, it was therefore, clearly time-barred. He refused to apply Art. 5 of the Limitation Act on the ground that the appellant had two remedies open to him; i. e., either to appeal or move the lower Court for "review of judgment." The petitioner had chosen the latter course and failed, aud therefore, there was no good reason for extension.

Now it seems to me that the learned District Judge was quite wrong in his view of the law on the point. I should have thought that, ordinarily speaking, when the Code gives two remedies to a person his prosecution of the one would be a very good ground for extending time for the other. But the respondent in the case has raised a preliminary objection that no revision lies because at best, this is only an error of law. Various rulings have been cited by counsel on both sides, but the case that comes nearest to the present is *Thandayuthapani Sethuram* v. *Chinnathal* (1). Following this ruling it seems to me that the preliminary objection must prevail and that I must reluctantly dismiss this application. I make no order as to costs.

Application dismissed.

(1) [1914] 24 I. C. 872.

A. I. R. 1927 Lahore 44

MARTINEAU, J.

Hardwari Mal—Plaintiff—Petitioner.

v.

Munna Lal and *another*—Defendants—Respondents.

Civil Revision Petition No. 564 of 1925, Decided on 22nd April 1926, from a decree of the Senior Sub-J., Gurgaon, D/- 18th May 1925.

Civil P. C., S. 115—Misconstruction of pleadings is ground for revision.

Where a Court proceeds on misunderstanding of the pleadings, revision lies. [P. 45, C. 1]

Shamair Chand—for Petitioner.

Judgment.—The plaintiff in this case sued to recover a sum of money which had been advanced by the firm of which he had been a member, to the first defendant Munna Lal. The other member of the firm had died and the plaintiff impleaded his legal representative Durga Parshad as a defendant. The suit was dismissed by the trial Court whose decision was upheld by the Senior Subordinate Judge on appeal. The plaintiff has applied to this Court for revision.

The learned Senior Subordinate Judge has based his decision on the ground that the plaintiff is seeking to recover the money from the representative of his deceased partner, and that he is not entitled to do this before a rendition of

accounts has taken place. The learned Judge, however, appears to be mistaken in thinking that the plaintiff is claiming the money from Durga Parshad, for in the plaint it was stated that Durga Parshad was impleaded only as a defendant pro forma. It is really Munna Lal from whom the plaintiff is seeking to recover the money, and the lower appellate Court's decision proceeds on a misunderstanding of the claim.

I accordingly accept this application, set aside the decree of the lower appellate Court, and remand the case to that Court for a fresh decision. Costs in this Court will be costs in the case.

Application allowed.

A. I. R. 1927 Lahore 45

ADDISON, J.

Kishna—Plaintiff—Appellant.

v.

Waryaman and *others*—Defendants—Respondents.

Second Appeal No. 484 of 1926, Decided on 21st October 1926, from the decree of the Dist.-J., Ludhiana, D/- 7th November 1925.

Civil P. C., O. 41, R. 23—Document put in, mechanically exhibited without reason in trial Court—Objection to admissibility in second appeal—Appellate Court ordered re-trial.

Where a copy of a registered sale deed was put in by the defendants in the suit, with a list, and it was never afterwards referred to in the trial Court which exhibited the document mechanically and without any reason and objection was taken to its admissibility in second appeal.

Held: that the appeal should be acceptad and in the interests of justice the whole case sent back for re-trial de novo under R. 23. [P 45 C 2]

Nand Lal—for appellant.

J. G. Sethi—for Respondent.

Addison, J.—The plaintiff and defendants are collaterals of one Naraina who died while the latter have taken possession of his land. The plaintiff has sued for a one-third share of this land. The defendants denied that the land was ancestral and further contended that the Will was valid as they had rendered service to the deceased. The issues framed were:

(1) Was the Will declared to be valid and binding and is the point res judicata against the plaintiff? (2) Did Naraina make the Will in favour of the defendants and is it valid? (3) Is the property in suit ancestral?

The Sub-Judge found the property to be ancestral and held that the previous cases did not make the question of execution of the Will res judicata. He further held that there was absolutely no proof that the defendants rendered any service to the testator. For this reason he could not will away his ancestral land. The suit was accordingly decreed.

On appeal a copy of a document Ex. D. 2 was brought to the notice of the learned District Judge. It showed that some 8 bighas pukhta of land had been purchased by Naraina. Relying on this document the District Judge held that all the land could not have been ancestral and, therefore, it must be taken that it was all non-ancestral. He then went on further to find that there was no evidence on the record as regards services rendered by the defendants to the deceased yet the fact that this was mentioned in the (sic) itself coupled with the circumstances of the case was sufficient to establish that service had been rendered. For both reasons he accepted the appeal and dismissed the suit.

On second appeal it was argued before me that Ex. D. 2 was not admissible in evidence. This would have been a good objection to take before the District Judge who has not stated that the appellant did so before him. What seems to have happened was that a copy of a registered sale deed was put in by the defendants in the suit, with a list and that it was never afterwards referred to in the trial Court which exhibited the document mechanically and without any reason. In the circumstances described both counsel agree that the course would be that this appeal should be accepted and in the interests of justice the whole case sent back for retrial de novo under O. 41, R. 23, Civil P. C. I also agree because it may be quite possible for the plaintiff to establish exactly the limits of these eight bighas and he may be even able to establish that they are not included in the suit.

At the same time the second part of Issue No. 2 should be amended as at present it is very vague and does not mention either custom or the allegation that the Will was valid under custom by reason of services having been rendered by the defendants. This appeal is accordingly accepted and the whole case

sent back for re-trial de novo in the light of the above remarks. The Court-fee in this Court will be refunded. Parties will bear their other costs in this Court. Other costs in the cause will abide the event.

Case sent back.

A. I. R. 1927 Lahore 46

ADDISON, J.

Harnam Singh and *another*—Defendants—Appellants.

v.

Jagir Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2680 of 1925, Decided on 19th October 1926, from the decree of the Dist. J., Ferozepur, D/- 9th June 1925.

(a) *Hindu Law—Joint family—Alienation by father—Son's suit challenging alienation is not collusive unless father is the real financier for suit.*

Son's suit challenging an alienation by father cannot be said to be collusive unless it is shown that the father is financing the litigation and is the real plaintiff : *A. I. R.* 1925 *Lah.* 24, *Foll.* [P 46 C 2]

(b) *Hindu Law—Joint family—Alienation—Alienor, a notorious spendthrift—Alienee is not protected by mere recital of necessity.*

Where the borrower is a notorious spendthrift a creditor would not be protected merely by the fact that the money advanced by him was said to be required to pay off antecedent debts, especially when the vendee must have known the character of the vendor : 76 *P. R.* 1917, *Foll.* [P 47 C 1]

Tek Chand—for Appellants.

Sheo Narain—for Respondents.

Judgment.—Jogind Singh, Defendant No. 1, sold 53 bighas 7 biswas of land situate at village Bhagwanpura Tarkhanwala for Rs. 8,700, to Hira Singh, the father of Defendants Nos. 2 and 3. The plaintiffs are the minor sons of the vendor and they instituted this suit through their mother for the usual declaration that the sale being without consideration and necessity should not affect their reversionary rights after the death of their father. It was also alleged that the vendor was a man of bad character and was possessed of a very large estate sufficient for his ordinary requirements. The trial Court held that the suit was collusive, and that both consideration and necessity had been established. It accordingly dismissed the claim.

On appeal the learned District Judge in an exhaustive judgment has held that no collusion had been established and that necessity had also not been made out for any of the items except the first one of Rs. 3,000 which could not be attacked by the plaintiffs as they were not in existence when it was incurred. He accordingly granted the plaintiffs the declaration prayed for, subject to the condition that they would not be entitled to get possession when the succession opened out except on payment of Rupees 3,000. Against the decision the vendee has instituted this second appeal.

The first point argued was that it should have been held that the suit was collusive. There is a clear finding of the District Judge that it was not collusive and it was given on the evidence on the record. The only fact which goes to support this contention is that the vendor is still residing with his sons and his wife. It is contended, however, that the District Judge did not notice that the vendor had gifted to his minor sons 26 bighas and 12 biswas of land. This is mentioned by the District Judge in his judgment, and it must have been before his mind when he came to his conclusion, though he has not repeated this fact when discussing the question of collusion. In any case this gift only shows that the vendor has given his sons the balance of the land which he has not sold or mortgaged, so that he cannot alienate that area. There is no proof that the father is financing the litigation and this is what was held in *Dad* v. *Lal* (1). The sons are entitled to sue, and in the absence of clear proof that the father is the real plaintiff it cannot he held that that the suit is collusive. The decision of the learned District Judge on this point is, therefore, correct.

It was pointed out by the lower appellate Court that the vendor raised some Rs. 4,000 from 1903 to 1908 and Rupees 10,000 from 1908 to 1915, when the sale in dispute was entered into. The father of the vendor died in 1885 leaving three sons. At that time the vendor was three or four years old. One of his brothers died and the share of the vendor was then 138 bighas 14 biswas, that is, about 550 kanals, in village Bhagwanpura and

(1) A. I. R. 1925 Lah. 24=5 Lah. 389.

57 kanals and 14 marlas in Thandewala, another village. The land in Thandewala, however, was mortgaged by all the proprietors including the vendor in 1898 when the vendor was still a minor. The vendor did not marry till June 1908, when the first mortgage for Rs. 3,000, which has been allowed by the District Judge, was entered into. His first son was born in 1909. Subsequently two other sons were born while he has also a minor daughter. The first mortgage by the vendor took place in June 1908, and it was only a year after when the vendor's first son was born. The fact that the reversioners, therefore, did not sue to set aside the first mortgage is not surprising especially as they themselves were for the most part the vendor's creditors. Hira Singh, the vendee, was himself a distant reversioner of the vendor. No adverse conclusion can, therefore, be drawn from the fact that the reversioners did not sue.

Further, the District Judge has clearly held, on the oral evidence combined with the fact that the vendor borrowed something approaching Rs. 14,000 in 12 years, that it has been established that the vendor was a reckless spendthrift. He pointed out that prior to the advances made, which have been disallowed by the District Judge, only 50 bighas out of 138 bighas 14 biswas were under mortgage, so that he still had a considerable area of his land unencumbered. He, therefore, held that as the borrower was a notorious spendthrift, a creditor would not be protected merely by the fact that the money advanced by him was said to be required to pay off antecedent debts, especially, as in the present case, the vendee must have known the character of the vendor. In this respect he followed *Ram Kishen* v. *Hassi* (2), and was justified in doing so. It was for the vendee to prove actual necessity, not only in respect of debts due to himself, but also for those which were due to others. Items Nos. 4, 5 and 6 were paid to third persons, but no attempt was made to prove actual necessity, and that was necessary in the present case. I have no hesitation in agreeing with the findings of the District Judge as regards those items.

Most of the other items were advanced by the vendee himself. He too certainly knew that those debts were contracted in reckless extravagance, and he cannot be protected merely because he was told that the money was required for payment of Government revenue and purchase of bullocks, etc. This leaves Item No. 7 which was paid to one Prem Singh, the mortgagee of the vendor's brother's land. Clearly this was not a necessary purpose as the vendor only obtained a mortgage of the land, and later on had to sell his own land to pay off the sum borrowed to enter into the mortgage.

After a careful consideration of the whole case, I agree with the findings of the learned District Judge and dismiss the appeal with costs.

Appeal dismissed.

(2) [1917] 57 P. W. R. 1917=39 I. C. 191=76 P. R. 1917.

A. I. R. 1927 Lahore 47

HARRISON AND FFORDE, JJ.

Shib Lal and *another* — Plaintiffs — Appellants.

v.

Hukum Chand—Defendant — Respondent.

Second Appeal No. 2590 of 1922, Decided on 12th October 1926, from the decree of the Dist. J., Hissar, D/- 14th August 1922.

Custom (Punjab)—Succession to self-acquired property of father — Aggarwals of Hissar District—Daughter is not excluded by collaterals.

Among the Aggarwal Banias of Hissar district, there is no custom excluding a daughter from succession to the self-acquired property of her father in the presence of his collaterals.

[P 47 C 2, P 48 C 1]

Tek Chand and *Anant Ram Khosla*—for Appellants.

Badri Das—for Respondent.

Harrison, J.—The plaintiffs being the collaterals of Mangat Rai, deceased, brought this suit claiming possession of a shop and a house, which had been sold by his widow Mt. Chalti. They were met by the plea that they had no locus standi in the presence of the two daughters of Mangat Rai. To this they pleaded a very special custom to the effect that amongst the Aggarwal Banias of the Hissar district daughters do not succeed to the self-acquired property of their fathers. (The finding of both the lower Courts is

that the property in suit is self-acquired). Both Courts held that the plaintiffs had wholly failed to prove the custom. A certificate has been given by the District Judge and on this certificate a second appeal has been presented to us. The grounds agitate the question whether the property is ancestral or not, but counsel has not addressed us upon it. The question cannot be raised as there is a clear finding of fact by the District Judge.

The only point, therefore, for decision is whether the plaintiffs have succeeded in establishing this custom. On this point I have nothing to add to the clear and well-reasoned judgment of the learned District Judge. I adopt the reasoning contained in that judgment throughout and agree with him and the trial Court in finding that the plaintiffs have failed lamentably to establish this peculiar custom. I have only to add that in the circumstances of the case there was no sufficient reason for granting a certificate. The evidence was not conflicting or uncertain and there was no substantial doubt regarding the existence of the custom pleaded as is shown by the judgment itself, and, under the circumstances the certificate should not have been granted.

I dismiss the appeal with costs.

Fforde, J.—I agree.

Appeal dismissed.

A. I. R. 1927 Lahore 48

ADDISON, J.

Mt. Indi—Defendent—Appellant.

v.

Jaimal Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 794 of 1926, Decided on 6th October 1926, from the decree of the Addl. Dist. J., Ferozepore, D/- 28th January 1926.

Evidence Act, S. 114—Long cohabitation—Presumption of marriage arises but it does not arise when connexion begins in concubinage—Woman unmarried at certain date continues to be so until contrary is proved.

A presumption of marriage may arise from long cohabitation, but if it is known that the connexion started in mere concubinage this presumption cannot arise. Relations or conditions of persons or things once shown to exist are presumed to continue until the contrary is proved. If it is proved that a certain woman was unmarried at a certain date the presumption is that she continues so until proved to have married and therefore when there is no proof of any marriage but there is a judicial decision that she was not married but was living as a concubine, there can be no presumption of marriage.

[P 48 C 2, P 49 C 1]

Nand Lal—for Appellant.

J. N. Bhandari—for Respondents.

Addison, J.—One Gurdiala died in 1912 and was succeeded by his widow Mt. Indi, defendant. At the end of 1913 the brothers of Gurdiala instituted a suit for possession of the land left by him on the ground that Mt. Indi had contracted illict intimacy with Hari Singh, their cousin, and later had married him in the Karewa form and given birth to a daughter by him. That suit was decided in 1914 when it was held that Mt. Indi had contracted an intimacy with Hari Singh, but that it was not proved that she had married him. It was further held that mere unchastity was insufficient to cause forfeiture of her estate and that, even if the Karewa marriage was held established, that also would not cause a forfeiture, as the alleged husband was a cousin of her first husband.

It was thus judicially held that there was no marriage up to 1914. Mt. Indi, however, continued with Hari Singh and a son was born to them. Hari Singh then died on the 11th August 1918 and his land was mutated in favour of one Bachittar Singh and of the son born to Hari Singh and Mt. Indi. One brother of Mt. Indi's deceased husband and his nephew have now instituted another suit on the ground that Mt. Indi contracted a marriage with Hari Singh in December 1914 after the first suit had been dismissed. The Court held that no Karewa had been proved and that the suit was barred by time as well as by the principles of res judicata. On appeal the learned District Judge held that there was no proof of a subsequent Karewa, but that marriage could be presumed on the basis of long cohabitation. He also found that the suit was not barred by time or by the principle of res judicata. He accordingly decreed the claim.

It is true that a presumption of marriage may arise from long cohabitation, but if it is known that the connexion started in mere concubinage this presump-

tion cannot arise. Relations or conditions of persons or things once shown to exist are presumed to continue until the contrary is proved: see the Commentary in Woodroffe and Ameer Ali's Law of Evidence at the top of page 778 and footnote No. (4) on the same page which is to the effect that if it is proved that F was an unmarried woman at a certain date the presumption is that she continues so until proved to have married. In the present case admittedly there is no proof of any marriage. and there is a judicial decision, between the same parties or their representatives that she was not married in 1914, but was living as a concubine of Hari Singh then. There can, therefore, be no presumption of marriage.

The fact that the son of Mt. Indi was allowed to succeed along with another son of Hari Singh does not advance the case in any way and this state of affairs may still be challenged.

It is clear, therefore, that it must be held that there was no remarriage of Mt. Indi. That being the case the previous litigation is a bar to any relief. I accordingly accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

A. I. R. 1927 Lahore 49

BROADWAY AND FFORDE, JJ.

Nur Din—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 2797 of 1922, Decided on 14th July 1926, from the decree of the Dist. J., Lahore, D/- 11th August 1922.

Civil P. C., O. 41, R. 1—Appeal from award under Land Acquisition Act—Court cannot dispense with copy of award.

It is within the powers of the appellate Court to dispense with a copy of the judgment, but not with a copy of the decree.

Where several references under the Land Acquisition Act are disposed of in an award in one reference and reference is made to that award in other references and the memorandum of appeal is not accompanied with the copy of the principal award.

Held: that the failure is fatal to the appeal, *A.I.R.* 1925 *Lah.* 438; *C.A.* 2096 and 113 of 1923, *Foll.* [P 49 C 2, P 50 C 1]

Ralli and *Gopal Chand*—for Appellant.

Govt. Advocate and *Mehr Chand Mahajan*—for Respondent.

Broadway, J.—The learned Government Advocate has raised a preliminary objection to the effect that as the memorandum of appeal is not accompanied by a copy of the award the provisions of R. 1 of O. 41 of the Civil P. C. have not been complied with and the appeal must fail.

Briefly, the facts are these. Certain land was acquired by the Government and the Land Acquisition Collector made an award. To this award there were 23 separate objections, each of which was referred to the District Judge in due course. By the consent of all concerned the evidence recorded in one reference was to be considered as evidence in all and the learned District Judge made his award.

On each of the separate references he noted as follows:

Application dismissed. See my judgment in Land Acquisition Case No. 16 of 1920, decided today.

The present appeal is in one of the references where the above appears and a copy of this note alone was filed with the memorandum of appeal.

Order 41, R. 1, requires that:

Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court. The memorandum shall be accompanied by a copy of the decree appealed from, and (unless the appellate Court dispense therewith) of the judgment on which it is founded.

Section 26 of the Land Acquisition Act provides that the award of a District Judge shall be "deemed to be a decree" and the "reasons" for the award to be a "judgment" within the meaning of the Civil P.C. It is clear that the learned District Judge made one award dealing with all the references. This award was attached to the record of Land Acquisition Case No. 16 of 1920 and a reference to it made, as set out above, in each of the others.

It is only this award that can be deemed to be the decree and a copy of that was not (and has not yet been) attached to the memorandum of appeal. As was held in *Mubarak Ali Shah* v. *Secretary of State* (1) such a defect is fatal to the appeal. See also *Uttam*

(1) A. I. R. 1925 Lah. 438=6 Lah. 218.

Chand etc. v. *Secretary of State* (C. A. 2096 of 1923), decided on 9-3-1926 and *Mushtaq Ahmad* v. *Secretary of State*, C. A. No. 113 of 1923, decided on 30-3-25. It was urged that by the use of the words " application dismissed " the District Judge's note became an " award." I am afraid I am unable to accept this contention as it seems to me clear that the only award was the one to which reference was made in this note. All that the learned District Judge intended to and did, do was to draw attention to the fact that by an award to be found on the record of Land Acquisition Case No. 16 of 1920 the objection had been disposed of i. e., had been dismissed. It was this award alone that could be be deemed to be the decree and a copy of it should have accompanied the memorandum of appeal.

It is within the powers of the appellate Court to dispense with a copy of the judgment, but not with a copy of the decree. This appeal therefore fails and is dismissed.

Fforde, J.—I agree.

Appeal dismissed.

A. I. R. 1927 Lahore 50

DALIP SINGH, J.

Firm Sheikh Ahmad-Mohammad Amin and *another*—Plaintiffs—Appellants.

v.

Firm Bachu Lal and *Gajandhar Lal*—Defendants—Respondents.

Second Appeal No. 729 of 1926, Decided on 21st October 1926, from a decree of the Dist. J., Jhelum, D'- 3rd December 1925.

Contract Act, S. 6—Offer by letter will be deemed to have reached addressee when letter is delivered at his residence.

Offer by letter must be deemed to have reached the addressee when the letter is delivered at the addressee's residence. Any delay in addressee actually receiving it in his hands caused owing to his failure to make proper arrangements to receive communications by him will not be considered. [P. 50, C. 2]

Muhammad Alam—for Appellants.

Sundar Das—for Respondents.

Judgment.—The plaintiffs in this case sued for damages for breach of contract for non-supply of 528 canisters of Mahua oil by the defendants. The defendants are commission agents and they offered to buy oil for the plaintiffs, at the same time informing them of the rate. The plaintiffs then after some negotiations finally on the 8th March 1921, accepted an offer of the defendants dated 26th February 1921, to supply 528 canisters at the rate of Rs. 16 per maund. Both the Courts below dismissed the plaintiffs' suit on various grounds. The appellate Court held that it was a condition precedent to the contract that the plaintiffs should pay the money to the defendants and as the plaintiffs had failed to pay the money the defendants were not bound to supply the oil.

Dr. Muhammad Alam for the appellants before me has raised two contentions. He firstly urges that the contract was completed on the 25th February 1921, because on that date the plaintiffs accepted an offer of the defendants dated the 24th February 1921, and, therefore, all things that happened thereafter are irrelevant to the consideration of the terms of the contract. I do not consider in the circumstances of this case that the wire of the defendants dated the 24th February 1921, was an offer at all and the plaintiffs' own pleadings show clearly that the plaintiffs themselves only considered the offer of the 26th February 1921, to be the offer which was accepted. In view of this I do not consider it necessary to discuss this point further.

The second point raised by Dr. Muhammad Alam has more force in it. But reading Exs. P-6 and P-5 together it seems to me that the defendants did really intend that the money should be paid before the plaintiffs could call upon them to supply Mahua oil; and, secondly, that the defendants were entitled to consider their offer on the 26th February, revoked when the plaintiffs did not reply within 24 hours as desired by the defendants. Dr. Muhammad Alam urges that the 24 hours must be held to run from the date of the actual receipt of the defendant's letter. It appears that on the 1st March 1921, the defendants sent this registered letter, i. e., Ex. P-5 which duly reached the plaintiff's residence on the 4th March 1921. Owing, however, to the absence of the plaintiffs the letter was not delivered till the 8th March 1921. The delay was due obviously to the plaintiffs not making proper arrangements to receive communications ad-

dressed to them and, therefore, I consider that the defendants were entitled to close the offer 24 hours after the letter had reached the plaintiffs' residence. In the circumstances, therefore, I dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1927 Lahore 51

FORDE AND ADDISON, JJ.

Abdul Ghani—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 817 of 1926, Decided on 4th November 1926, from the order of the S. J., Karnal, D/- 10th July 1926.

Penal Code, S. 302—Accused convicted for murder—Evidence consisting only of statements of witnesses as to peculiar demeanour of accused—Conviction was set aside.

Where the evidence on which the accused has been convicted consists mainly of statements made by witnesses, suggesting that his demeanour was somewhat too calm when attention was drawn to the fact that his hut of grass was burning which had been set on fire and in which the deceased was found lying dead and a gun lying between his legs.

Held: that his conviction is not sustainable and must be set aside. [P 51 C 2]

Shamair Chand—for Appellant.

R. C. Soni—for the Crown.

Fforde, J.—Shakur, Bullan, and Mahbub, and the appellant Abdul Ghani, have been tried together for the murder of one Mubin. Shakur, Bullan and Mahbub have been acquitted and Abdul Ghani has been convicted, the assessors disagreeing with the learned trial Judge.

The facts are that on the 14th April 1925, Mubin was found between 7 and 8 p. m. lying dead in a hut of grass which had been set on fire. A gun was lying between his legs. The medical evidence is that he probably died from a gunshot wound fired close to the left side of the neck in front, the shot emerging at the left parietal region. There is some discrepancy between the Crown witnesses as to whether this particular gun had actually been fired or not even whether it was capable of being fired at all. The Sub-Inspector of Police who made the investigation was of opinion that the gun could have been fired whereas the medical witness who was not an expert qualified to give an opinion with regard to this, volunteered that, judging from the condition in which he saw it he was of opinion that it could not have been fired. It must be borne in mind, however, in considering this evidence that this gun had been lying in a hut which had been burnt by fire and which also had water thrown over it. It seems hardly possible to state what was the condition of that weapon before it was exposed to both fire and water.

The evidence on which the appellant has been convicted consists mainly of statements made by witnesses, suggesting that his demeanour was somewhat too calm when attention was drawn to the fact that his hut of grass was burning. One of these witnesses had not made his statement to the police until ten days after the event. In any event it seems to me that quite a disproportinate weight has been given to this class of evidence. After all, if a man sees his hut of grass more or less in full possession of flames it is hard to understand, when it is obvious that he could do nothing to put the flames out why he should not have remained calm. It depends a good deal upon the temperament of the man but it is largely upon his demeanour as testified to by these witnesses that the learned Judge has based his conviction.

The motive alleged is that the deceased who was a servant of the appellant had perverted intercourse with a boy Saddiq and that after some time the boy contracted the same type of intimacy with the appellant, and that thereupon the deceased retaliated by committing an unnatural offence with Akbar, the nephew of the appellant. Owing to these circumstances it is suggested that the appellant murdered Mubin. The learned trial Judge has found and after carefully examining the entire evidence we consider he has found rightly that this motive has not been established. Mr. Shamair Chand for the appellant has suggested that the nature of the wounds upon the dead man, and the fact that he is proved to have quarrelled with his wife and not visited his house for several months coupled with the fact that on the morning of the Id celebrations he was seen going about bare-headed would suggest that he had committed suicide.

Whether he was murdered or whether he committed suicide, we are satisfied upon the evidence in this case that his death has not been legally brought home to the appellant. The learned trial Judge in sentencing the appellant to transportation for life instead of to the death penalty gives his reasons for so doing in the following terms :

As, however, the circumstances under which the murder was committed are not very clear and are somewhat mysterious, I do not think the case is one in which the sentence of death should be passed.

In other words the learned trial Judge seems to have come to the conclusion that as the charge of murder had not been clearly brought home to the appellant it would be safer to sentence him to transportation for life than to sentence him to be hanged. The conviction is clearly not sustainable and must be set aside.

I would accordingly accept the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty. There is also a revision application for enhancing the sentence. Nobody appeared to support this application and in view of the above conclusion this application must be rejected.

Addison, J.—I concur.

Appeal accepted.

A. I. R. 1927 Lahore 52

HARRISON AND DALIP SINGH, JJ.

Mani Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 846 of 1926, Decided on 2nd November 1926, from an order of the S. J., Karnal, D/- 6th July 1926.

Penal Code, S. 84—Unsoundness of mind—Insanity to amount to unsoundness of mind within S. 84 must be such that the person is incapable of understanding the nature of the act.

The mere presence of five circumstances, viz. : (1) the absence of any motive, (2) the absence of secrecy, (3) Multiple murders, (4) want of prearrangement, and (5) want of accomplices, does not fulfil the requirements of S. 84. A man may be suffering from insanity in the sense in which the words would be used by an alienist, but may not be suffering from unsoundness of mind as defined in S. 84. The law recognizes nothing but incapacity to realize the nature of the act, and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing he must always be presumed to intend the consequences of the action he takes. [P. 53, C. 1]

Shamair Chand—for Appellant.

Ram Lal—for the Crown.

Judgment.—The facts of this case are absolutely clear and counsel does not question the correctness of the evidence by which they are proved.

One Mani Ram, a man of 50 years of age, murdered four persons with a gandasa in rapid succession. These were his two nephews aged 4 and 12, Mt. Balam Kaur, the wife of his neighbour, aged 30, and her boy Fatta, aged 4. One Ram Sarup was passing the house of Kirpa, the neighbour, and on hearing cries went in and saw Mani Ram striking Mt. Balam Kuar with a gandasa. He said : "O butcher, what are you doing?" On this Mani Ram dropped the gandasa and ran away, and was caught with the assistance of Sheo Datt and Hardat Singh. On going into the room where the corpse of Mt. Balam Kaur was lying Fatta, her child, was found murdered, and Ram Kishan, the younger nephew of Mani Ram, was lying seriously wounded. This boy was taken to hospital where he died and stated before his death that his uncle had killed him. When they were ready to start for the thana a remark was made that Sarupa, the elder son of the brother Sri Ram, was also missing, and the accused volunteered the information that he had murdered him and thrown him into Nathuwali Johri, where he was found.

Such are the facts and the only point agitated before us is that the very nature of the acts committed establishes that Mani Ram must have been suffering from "unsoundness of mind," in the sense in which the words are used in S. 84 of the Indian Penal Code. Four witnesses were produced for his defence, but their evidence is of no value, and counsel urges that the conduct of Mani Ram coupled with the presence of the five circumstances detailed both in Lyon's Jurisprudence and Modi's Jurisprudence, leads to the irresistible conclusion that he was suffering not only from paralysis of the will, but also from paralysis of the mind in the sense that he was incapable of knowing the nature of the act or that he was doing what was either wrong or con-

trary to law. These five circumstances are:

(1). The absence of any motive.
(2). The absence of secrecy.
(3). Multiple murders.
(4). Want of pre-arrangement.
(5). Want of accomplices.

These five circumstances all do exist in this case, but counsel has been unable to satisfy us that the mere presence of these five circumstances fulfil the requirements of S. 84 of the Indian Penal Code. The words there used are very clear, and it is a commonplace that a man may be suffering from insanity in the sense in which the words would be used by an alienist, but may not be suffering from unsoundness of mind as defined in S. 84. The law recognizes nothing but incapacity to realize the nature of the act, and presumes that where a man's mind or his faculities of ratiocination are sufficiently clear to apprehend what he is doing he must always be presumed to intend the consequences of the action he takes. It is perfectly clear in this case from the conduct of the accused, from the fact that he dropped the gandasa, from the fact that he began to run away, and from the fact that he volunteered the information that he had murdered the elder nephew, that he knew what he was doing and that what he was doing was wrong. We have no option in the matter, but to find that the accused has wholly failed to establish unsoundness of mind. We, therefore, dismiss his appeal and confirm the sentence of death.

Appeal dismissed.

A. I. R. 1927 Lahore 53

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Chet Singh—Defendant—Appellant.

v.

Tarlochan and *others* Plaintiffs an Defendants—Respondents.

Second Appeal No. 2865 of 1922, Decided on 18th November 1926, from the decree of the Dist. J., Gurdaspur, D/-28th June 1922.

(a) *Custom (Punjab —Alienation — Legal necessity.*

Payment of antecedent debt constitutes valid necessity. [P. 3,C. 2]

(b) *Custom (Punjab)—Alienation challenged for want of legal necessity—Two mortgages—Declaratory suit in respect of one only—Decree in respect of other mortgage cannot be given.*

In a suit for a declaratory decree in respect of only one mortgage, challenging it on the ground of want of legal necessity, the plaintiff cannot in the same suit obtain a declaratory decree with respect to an earlier mortgage. [P. 53, C. 2]

H. D. Kumar—for Appellant.
Muhammad Amin—for Respondents.

Judgment.—On the 14th March 1916 one Desu, a Rajput of the Gurdaspur district, mortgaged the land in dispute to Dharm Singh for Rs. 1,400. The plaintiffs who are the reversioners of the mortgagor, have brought the present action for the usual declaration that the alienation shall not effect their reversionary rights of succession after his death.

The question for consideration is whether necessity for the alienation has been established. Now, the Courts below have concurred in holding that Rs. 650 were due to the plaintiffs themselves on the basis of two prior mortgages, and to that extent the alienation has been upheld.

The mortgagor also owed Rs. 600 to Kirpa Ram in whose favour he had executed a mortgage deed on the 18th May 1918. Prima facie the debt due to Kirpa Ram should be regarded as an antecedent debt, and the payment of the antecedent debt constitutes a valid necessity. It is to be observed that this suit was brought for a declaratory decree in respect of only the mortgage in favour of Dharm Singh; and though the plaint is badly drafted, there can be no doubt that the plaintiffs could not in the same suit obtain a declaratory decree with respect to the earlier mortgage. Indeed, Mr. Muhammad Amin for the plaintiff admits that the suit must be treated as one brought for a declaratory decree in respect of the mortgage in favour of Dharm Singh, and it is therefore clear that the debt due to Kirpa Kam was an antecedent debt. The learned counsel for the plaintiffs is unable to invite our attention to any evidence which would show that Kirpa Ram was identified with Dharm Singh and could not be regarded as an antecedent creditor.

The result of the above discussion is that not only Rs. 650 due to the plaintiffs but also Rs. 600 due to Kirpa Ram, must be held to constitute a valid necessity for

making the alienation in question. As to the balance of consideration for the mortgage, we find that Rs. 26 were the cost of registration, and Rs. 124 were paid or promised to be paid to the mortgagor. It is true that no necessity for Rs. 124 has been established, but the amount is less than one-tenth of the total consideration and we do not think that we should interfere with the transaction simply because necessity for a small item has not been proved.

For the aforesaid reasons we accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

✻ A. I. R. 1927 Lahore 54

JAI LAL, J.

Fitzholmes—Accused—Appellant.

v.

The Crown—Opposite Party.

Criminal Appeal No. 453 of 1925, Decided on 3rd November 1925, from the order of the S. J., Ambala, D/- 14th June 1924.

✻ *Criminal P. C., S. 476-B—Appeal against order directing complaint to be made—Time begins from the date of filing the complaint and not from the date of order.*

For an appeal against an order directing a complaint to be made under S. 476-B, time begins to run from the date of the making of the complaint and not from the date of the order directing that a complaint be drawn up.

[P 54, C 2; P 55, C 1]

Badri Das and *Bishen Narain*—for Appellant.

D. R. Sawhny—for the Crown.

Judgment.—This is an appeal under S. 476-B of the Criminal Procedure Code against the action of the District Judge, Ambala, making a complaint under Ss. 193, 465 and 192 of the I. P. C., against the appellant. The learned Public prosecutor, who appeared on behalf of the Crown, raised a preliminary objection that the appeal was barred by time. On the 14th June 1924 the District Judge directed that a complaint be drawn up by the Public Prosecutor and filed against the appellant in the Court of a Magistrate, 1st Class, having jurisdiction and took bail for the appearance of the appellant in Rs. 2,000 with two sureties. In pursuance of this order a complaint was filed by the Public Prosecutor in the Court of the District Magistrate, Ambala, in the beginning of April 1925. The District Magistrate sent the case to the Additional District Magistrate on the 8th April on the same day this appeal was presented in this Court. It is admitted by the counsel on both sides that the ordinary period of appeals to this Court in such cases is two months, but they differ as to the date from which the limitation should begin to run. The learned Public Prosecutor contends that time should run from the 14th June 1924 when the District Judge directed that a complaint be filed against the appellant. The learned counsel for the appellant on the other hand contends that time should run from the date of the making of the complaint and in support of his contention relies upon the provisions of S. 476-B which are as follows:

> Any person * * * against whom such a complaint has been made may appeal to the Court to which such Court is subordinate * * * and the superior Court may thereupon * * * direct the withdrawal of the complaint.

In my opinion the contention of the counsel for the appellant is correct and the appeal is within time. S. 476-B gives a right to appeal to a person against whom a complaint has been made and if such person succeeds on appeal the appellate Court's proper order should be to direct the withdrawal of the complaint. This clearly contemplates that an appeal is to be filed after a complaint has actually been made and not before. The law does not contemplate that any great interval should elapse between the passing of a formal order directing a complaint to be made and the actual making of the same, and, therefore, an appeal is allowed not from the finding of the Court that a complaint should be made but from the complaint itself. This view is further supported by the wording of S. 476 which provides that the Court after such preliminary enquiry, if any, as it thinks necessary may record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any offence referred to in S. 195-(1) (b) and (c) and make a complaint thereof in writing. The person against whom such a finding is recorded is affected by it only when a complaint in pursuance thereof has been made. In my opinion time begins to run from the date

on which the complaint is made. I, therefore, overrule the preliminary objection.

On the merits, I am of opinion that this is not a case in which it was expedient in the interests of justice to order that an enquiry should be made. I have carefully gone though the record of the civil suits out of which these proceedings have arisen and do not consider that the case is sufficiently strong to warrant a conviction. The prosecution will have to depend a good deal on the statement of Waryam Singh at whose instance these proceedings were started. Having regard to the previous relations of this person and the appellant it will not be an easy matter to decide which of them has told the real truth. There are documents on the record and circumstances which to a certain extent lend support to the allegations of the appellant. Such material may not have been found sufficient by the civil Courts to enable them to hold that the appellant had discharged the burden of proof which was on him so far as the civil suits were concerned, but in the criminal case the prosecution will have to prove affirmatively, the falsity of his assertions. I do not think, on the material before me, that they are likely to succeed in this. Moreover in view of the conduct of both the parties it is undesirable that either should, in the present case, be allowed to take advantage over the other by the use of S. 476 of the Criminal P. C.

I might note that in the complaint filed by the Public Prosecutor a number of heads of charges are included which were not mentioned by the District Judge in his order.

I, therefore, set aside the order of the learned District Judge and direct the withdrawal of the complaint filed against the appellant.

Order set aside.

A. I. R. 1927 Lahore 55

ADDISON, J.

The firm Rup Chand-Prithi Chand—Plaintiffs—Petitioners.

v.

Hardayal Mal—Defendant—Respondent.

Civil Revision No. 754 of 1925, Decided on 6th May 1926, from the order of the 4th Cl. Sub-J., Rawalpindi, D/- 30th October 1925.

Civil P. C., O. 9, R. 13—Revision.

Revision should not be allowed against an order setting aside ex-parte decree when the applicant in revision has acquiesced in the order. 25 *P. R.* 1914 and *Lahore C. R.* 160 *of* 1925, *Foll.* [P 55, C 2, P 56, C 1.]

Din Dayal—for Petitioner.

Nand Lal—for Respondent.

Addison, J.—A Rawalpindi firm, through its owner and Manager Tola Ram, sued Hardial Mal, proprietor of a firm in Kashmir, for recovery of Rupees 856-14-0, and obtained an ex-parte decree for Rs. 856-5-9 on the 12th March 1925. This decree was transferred for execution to Kashmir by order dated the 27th March 1925. On the 12th May 1925, the defendant filed an application to set aside the ex-parte decree against him. This was ordered to be done on the 30th October 1925, on payment of costs. Against this order this revision has been filed.

The Subordinate Judge, 4th Class, found that a summons had been sent to the defendant by registered post and that he received it. He further held that this was not due service under O. 5, R. 10. as amended by the Rules Committee of this Court. He then went on to find that the defendant knew that the suit had been instituted but that he did not know that a decree had been passed against him till the 2nd May 1925. For that reason he found that the application was within time. As, however, the defendant was residing in Kashmir it would seem that O. 5, R. 25, Code of Civil Procedure, would apply and that service by post was sufficient.

It was argued on behalf of the respondent that the 16th November 1925 was fixed by the Subordinate Judge, 4th Class, on the 30th October 1925, for payment of the costs and the filing of defendant's pleas. On that date counsel for the parties were certainly present, costs were paid and accepted by plaintiff's counsel, pleas were filed, issues were framed and the 17th February 1926 fixed for evidence. It was not till after all this had been done that this revision was filed here on the 23rd November 1925. In similar circum-stances a Division Bench of this Court held in *Punna Lal* v. *Cowasji* (1) that even if revision lay it was incompetent in view of the petitioner's acquiescence in the

(1) [1914] 157 P. L. R. 1914=23 I. C. 919=25 P. R. 1914.

order under revision by acts similar to those enumerated above. Again in Civil Revision No. 160 of 1925 in conditions somewhat similar to the present the Judge declined to interfere. I agree that a revision, where interference is discretionary, should not be allowed when the order has been accepted as it has been in the present case. I, therefore, dismiss the petition but leave the partie to bear their own costs.

Petition dismissed.

A. I. R. 1927 Lahore 56

JAI LAL, J.

Mt. Kako—Applicant—Petitioner.

v.

Sohna—Respondent.

Civil Revision No. 131 of 1926, Decided on 20th October 1926, from the order of the 1st Cl. Sub-J., Sialkot, D/- 8th December 1925.

(a) *Civil P. C. S.* 115—*Refusing leave to sue as pauper—Revision lies—Civil P. C., O.* 33, *R.* 1.

Revision lies against an order refusing leave to sue as a pauper. [P. 56, C. 2]

(b) *Civil P. C., O.* 37, *R.* 5 (*d*)—*Suit for maintenance by wife on ground of her being turned out by husband—There is cause of action.*

The allegation that the petitioner was turned out by her husband gives her cause of action to sue for maintenance and residence according to her allegations. [P. 56, C. 2]

Duni Chand—for Petitioner.

Mehr Chand—for Respondent.

Judgment.—The petitioner applied for permission to sue as a pauper under O. 33, R. 1, of the Civil P. C. The Subordinate Judge, First Class, after recording her statement rejected the application on the ground that it had not been proved to his satisfaction that the petitioner was a pauper as her former husband had left a house. Another ground for the rejection of the application was that as she had been 'turned out' by her second husband, the defendant, her suit for maintenance allowance and residence could not succeed.

A preliminary objection is taken on behalf of the respondent that an application for revision does not lie to this Court as the learned Subordinate Judge did not decide "a case". It is contended that the result of the rejection of the application is that the suit continues on the payment by the plaintiff of the requisite Court-fee stamp. *Mahadeo Sahai* v. *Secy. of State* (1) and *Shanker Bau* v. *Ramdeo*, *A. I. R.* 1926 *All.* 446, are cited in support of this contention. The learned counsel conceded that there is an authority of the Allahabad High Court that a petition for revision lies against an order granting an application for leave to sue as a pauper. In principle I am unable to see any difference between the two cases. I have already had occasion to record my reasons for holding that a petition for revision lies in a case like the present and do not therefore wish to repeat them here. I overrule the preliminary objection.

On the merits the order of the learned Subordinate Judge cannot be supported. The suit was for maintenance allowance and residence against the defendant who, the plaintiff alleged, is her husband and has turned her out. It is based on the basis of an agreement in writing. It is true that the former husband of the plaintiff left a house but he left two sons who now own it. Presumably the plaintiff lost the rights, if any that she had in her former husband's estate by her remarriage. The factum of remarriage, I understand, is denied by the defendant. This will be a point for determination when the suit proceeds to trial on merits. The fact that the plaintiff was turned out by the defendant gives her cause of action to sue for maintenance and residence according to her allegations. I do not therefore follow the view of the Subordinate Judge that the suit cannot succeed on that account. The plaintiff filed an application under S. 488 of the Criminal P. C. for grant of maintenance. This was dismissed by the learned Chief Justice on the ground that the question of the factum of marriage was in issue and that such a question must in the present case be left to be decided by the civil Court and consequently the present application was made by the petitioner.

Another objection raised by the respondent before me was that the application is not accompanied by the necessary documents required by law. This point has not been determined by the Subordinate Judge and I express no opinion about it.

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(1) A. I. R 1922 All. 1=44 All. 248.

I accept this petition, set aside the order of the Subordinate Judge and remand the case to him with directions to proceed with it in accordance with the law as in my opinion he has not made proper enquiries into the allegations of both sides. No order as to costs.

Petition accepted.

A. I. R. 1927 Lahore 57

DALIP SINGH, J.

Mohammad Ayub—Plaintiff — Appellant.

v.

Mt. Fatima Sultan and *others*—Defendants—Respondents.

Second Appeal No. 1023 of 1926, Decided on 3rd November 1926, from the decree of the Senior Sub-J., Rohtak, D/- 1st February 1926.

Mortgage—Redemption—Suit for—Redemptor must prove mortgage transaction.

In a suit for redemption the mortgage transaction has got to be proved by the redemptor. It may be that the onus of showing the extent of the charge in a particular case may lie on the mortgagee where it is a matter for accounts. But a mortgagor must prove the transaction and the essentials of the transaction are the sum for which the mortgage was made and the terms, if any, as to interest and duration. [P 58 C 1]

Mehr Chand Mahajan for *Tek Chand*—for Appellant.

Shamair Chand—for Respondents.

Dalip Singh, J.—The plaintiff in this suit asked for possession in respect of a house by way of redemption on payment of Rs. 130-13-4. The defendants denied the factum of the mortgage and denied the receipt of any portion of the mortgage money. They also pleaded that the mortgage deed or its duplicate (musanna) was inadmissible in evidence for want of registration. They also pleaded adverse possession. The trial Court decreed the suit on payment of Rs. 410-13-4. The learned Senior Sub-Judge held that neither a mortgage nor a subsisting right of redemption had been proved and dismissed the suit. The learned Senior Sub-Judge also held that the counterpart was inadmissible in evidence to prove either the factum of the mortgage or the date of the mortgage because the date of mortgage was not a collateral purpose. This document has throughout been called a counterpart. It is conceded before me that it is not a counterpart but a duplicate or a copy. Counsel for the respondents has objected that there is no proof that this is true copy of the mortgage. But this point was never raised in the Court below and even if it can be raised I consider that in the circumstances of this case, there is sufficient ground to base an inference that it was a correct copy.

Counsel for the appellant has urged that the counterpart of the mortgage deed can be looked at to prove the nature of the mortgagee's possession. He cites *Varada Padlai* v. *Jeevaratnammal* (1) a Privy Council ruling, *Qadir Bakhsh* v. *Mangha* (2). *Ata Muhamad* v. *Shankar Das* (3). He has also cited *Chhota Lal* v. *Bai Mahakore* (4) and *Bishen Das* v. *Ram Singh* (5). He also raised a further point that if the nature of the possession can be proved by these means and the factum and date of the mortgage can be proved aliunde then if he has proved the factum of the mortgage, its date and its continuance he has proved that there is a subsisting mortgage. The right of redemption is incidental to a mortgage and therefore according to him his suit for redemption must be decreed. He admits that on this argument a mortgagor would be able to redeem a mortgage with paying anything or at any rate without paying anything but a nominal sum because the mortgagee in such a case would be unable to prove the amount of the charge and therefore as the onus would lie on the mortgagee to prove the charge, redemption could be had at the will of the mortgagor and on such terms as he chose to admit.

Counsel for the respondents urges on the other hand that the onus of proving the amount of the charge lies on the mortgagor and that if he fails in this he cannot sue to redeem. He further urges that the charge being a term of contract cannot be proved as the deed is inadmissible in evidence. His second argument is that there is a distinction between the

(1) [1920] 43 Mad. 244=53 I.C. 901=46 I.A. 285 (P.C.).
(2) A.I.R. 1923 Lah. 495=4 Lah. 249.
(3) A.I.R. 1925 Lah. 491=6 Lah. 319.
(4) [1917] 41 Bom. 466=40 I.C. 83=19 Bom. L.R. 322.
[1920] 61 I.C. 399.

cases mentioned in *Varada Padlai* v. *Jeevaratnammal* (1), *Qadir Bakhsh* v. *Mangha* (2) and *Ata Mahomed* v. *Shankar Das* (3) and a mortgage deed. He admits that the nature of the possession of the mortgagee might be proved by the counterpart but he contends that this is not sufficient. In a suit for redemption the mortgage has to be proved as a transaction and the nature of the possession alone does not confer any right on the mortgagor. As the mortgage cannot be proved as a transaction the suit for redemption must fail. The point is by no means free from difficulty.

On the whole, however, I am of opinion that the appellant must fail. Were the position of the appellant conceded or held to be correct, it would follow that wherever a mortgage deed which required registration was not registered the plaintiff could have redemption on payment of nothing at all. I do not think that such a position was ever contemplated by the law and it would be stultifying the Registration Act if such were held by the Court. Be that as it may, I consider that in a suit for redemption the mortgage transaction has got to be proved by the redemptor. It may be that the onus of showing the extent of the charge in a particular case may lie on the mortgagee where it is a matter for accounts. But it seems to me that a mortgagor must prove the transaction and the essentials of the transaction are the sum for which the mortgage was made and the terms, if any, as to interest and duration. None of these can be proved by the mortgagor in a case like the present and therefore it follows that he is unable to prove the transaction on which he bases his suit and therefore he must fail. I therefore dismiss the appeal but as the point is difficult and the appellant had some justification for his suit I leave the parties to bear their own costs throughout.

Appeal dismissed.

A. I. R. 1927 Lahore 58

MARTINEAU AND CAMPBELL, JJ.

Municipal Committee, Panipat—Petitioner.

v.

Jasrat Mal and *others*—Respondents.

Criminal Revision No. 265 of 1926, Decided on 11th October 1926, reported by the Dist. Mag., Karnal, D/- 6th February 1926.

Punjab Municipal Act (1911), *Ss.* 195 *and* 225 *—Demolition of building ordered under S.* 195*—Magistrate cannot prohibit the demolition—Remedy of person aggrieved by notice is under S.* 225.

The Municipal Committee has power under S. 195 to issue a notice requiring the building to be demolished and the Magistrate is not competent to direct that the building should stand, the remedy of the persons aggrieved by the notice being to appeal to the Commisssioner under S. 225. [P 58 C 2, P 59 C 1]

Ghulam Mohi-ud-Din—for Petitioner.

Shamair Chand—for Respondents.

Facts.—The accused in contravention of the terms of the sanction granted to them under S. 193 of the Punjab Municipal Act by the Panipat Municipal Committee erected certain projections in a shop built by them. The Committee by due notice required the projections to be demolished. The accused disregarded the notice and were accordingly prosecuted by the Municipal Committee under Ss. 195/199 of the Punjab Municipal Act.

The accused on conviction by Pandit Kalyan Datt, Naib-Tahsildar, Panipat, exercising the powers of a Magistrate of the 3rd Class in the district, were sentenced by order, dated 15th February 1925, under Ss. 195/199 of Act 3 of 1911 to a fine of Rs. 10 each, in default to undergo one week's simple imprisonment each. The fine has been recovered.

Grounds.—In the Magistrate's final order the following words occur :

Makan Mukamal ho chuka hai. Is ke barne se koi khas rukawat jalus waghaira men nahin hoti, is liye iske girae jane ka hukam namunasib hoga.....makan badastur rahega.

The words are ultra vires and are an unjustifiable limitation of the Committee's rights. I recommend that they be expunged from the judgment.

Martineau, J.—We agree with the District Magistrate that the trial Magistrate was not competent to direct that the building should remain, as the Municipal Committee had power under S. 195

of the Municipal Act to issue a notice requiring the building to be demolished, the remedy of the persons aggrieved by the notice being to appeal to the Commissioner under S. 225. We direct that the words referred to by the District Magistrate be expunged.

Reference accepted.

A. I. R. 1927 Lahore 59

DALIP SINGH, J.

B. B. & C. I. Ry. Company—Defendant—Appellant.

v.

Firm Ram Sarup-Mahru Mal—Plaintiff—Respondent.

First Appeal No. 1136 of 1926, Decided on 7th October 1926, from a decree of the Dist. J., Hissar, D/- 4th April 1926.

(a) *Limitation Act, Ss. 5 and 12—Delay in attending to obtain copies not sufficiently explained—Extension cannot be allowed.*

The decree of the trial Court was passed on 29th August 1924. On 22nd October 1924 the appeal was filed. Application for copies was made on 17th September 1924. The application was returned for correction of particulars on 2nd October 1924. It was re-filed on 3rd October 1924. The copies were ready for delivery on 9th October 1924. Actual delivery was taken on 11th October 1924. There was no affidavit explaining the delay. or the facts as to what happened between the 3rd and 11th.

Held; that no ground was shown for extension of time under S. 5. [P 59 C 2, P 60 C 1]

(b) *Practice—Appeal—Limitation—Counsel informed of date for delivery of judgment—No appearance when judgment delivered—Time will run from such date.*

Where parties' Counsel have been duly communicated the date fixed for delivery of judgment limitation for appeal will run from such date in spite of the fact that neither the parties nor the Counsel were present. [P 59 C 2]

Jagan Nath Aggarwal—for Appellant.

Shamair Chand—for Respondent.

Judgment.—The learned District Judge in this case dismissed the appeal as barred by time. The facts are as follows:

On 29th August 1924 the decree of the trial Court was passed. On 22nd October 1924, tha appeal was filed. Application for copies was made on 17th September 1924. The application was returned for correction of particulars on 2nd October 1924. It was re-filed on 3rd October 1924. The copies were ready for delivery on 9th October 1924. Actual delivery was taken on 11th October 1924.

Lala Jagan Nath for appellant has contended: firstly, that time did not run from the 29th of August, 1924, as the parties were not present in Court on that date. The record shows, however, that arguments were heard on the 26th and counsel for the parties were informed that judgment would be pronounced on the 28th. On the 28th August 1924, counsel were present and were informed that judgment would be pronounced on the 29th. On the 29th it would appear that counsel were not present, but judgment was duly pronounced in open Court. In the circumstances I do not see why time should not run from the 29th of August 1924, when the date for delivery of judgment had been duly communicated to counsel for the parties. There is, therefore, no force in this contention.

Mr. Jagan Nath next contends that in any event, as copies were not ready for delivery on the third day, and were not ready for delivery three days after, the office did not comply with the rules of the High Court: see Vol. 3, page 36, R. 22 (i) and (ii), and he cites in support of his contention *Mohan Ram* v. *Muhammad Khuda Dad Khan* (1); *Sarkhara* v. *Nawab* (2) and *Madan Singh* v. *Puran Singh* (3). All these are single Bench decisions of this Court and the facts of the case are quite different from the facts of this. On the other hand Mr. Shamair Chand for the respondent contends that the appellant is only entitled to deduction of the days from 3rd October 1924 to 9th October 1924, because it was his own fault that the first applicatien of 17th September 1924, had to be returned for correction of particulars. He cites *Pramatha Nath Roy* v. *Lee* (4) and *Kamruddin Hyder* v. *M. N. Mitter* (5) He also contends that there is no affidavit explaining the subsequent delay, or the facts as to what happened between the 3rd and 11th. After considering the authorities cited, I am of opinion that the decision of the learned District Judge is correct, and I do not consider that the appellant has accounted for the delay in

(1) [1911] 79 P. L. R. 1911=9 I. C. 607=71 P. W. R. 1911.
(2) [1912] 11 P. W. R. 1912=13 I. C. 850.
(3) A. I. R. 1926 Lah. 84.
(4) A. I. R. 1922 P. C. 352=49 Cal. 999.
(5) A. I. R. 1925 Cal. 735=52 Cal. 342.

presenting the appeal, nor do I consider that he can rely on the fact that the copies were not ready on 6th October 1924, when he himself does not assert that he presented himself to receive those copies on the 6th or on subsequent dates. There is no good ground for the application of S. 5 of the Limitation Act.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1927 Lahore 60

BROADWAY AND ZAFAR ALI, JJ.

Rallia Ram—Defendant—Appellant.

v.

Balmokand and *others* — Plaintiffs—Respondents.

First Appeal No. 2801 of 1922, Decided on 3rd November 1926, from the decree of the Senior Sub-J., Amritsar, D/- 18th July 1922.

Hindu Law—Debts—Pious obligation of sons—Father becoming liable for money taken—Taking constituting criminal offence — Sons are not liable.

Where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence. his sons cannot be held, under the rule of Hindu Law as to the pious duty of a son, liable to pay his father's debt, but it must be shown that the debts were incurred as a result of the criminal activities of the father or grandfather : 24 *Cal.* 672 and 27 *Mad.* 71, *Rel. on.* [P 61, C 1]

Faqir Chand and *Vas Dev Kumaria*—for Appellant.

Badri Dass and *Jagan Nath Aggarwal*—for Respondents.

Broadway, J.—On the 5th May 1919, a deed of sale was executed by Jaitu Mal, his son Daulat Ram and Mt. Ratan Devi, wife of Daulat Ram, under which a certain house was conveyed to Lala Rallia Ram for a sum of Rs. 5,300. The consideration was paid by wiping out two former mortgages to the extent of Rs. 2,600. Rs. 700 were paid to Mt. Ratan Devi in cash, Rs. 400 to Mansa Ram a relative of Lala Rallia Ram and Rs. 800 were to be paid to Vasdeo son-in-law of Jaitu Ram by Rallia Ram in settlement of a decree of Rs. 800 and the balance of Rs. 800 was to be paid by the vendee to certain creditors who were specified in the deed.

Soon after the execution of this deed of sale Mt. Ratan Devi commenced criminal proceedings against Lala Rallia Ram as a result of which she was paid by Rallia Ram Rs. 864 which it was said she had paid off to all the creditors named in the deed of sale and which had to be paid by the vendee. On the 5th January 1920, Mt. Ratan Devi gave birth to a male child whose name is Balmokand. On the 5th October 1920, this male child Balmokand instituted a suit through his grandmother's sister Mt. Bochi in which he sought a declaration to the effect that his rights in this property would not be affected in any way by the sale after the death of his father and grandfather. Both these two gentlemen were said to be whoremongers, gamblers and persons addicted to all sorts of vices. Rallia Ram pleaded that the transaction was perfectly honest and straightforward as far as he was concerned, and also challenged the plaintiff's rights to sue on the ground that he was an after-born child, that is to say, a child born after the alienation had been effected.

The trial Court held that inasmuch as the child was in his mother's womb on the date of the alienation, under the Mitakshara Law which governs the family, the plaintiff had a right to sue. It was further held that so far as the previous mortgages were concerned, they having been executed before the plaintiff was born, he was not in a position to challenge their correctness. A decree was accordingly passed in favour of the plaintiff declaring that his rights would not be in any way affected by this alienation on the death of his father and grandfather except in so far as the sum of Rs. 2,600 was concerned i. e., he would have to pay the amount of the mortgages. Against this decree the vendee Rallia Ram has come up to this Court on appeal through Mr. Faqir Chand and the minor has filed cross-objections qua the mortgage money through Mr. Jagan Nath.

At the hearing Mr. Jagan Nath stated that having regard to the recent authority of *Brij Narain* v. *Mangal Prasad* (1) the cross-objections could not be pressed. He urges that his client should not be mulcted in costs qua this point. We note that the cross-objections were

(1) A. I. R. 1924 P. C. 50=46 All. 95.

filed on the 23rd February 1925. On behalf of the appellant Mr. Faqir Chand urges that the evidence on the record clearly shows that the view taken by the learned Subordinate Judge is untenable. He has taken us laboriously through the evidence and a careful examination of it clearly shows that there is no real evidence to show that either Jaithu Mal or his son Daulat Ram, was the unmitigated blackguard that the plaintiff would have us believe. There is no real evidence to show that they were drunkards or gamblers although it is true that these two persons have been charged with, convicted of and punished for misappropriating gold in their possession as zargars for the purpose of making ornaments. There can be no doubt that the family including Mt. Ratan Devi is by no means what might be regarded a respectable one, but that is a different thing from saying that the family property has been sold as a result of debauchery and immorality.

No doubt as has been pointed out in *Pareman Das* v. *Bhattu Mahton* (2) and *Mc Dowell* v. *Ragava Chetti* (3) cited by Mr. Jagan Nath that :

> where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence his minor sons cannot be held under the rule of Hindu Law as to the pious duty of a son liable to pay his father's debt.

In the present case, however, there is nothing on the record to show that the debts for which this alienation took place were incurred as a result of the criminal activities of the two male defendants. It is true that the son-in-law Vasdeo, who held a decree against his father-in-law says when produced as a witness by the defendants (see page 30) that his father-in-law squandered the sums of monys borrowed from creditors in vices, but he knows nothing about his gambling. He further says that he lent Jaithu Mal money to repay sums misappropriated by him but there can be no doubt that the son-in-law's evidence on this point cannot be relied upon. It is obvious that the family have combined in order to cheat or deprive Lala Rallia Ram of the benefit derived by him under this alienation, taking advantage of the fact that Balmokand was born so soon after the alienation was effected.

Turning to the items themselves Vasdeo has admitted the receipt of Rs. 734 odd due to him under the decree. The mere fact that this decree was in existence no doubt put the vendee on enquiry, but this enquiry would not in my judgment lead him to suspect that the debt had been incurred for or spent on immoral purposes.

As to the sum of Rs. 700 which was paid to Mt. Ratan Devi at the time of registration Mr. Jagan Nath has contended that no necessity has been shown, there being no antecedent debts. It appears that Vasdeo, the son in-law in execution of his decree sought to bring this very property to sale. Mt. Ratan Devi claimed that she had spent a sum of Rs. 700 on building a chaubutara and that the chaubutara should not be sold in execution of the decree inasmuch as it was hers. The property as a matter of fact was not sold but the appellant was approached with a suggestion that he should purchase the property as he was one of the previous mortgagees. In order to safeguard his interests he insisted that Mt. Ratan Devi should be covendor qua her property the chaubutara and as already stated. Mt. Ratan Devi did join in execution of this deed. As a matter of fact she stated that the chaubutara had been built by her at her own cost, and there is nothing on the record to show that she is entitled to it. I do not think that the plaintiff is entitled to any credit for this amount.

There remains the sum of Rs. 400 paid to Mansa Ram, son-in-law of Rallia Ram. It appears that the negotiations for the sale had first commenced between the vendors and Mansa Ram and that Mansa Ram had paid the sum of Rs. 400 as earnest money. The arrangement with Mansa Ram was taken over by Rallia Ram with the consent of all concerned and Mansa Ram was repaid this sum of Rs. 400 by his father-in-law. I consider that this was a valid charge.

With regard to the payment made to the creditors named in the deed of sale it has been urged that inasmuch as these creditors were not paid off by the vendee after the sale had been effected and that Mt. Ratan Devi had paid them off herself the debts due to those creditors cannot be deemed to be antecedent debts and in support of this contention Mr. Jagan Nath refers to a case reported

(2) [1897] 24 Cal. 672.
(3) [1904] 27 Mad. 71.

in *Jawahar Singh* v. *Udai Prakash* (4). The facts given in that case by their Lordships of the Judicial Committee clearly show that that decision has no bearing on the present suit. There a sale for a consideration which was made up partly of previous mortgages was pre-empted by B who brought suit to enforce his claim for pre-emption and it was held that B's right and title in the property commenced from the date of his decree and consequently that the mortgages which had formed the consideration of the sale and which were paid off during the pendency of the suit before the decree had been passed, could not be regarded as antecedent debt qua B. This case does not assist us in the present instance. The debts here were undoubtedly antecedent to the sale. The mere fact that Mt. Ratan Devi succeeded in paying them off probably for a lesser sum than was entered in the deed of sale and thus got the whole of the amount entered in the deed of sale from Rallia Ram by bringing criminal proceedings does not render those debts any the less antecedent to the sale itself. In these circumstances in my judgment it is perfectly clear that the present suit has been brought in bad faith and I would therefore accept this appeal and dismiss the plaintiff's suit with costs.

The cross-objections will also be dismissed with costs.

Zafar Ali, J.—I agree.

Appeal accepted.

(4) 30 C. W. N. 698.

✻ A. I. R. 1927 Lahore 62

HARRISON, J.

Rur Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1237 of 1926, Decided on 29th October 1926, reported by the S. J., Karnal, on 7th August 1926.

✻ (*a*) *Workman's Breach of Contract Act* (1859), *S. 2—Order for imprisonment must be separate from that for repayment.*

The Magistrate cannot order the workman to be imprisoned by the same order by which he directs him to make a payment. The order about imprisonment should be a separate order passed after the workman has failed to comply with the order about repayment. [P. 62, C. 2]

(*b*) *Criminal trial—Sentence of imprisonment for several priods by same order is illegal.*

It is not competent for a Magistrate to award by an order imprisonment for several periods with interval between each period. [P. 62, C. 2]

Facts.—Sahib Singh made a complaint that he had advanced Rs. 50, Rs. 32 and Rs. 24-4-0 to accused Rur Singh in order to perform certain work, but Rur Singh had done work worth only Rs. 25 and refused to do the rest.

The defence was that the accused had done work worth Rs. 62-8-0 and repaid more than the balance amount to complainant. It was found by the Magistrate that the accused had performed work of the value of Rs. 62-8-0 but had not repaid the balance. The Magistrate ordered Rur Singh to repay Rs. 45 in nine monthly instalments of Rs. 5 each or in default to undergo 15 days' imprisonment for default of each instalment the total period of imprisonment being limited to two months.

Grounds.—So far as the facts of the case are concerned I think that the finding of the Magistrate is right. Applicant has failed to prove that any sums of Rs. 10 and Rs. 12 were paid to Sahib Singh. As to the six sums of Rs. 36 realized by the complainant from other workmen he has filed a receipt (P-D) which shows that these repayments were by other workmen for advances received by them.

The final order of the Magistrate about imprisonment in default does not, however, seem to be right. In the first place the language of S. 2 shows that the Magistrate cannot order the workman to be imprisoned by the same order which he directs him to make a payment. The words of the section are :

If such artificer, workman or labourer shall fail to comply with said order, the Magistrate may sentence him to be imprisoned, etc.

I think it is clear from this that the order about imprisonment should be a separate order passed after the workman has failed to comply with the order about repayment, etc. In the second place, the order of 15 days' imprisonment for default of each instalment also does not seem to be right for it implies that by one order the accused has been sentenced to several periods of imprisonment with free intervals between. I do not think our criminal law contemplates such sentences. For instance a man can be sentenced for theft for three years, but a

Magistrate cannot sentence a thief to two separate terms of one year each with an interval of six months between.

The proceedings are, therefore, submitted to the High Court for revision of the sentence with a recommendation that the sentence of imprisonment may be set aside leaving the Magistrate to pass a sentence after default has been made by the applicant in making the payments ordered by the Magistrate.

Order.—The order of the Magistrate regarding imprisonment is clearly illegal. For the reasons given by the learned Sessions Judge, I set it aside and leave the Magistrate to pass a sentence in accordance with the law if default is made.

Order set aside

A. I. R. 1927 Lahore 63

MARTINEAU AND CAMPBELL, JJ.

Bahaduri and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 577 of 1926, Decided on 26th October 1926, from an order of the S. J., Shahpur, D/- 8th April 1926.

(a) *Penal Code, S. 300—Violent blows on head causing fracture of bones and consequent death—Intention to cause injury likely to cause death will be presumed.*

A person who striked another on the head such violent blows as to cause the fracture of temporal and parietal bones and consequent death, must ordinarily accept the onus of proving that his intention was not to cause such bodily injury as would in all probability cause death or that he did not know that the injury inflicted by him would in all probability cause death [P 64 C 2]

(b) *Criminal trial—First information—Omission to mention accused's name in first information—Informant not an eye-witness—Omission is no circumstance in accused's favour.*

The fact that the name of a particular accused was not mentioned in the first information report is not a circumstance in favour of the accused where the informant was not an eye-witness of the occurrence. [P 65 C 1]

R. C. Soni for *M. Sleem*—for Appellants.

J. M. Mackey for *the Government Advocate*—for the Crown.

Judgment.—Taja, Bahaduri, Sahna, son of Shahabal, Mahla and Sahna, son of Smail are five persons who were tried jointly by the Sessions Judge, Sargodha, on charges under Ss. 302, 147, 326 and 324, Indian Penal Code. Taja was acquitted, Bahaduri was convicted of an offence under S. 325, Sahna, son of Shahabal, was convicted under S. 323, Mahla was convicted under 326 and Sahna, son of Smail has not appealed. Bahaduri, Sahna, son of Shahabal, and Mahla have appealed jointly against their convictions (Appeal No 577 of 1926) and another appeal has been filed (Appeal No. 699 of 1926) by the Crown praying that all the five persons who were tried should be convicted under S. 302 read with S. 149, Indian Penal Code.

The affair out of which the case has arisen took place on the 12th October 1925. The prosecution story was as follows :

One Ghulam Hussain Shah of Shahpur City lost a bullock in September and requested his relations to assist him in finding it. These relations got information that the animal was in the house of Bahaduri, appellant, and six of them accordingly proceeded one evening to that place. They were Hidayat Shah, Raja Shah, Wilayat Shah, Jiwan Shah, Hussain Shah and Muhammad Shah. They found the bullock among Bahaduri's cattle and seized it. Some argument followed, and Bahaduri eventually permitted them to take away the animal on their promising not to report the matter to the police. When they had left the village about 200 karams they saw a party of people pursuing them. Raja Shah ran away with the bullock. The other five of whom three were elderly men, were overtaken and attacked by 13 persons including the five accused and were severely beaten. Hidayat Shah was killed. Wilayat Shah and Muhammad Shah were very seriously injured and were taken by the assailants to Bahaduri's house. Hussain Shah and Jiwan Shah were also injured, but they managed to escape.

The defence version was that the occurrence took place later in the evening than is stated by the prosecution witnesses, in fact at bed time. Hidayat Shah, deceased, and his five companions went to Bahaduri's house to steal a bullock. He raised an alarm and a large crowd collected. Two of the thieves, Walayat Shah and Muhammad Shah, were secured. The other ran away with the bullock. The accused professed themselves unable to state how Hidayat Shah was killed, but left it to be inferred that this happened during the pursuit at the hands of some unknown members of the large crowd which had collected from the village to recover the bullock.

The learned Sessions Judge held that the prosecution had failed to prove definitely that the bullock in question belonged to Ghulam Huasain Shah, but he also held that Hidayat and his party genuinely believed it to be Ghulam Hussain Shah's animal, and that they went to Bahaduri's house for the purpose not of committing theft, but of getting back the bullock. The defence story the learned Judge considered to be altogether improbable. He was satisfied that the occurrence took place in the early evening at digarwela as stated by the prosecution. He did not believe that the bullock was taken away with the consent of Bahaduri, but he thought that the complainant party quietly removed it. He found that the accused party pursued in order to recover the bullock, that there was a fight, that the accused had no common object to kill or even to cause any grievous hurt and that each man, accordingly, was liable only for the acts proved to have been committed by him.

It was held that the fatal injury to Hidayat Shah was caused by Bahaduri, who had no further intention than to inflict grievous hurt that Sahna, son of Shahabal, had only caused simple hurt to Wilayat Shah and hence was only guilty under S. 323 and similarly Sahna, son of Smail, had only caused simple injury to Hussain Shah. Mahla was held to have caused grievous hurt to Wilayat Shah with a hatchet and so was convicted under S. 326.

The finding of the learned Sessions Judge that the three appellants, Bahaduri, Sahna, and Mahla, were concerned in the affair is not seriously contested. Their learned counsel has asked us to accept the defence version of theft at Bahaduri's house pinning his faith principally to the fact that the police found the injured persons Wilayat Shah and Muhammad Shah at that place. In our opinion this story was rightly disbelieved by the learned Sessions Judge. We are satisfied that the occurrence took place outside the village at some distance from Bahaduri's house, and that Wilayat Shah and Muhammad Shah, after being injured, were removed from there, possibly from motives of humanity, but more probably in order to support a story of justification.

We are also satisfied that all the three appellants attacked and struck members of Hidayat Shah's party. No grounds have been made out for acquitting any of them.

We come now to the Crown appeal, and in this connexion we find some difficulty in subscribing to the learned Sessions Judge's observation:

> A mere injury on the head does not show that the intention was to kill Hidayat Shah or even to cause him such bodily injury as would in all probability cause death, or even that the assailant knew that the injury he was inflicting would in all probability cause death.

The head injury of Hidayat Shah in the present case, or rather the injuries since there were two, had the effect of fracturing both the right temporal and the right parietal bones and were evidently caused by violent blows of a blunt weapon.

A person who struck another on the head such blows must ordinarily accept the onus of proving that his intention was not to cause such bodily injury as would in all probability cause death or that he did not know that the injury inflicted by him would in all probability cause death.

The learned Sessions Judge considered that the common object of the assembly of which the accused were members was to seize the bullock and was not to cause grievous hurt or even hurt to any complainant party. This finding is scarcely in harmony with the medical evidence. (The judgment then proceeded to examine the evidence and continued.) There can be no doubt whatsoever from the medical evidence that the persons who beat Hidayat Shah intended to cause such bodily injury as they knew was likely to cause his death; in other words, those persons committed the offence of murder.

Was this an offence which the other members of the assembly knew to be likely to be committed in prosecution of their object to inflict bodily injury upon Hidayat Shah and his companions?

In our opinion it was; and this is proved by the fact that those who attacked persons of the complainants' party other than Hidayat Shah struck them repeatedly on the head. The present appellants have failed to prove any circumstances bringing their action within any of the exceptions to S. 300, Indian Penal Code, or within the sections dealing with the right of private defence. It is proved that their action was taken, not with a view to recovering property which some

of them, may have believed to have been stolen or to prevent the escape of persons believed to be thieves, but purely in the spirit of retaliation and revenge. Each of them, under the provisions of S. 149 is guilty of the offence of murder under S. 302, Indian Penal Code.

There remains the Crown appeal against Taja. This man was found with injuries on his person, as already stated, and the prosecution evidence against him is precisely the same as against the other accused persons.

He has been acquitted merely because his name does not occur in the First Information Report. This, in our view, is no adequate reason. The First Information Report was made by Raja Shah, who did not profess, and is not shown, to have been eyewitness of the assault. In that report he named eight persons, including the three convicted by the learned Sessions Judge, whose names he said had been given to him by Hussain Shah, and he further reported that Hussain Shah had said that there were eight or nine other men whose names he did not remember but could be given by the other wounded persons. Both Raja Shah and Hussain Shah were witnesses in the case. Raja Shah was never asked whether Hussain Shah had or had not mentioned Taja to him by name. Hussain Shah was not asked this question either, nor was he asked whether he knew Taja's name at the time. The First Information Report by Raja Shah was no contradiction of the evidence given in Court by Hussain Shah and the other eyewitnesses.

We dismiss the appeal of Bahaduri, Sahna, son of Shahabal, and Mahla. We accept the Government appeal, convict all five respondents, Taja, Bahaduri, Sahna, son of Shababal, Mahla, and Sahna, son of Smail, of an offence under S. 302 read with S. 149, and sentence each of these persons to transportation for life.

G. B. J. *Appeal by accused dismissed;*
Appeal by Crown accepted.

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A. I. R. 1927 Lahore 65

DALIP SINGH, J.

Makhan Shah and *another*—Defendants—Appellants.

v.

Mt. Halima and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 2021 of 1925, Decided on 1st February 1926, from the order of the Senior Sub-J., Ludhiana, D/- 18th May 1925.

(a) *Civil P. C., O. 40, R. 1—Appellate Court should not interfere with lower Court's discretion to appoint Receiver.*

Appellate Court should not interfere with the discretion exercised by the lower Court in appointing a Receiver without sufficient reasons. [P 65 C 2]

(b) *Civil P. C., O. 40, R. 1—Receiver.*

A Receiver can be appointed in a declaratory suit: *A. I. R. 1922 Lah. 444 Foll.* [P 65 C 2]

Niaz Muhammad—for Appellants.

Shamair Chand—for Respondents.

Dalip Singh, J.—The sole question in this appeal is whether the Receiver appointed by the Court has been rightly or wrongly appointed in the exercise of the Court's discretion under O. 40, R. 1. Counsel for the appellants has relied on the following facts: 1. That the plaintiffs are not in possession, but the learned District Judge has found that the disturbance of possession is very recent and I do not think that in the circumstances of this case it is necessary to interfere with the order on that ground. 2. Counsel contends that the income of the property is too small to justify the appointment of a Receiver. This is a matter which can be dealt with when the Receiver, if any, is actually appointed and his emoluments are fixed. 3. Counsel contends that O. 40, R. 1 (2) applies to the circumstances of this case, and as the suit is declaratory no Receiver can be appointed. *Amar Nath* v. *Mt. Tehal Kaur* (1) is against this proposition and I see no reason therefore to interfere with the discretion exercised by the lower Court, see *Haji Kadir Bakhsh* v. *Ghulam Mohammad* (2) which was upheld in Letters Patent appeal and *Mt. Ishri* v. *Shib Ram* (3). I accordingly dismiss the appeal with costs.

R. D. *Appeal dismissed.*

(1) A. I. R. 1922 Lah. 444.
(2) [1920] 55 I. C. 50.
(3) A. I. R. 1923 Lah. 239.

A. I. R. 1927 Lahore 66 (1)

BROADWAY, J.

Mohan—Plaintiff.

v.

Khan Mohammad and *others*—Accused

Criminal Revision No. 363 of 1926, Decided on 28th September 1926, on report by the Dist. Mag. Gurgaon.

Criminal P. C., S. 439—Delay in disposal not due to complainant—Proceedings should not be quashed.

Where the delay in disposal of a criminal case is not due to the complainant, proceedings should not be quashed on that ground, as, to quash the proceedings would be to deny the complainant justice which would be as much a scandal as to allow their continuance. [P 66, C 1]

Broadway, J.—This is a reference by the learned District Magistrate of Gurgaon recommending that certain proceedings should be quashed. His reason for the recommendation is that the proceedings were initiated on the 6th of August 1924 and that so far as 16 of the persons accused are concerned, they are still pending at this date. He considers this is a scandal and suggests that the proceedings should be quashed. The learned District Magistrate has very rightly and correctly described the situation as being a scandal. At the same time he has also pointed out that the delay in disposal of the case is not due to the complainant. To quash the proceedings now would be to deny the complainant justice which to my mind, would also be a scandal. The learned District Magistrate has very rightly pointed out that the Magistrates of the District to a great extent are responsible for the delay. I am not prepared to accept the recommendation and to deny the complainant justice by quashing the proceedings. I think that the best course for the District Magistrate is to take up the case himself and to proceed with it from day to day until it is disposed of.

If the District Magistrate is occupied with other and more important work he is authorized to make over the case to one of his subordinate Magistrates with the distinct instructions that the case is to be proceeded with from day to day until it is concluded. No other work should be allowed to interfere with the disposal of this case. With these remarks the case is returned to the learned District Magistrate.

R. D. *Order accordingly.*

A. I. R. 1927 Lahore 66 (2)

JAI LAL, J.

Rallia Ram—Decree-holder — Appellant.

v.

Mt. Hayat Bibi and *others*—Judgment-debtors—Respondents.

Second Appeal No. 1111 of 1926, Decided on 20th October 1926, from the order of the Senior Sub-J., Gujranwala, D/-9th December 1925.

Civil P. C., S. 60 (3)—House occupied by agriculturist as such only is exempted.

In order to establish an exemption under S. 60 (3) it must be found that the house is owned by an agriculturist and that it is occupied by him as such. In other words, that the house is used by the judgment-debtor for purposes which are necessary for the cultivation of his land. [P 66, C 2]

Bodh Raj Sawhney—for Appellant.

Judgment.—In execution of a money decree the house of one Khuda Dad the judgmant-debtor, was attached. An objection was taken to the attachment and sale of the house on the ground that Khuda Dad being an agriculturist it was exempt from attachment and sale under S. 60 (3) of the Civil Procedure Code. The executing Court rejected this objection and ordered the house to be sold. On appeal the Senior Subordinate Judge set aside this order.

No evidence was given by either side as to the purpose for which the house is used. The only statement on which the lower Courts have acted is by the judgment-debtor that he lives in the house but gets his land cultivated by asamis. It is not explained whether these asamis are his servants or whether they are his tenants. There is authority that in order to establish an exemption under S. 60 (3) it must be found that the house is owned by an agriculturist and that it is occupied by him as such. In other words, that the house is used by the judgment-debtor for purposes which are necessary for the cultivation of his land.

As there has not been a proper enquiry in the matter, I accept the appeal and remand the case under O. 41, R. 25 of the Civil Procedure Code to the Senior Subordinate Judge with directions to record the evidence that may be produced by both parties as to the nature of the occupation of the house by the judg-

ment-debtor and to make the usual return to this Court within three months. Ten days will be given to the parties for filing objections. The Senior Subordinate Judge may record the evidence himself or get it recorded by the executing Court.

G. B. J. *Case remanded.*

A. I. R. 1927 Lahore 67

BROADWAY AND FFORDE, JJ.

Fakir and *another*—Plaintiffs—Appellants.

v.

Ramzan—Defendant—Respondent.

Second Appeal No. 1097 of 1922, Decided on 31st March 1926, from the decree of the Dist. J., Sialkot, D/- 27th March 1922.

Custom (Punjab) — Succession to gifted property—Reversion to donor's collaterals does not take place until donee's line becomes extinct.

Where the intention of the donor is to benefit the donee and her line, it is only when the donee's line has become extinct that the reversion of the donated property in favour of the collaterals of the donor can take place : 82 *P. R.* 1918 ; 68 *P. R.* 1911 ; 84 *P. R.* 1909 ; 12 *P. R.* 1892 ; 13 *P. R.* 1914, *Rel. on* ; 4 *P. R.* 1916, *not Foll.* [P. 67, C. 2]

Parkash Chandar—for Appellants.

Khurshid Zaman—for Respondent.

Broadway, J.—One Hazur Bakhsh gifted certain property to his daughter Mt. Karim Bibi, wife of Fakir. On Karim Bibi's death this donated property devolved on her son Buta, her daughter Begam Bibi not succeeding to anything. Buta died childless and this property was mutated in the name of Mt. Resham Bibi, his widow. Mt. Resham Bibi, remarried and the property in question was mutated in the name of Ramzan who is a collateral of Hazur Bakhsh. Fakir, husband of Mt. Karim Bibi and their daughter Mt. Begam Bibi instituted a suit asking for a declaration that the mutation in favour of Ramzan was incorrect and that they were entitled to hold the property, on the ground that the collaterals of the donor could not succeed to the donated property until the donee's line had become totally extinct. Their suit was dismissed and an appeal preferred by them failed.

They have come up to this Court in second appeal and it has been urged on their behalf that the view taken by the Courts below is opposed to the established principle that donated property does not revert to the donor's collaterals so long as there are any descendants, male or female, of the donee, or, in other words, so long as the donee's line is in existence. The most recent reported authority on this question is *Tani* v. *Tara Chand* (1), where it was held that there is no reversion to the donor's collaterals so long as the descendants of the donee, whether in the male or female line, are existing.

In that case reference was made to *Gurdit Singh* v. *Mt. Prem Kaur* (2) and *Lachman* v. *Bhagwan Sahai* (3), which lay down the same principle. In *Shahanchi Khan* v. *Mt. Begam Jan* (4) a similar rule was laid down, and it was there held that the rule regulating succession to property gifted to a son in-law is that there must be failure of all female as well as male heirs in the donee's line before the collaterals of the donor can come in to claim the inheritance. This view is in consonance with the principles under which this departure from the ordinary customary law of succession is based. As was pointed out in *Sita Ram* v. *Raja Ram* (5) where gifts to, or adoptions of, such relations as daughter's sons or sister's sons were allowed, this was done from a tender feeling to benefit the direct descendants of the old stock and not in order to benefit the family in which the daughter of a tribe happens to be married.

Applying this principle to the case before us it seems clear that the intention of Hazur Bakhsh was to benefit Mt. Karim Bibi and her line, and it is only when Karim Bibi's line, has become extinct that the reversion of the donated property in favour of the collaterals of Hazur Bakhsh can take place. The only authority that has been brought to our notice which is in conflict with the cases already referred to is that of *Mt. Jannat* v. *Abdulla* (6). In that case,

(1) [1918] 82 P. R. 1918=109 P. L. R. 1918=47 I. C. 373=160 P. W. R 1918.
(2) [1909] 84 P. R. 1909=76 P. L. R. 1909=3 I. C. 604=118 P. W. R 1909.
(3) [1911] 68 P. R. 1911=160 P. L. R. 1911=10 I. C. 277=208 P. W. R. 1911.
(4) [1914] 13 P. R. 1914=286 P. L. R. 1913=20 I. C. 451=191 P. W. R. 1913.
(5) [1892] 12 P. R. 1892 (F. B.).
(6) [1916] 4 P. R. 1916=32 I. C. 817=25 P. W. R. 1916.

as the head-note shows, it was held that the presence of sisters of the last holder of donated property does not prevent its reversion to the donor's family, notwithstanding that they are daughters of the original donee A reference to the judgment itself, however, shows that this question was not necessary to decide for the decision of the case itself. The learned Judges, after oxpressing their opinion in the manner set out in the head-note go on to say that

> in view, however, of our finding that the family of the parties has in the past observed custom and not Muhammadan Law, this point is not of great importance.

As this is nothing more than an obiter dictum I do not feel bound to follow it in face of the large number of authorities which have taken a different view, more especially as one of the Judges responsible for that obiter expressed a totally different view in *Kaman* v. *Samand Khan* (7). where it was held that gifted property does not revert to the collaterals of the donor so long as there are any descendants, male or female, of the donee in existence. The same Judge took a similar view in *Jindu* v. *Gopala* (8).

I would, therefore, accept this appeal and grant the plaintiffs a decree for a declaration as prayed for with costs throughout.

Fforde, J,—I agree.

Appeal accepted.

R. D.

(7) [1912] 228 P. W. R. 1912=15 I. C. 99.
(8) [1912] 135 P. W. R. 1912=15 I. C. 266=235 P. L. R. 1912.

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* A. I. R. 1927 Lahore 68

ADDISON, J.

Buta Ram—Plaintiff—Appellant.

v.

Sundar Das and *others*—Defendants—Respondents.

Misc. First Appeal No. 1330 of 1926, Decided on 22nd October 1926, from the orders of the Sr. Sub-J., Ferozepur, D/- 3rd February and 18th March 1926.

* *Civil P. C., S. 152—Amendment of decree—Appeal.*

No appeal lies from an order amending a decree. [P 68 C 2]

D. R. Naurang—for Appellant.

Mehr Chand Mahajan for *Tek Chand*—for Respondents.

Judgment.—Two suits were filed by two rival pre-emptors for possession of certain land which had been sold. Both obtained decrees on payment of a specified amount within specified times. The present appellant, Buta Ram, had to pay the amount fixed within specified time of a default made by the other pre-emptor. He did not do so and his suit, therefore, stood dismissed with costs. The vendee applied for execution of costs which amounted to Rs. 1,370 against Buta Ram. This sum was made up of Rs. 1,200 pleader's fee, and Rs. 170 other costs. Notice issued to Buta Ram. He applied for the amendment of the decree on the ground that pleader's fee should have been fixed on Rs. 2,538-3-6, the value for purposes of jurisdiction, and not on Rs. 1,20,000, the sum for which pre-emption was decreed. The Senior Subordinate Judge held that he was entitled to fix the pleader's fee up to Rs. 1,200, but that he had discretion to award less. He accordingly accepted the petition for amendment by Buta Ram to this extent that he reduced the pleader's fee to Rs. 1,000 instead of Rs. 1,200 and he ordered the decree to be amended accordingly. Against the order Buta Ram has instituted this appeal on the ground that the pleader's fee should have been fixed on Rs. 2,538-3-6 only. It was definitely stated before me that the first four grounds were given up.

A preliminary objection was taken that no appeal lay from the order of amendment. It is admitted that the appeal was brought only from that order. It has been held by the High Courts of Calcutta, Allahabad and Bombay that an appeal does not lie from such an order though it may be the subject of revision under S 115 of the Civil P. C. The High Court of Madras, however, has held that an appeal lies from the decree as amended, though not from the order, vide page 362 of the Civil P. C. by Mulla. The appellant, however, has taken neither course. He has not appealed from the decree nor has he presented a revision petition from the order. Further, in his grounds of appeal, he has given no grounds for revision within the meaning of S. 115, Civil P. C. It is, therefore, impossible for me to treat the appeal as a

revision. The appeal accordingly fails and is dismissed. I also dismiss the cross-objections which were not seriously pressed. Parties can beat their own costs here.

G. B. J. *Appeal dismissed.*

A. I. R. 1927 Lahore 69 (1)

MARTINEAU AND CAMPBELL, JJ.

King Emperor—Appellant.

v.

Jasrat Mal and *others* — Accused — Respondents.

Criminal Appeal No. 263 of 1926, Decided on 11th October 1926, from the order of the 3rd Cl. Mag., Panipat, D/- 30th November 1925.

Punjab Municipal Act (1911), *Ss.* 195 *and* 225—*Demolition of building ordered by Municipality under S.* 195—*Magistrate cannot prohibit demolition — Remedy of aggrieved accused is under S.* 225.

The Municipal Committee has power under S. 195 to require a building to be demolished, and a Magistrate cannot interfere with the exercise of the power and is not competent to prohibit the demolition of the building, the remedy of the accused, if he is aggrieved by the notice, being to appeal to the Commissioner under S. 225. [P 69, C 2]

C. H. Carden Noad—for Appellant.

Shamair Chand—for Respondents.

Martineau, J.—This is an appeal by the Crown against an order of a Magistrate acquitting the respondents of an offence under S. 195-219 of the Municipal Act. The Municipal Committee of Panipat had given permission to the respondents to erect a building, but in erecting it they made certain projections which were in contravention of the sanction given. The Committee issued a notice to them under S. 195 of the Municipal Act to demolish the building, and as the notice was disregarded they were prosecuted and were fined Rs. 10 each by the Magistrate by his order of the 13th February 1925.

The Committee again issued a notice for the demolition of the building, and as that notice also was not complied with the respondents were prosecuted a second time, but the Magistrate has acquitted them on the ground that in his judgment in the first case he had passed an order that the house should remain standing as the projections caused no inconvenience, which order, not having been set aside by an appeal, he holds to be binding on the parties to the case. It is, however, clear that the Magistrate in giving his judgment in the first case was not competent to prohibit the demolition of the building. The Municipal Committee had power under S. 195 of the Municipal Act to require the building to be demolished, and the Magistrate could not interfere with the exercise of the power, the remedy of the accused, if they were aggrieved by the notice, being to appeal to the Commissioner under S. 225. The Magistrate's order in the first case directing that the building should stand was therefore ultra vires and has, in fact, been expunged by us on the motion of the District Magistrate. The respondents not having complied with the second notice issued to them by the Municipal Committee have again incurred a penalty under S. 219 of the Act.

We accordingly accept the appeal and convict them of an offence under that section. As they may have been misled by the order in the first case, we think it is sufficient in this case also to impose on each respondent a fine of Rs. 10, in default of payment of which he will undergo two weeks' simple imprisonment.

R. D. *Appeal accepted.*

A. I. R. 1927 Lahore 69 (2)

DALIP SINGH, J.

Phullu and *others*—Plaintiffs—Appellant.

v.

Ghulam Nabi and *others* — Defendants—Respondents.

Second Appeal No. 1036 of 1926, Decided on 6th October 1926, from a decree of the Sr. Sub-J., Rohtak, D/- 15th February 1926.

Practice—Evidence—Record sent for by Court.

The mere sending for a record does not make the record evidence in the case. [P 70 C 1]

Shamair Chand—for Appellants.

S. G. Salariya—for Respondents.

Judgment.—The point raised in this appeal is that certain documents have been relied on by the appellate Court which are not evidence in the case. It seems that the plaintiff himself put in

an application to send for the Revenue Record in connection with the disputed land. The Court granted the application and the whole of the revenue file in connexion with the dispute in the revenue case was sent for. Nothing further appears to have been done, but the jamabandis which were on the file of the Revenue Record appear to have been used by the appellate Court. It has been frequently pointed out by this Court that the mere sending for a record does not make the record evidence in the case. At the same time as there has been misapprehension in the minds of the learned Judges who decided the case on this point I am not prepared to accede to Mr. Shamair Chand's contention that the suit should be decreed in the absence of any proof by the defendant of adverse possession.

I, therefore, accept the appeal and remand the case giving the parties an opportunity to produce all their documentary and oral evidence in a proper manner before the Courts below. The costs of this appeal will be paid by the respondent to the appellant. Other costs will abide the event. I set aside the decree of both the Courts and remand the case to the trial Court for a fresh decision.

G. B. J. *Case remanded.*

A. I. R. 1927 Lahore 70

HARRISON AND FFORDE, JJ.

Mt. Nawaz Bai Ardishar Cooper and *others*—Plaintiffs—Appellants.

v.

Ghulam Mohi-ud-Din — Defendant—Respondent.

First Appeal No. 2559 of 1922, Decided on 6th October 1926, from a decree of the 1st Cl. Sub-J., Lahore, D/- 15th August 1922.

Limitation Act, Art. 144—*Suit for ejectment—Question as to possession and dispossession not involved—Suit is governed by Art.* 144.

Where the question of possession and dispossession is not raised and does not form the basis of a suit for ejectment, the suit is governed by Art. 144. [P 70, C 2]

Tek Chand and *Jagan Nath Aggarwal*—for Appellants.

Badri Das and *Nawal Kishore*—for Respondent.

Judgment.—In the year 1921 Mt. Nawaz Bai Ardishar Cooper instituted a suit against Ghulam Mohi-ud-Din to eject him from a small house situated at the corner of her compound on the Lower Mall. She established her title without any difficulty and this title has not subsequently been questioned. The trial Court, however, holding almost as a matter of course that Art. 142 governed the case found that she had not proved her subsisting title in the sense that she had failed to establish her possession and dispossession within twelve years of suit.

From this decision the executors and trustees of her Will have appealed and the first point to be decided is whether the finding is correct. As to the question of possession and dispossession, or rather of 'possession' to which it narrows down. I find on the evidence of Qalandar Bakhsh, P. W. No. 1, Kishan Chand, P. W. No. 8, and plan P. 5 that in the year 1913 Mr. Cooper re-built a block of servants' quarters including the portion of the premises now in suit; that he applied to the Municipality for permission to do so, presented a properly prepared plan and did carry out the work in accordance with the plan. This building included the main portion of the block now occupied by the appellant, the remainder not being in existence at the time and having been subsequently added. The evidence in rebuttal produced by the defendant is, in my opinion, wholly worthless and I find that the plaintiff successfully established her possession within twelve years. It is, therefore, unnecessary to go at length into the question of whether Art. 142 or Art. 144 applies and I merely add that, in my opinion the case is one to which the principles laid down in *Secretary of State for India* v. *Chelli Kani Rama Rao* (1) should have been applied. The question of possession and dispossession not having been raised and not forming the basis of the suit Art. 144 governed the case and as the defendant failed to establish adverse possession for twelve years, the plaintiff was entitled to succeed. The appeal is accepted with costs throughout in both Courts.

R. D. *Appeal accepted.*

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(1) [1916] 39 Mad. 617=35 I. C. 902=43 I. A. 192 (P. C.).

* A. I. R. 1927 Lahore 71 (1)

ADDISON, J.

Firm Piare Lal-Mohan-Lal— Plaintiff —Petitioner.

v.

Haider—Defendant—Respondent.

Civil Revision No. 114 of 1926, Decided on 5th October 1926, from the order of the 4th Cl., Sub-J., Gujrat, D/- 15th December 1925.

* (a) *Civil P. C., O. 9, R. 4—Application for restoration dismissed for default—Second application for restoration of suit is competent.*

Where an application to restore a suit dismissed under O. 9, R. 3, is itself dismissed for default, a second application to restore the suit is competent: 1 *Lah.* 339, *Foll.* [P 71 C 1]

(b) *Civil P. C., O. 9, R. 4—Application to restore cannot be dismissed summarily.*

An application to restore a suit dismissed for default cannot be rejected summarily: 69 *P. L. R.* 1919, *Foll.* [P 71 C 1]

Muhammad Amin—for Petitioner.

Addison, J. — The petitioner's suit was dismissed under O. 9, R. 3, Code of Civil Procedure, on 15th October 1925. On the same day he applied for restoration. That application was dismissed in default on the 11th December 1925. He applied on the 11th December 1925 again to have it restored. The Sub-Judge, 4th Class, has summarily rejected this application, and against this order this revision petition has been admitted.

It has been held in *Kirpu Singh* v. *Mula Singh* (1) and *Abdul Rahman Shah* v. *Shahana* (2) that the second application was competent; and it has also been held in *Ram Saran Das* v. *Nathwa* (3) that an application to restore an appeal dismissed for default cannot be rejected summarily, as has been done in the present case.

I, therefore, accept this revision petition ex parte and setting aside the order of the Sub-Judge, 4th Class, remand the proceedings to him to proceed in accordance with law.

There will be no costs here.

G. B. J. *Revision accepted.*

(1) [1919] 1 P. L. R. (1919)=50 I. C. 401=10 P. W. R. 1919.
(2) [1920] 1 Lah. 339=58 I. C. 748.
(3) [1919] 38 P. W. R. 1919=52 I. C. 926=69 P. L. R. 1919.

* A. I. R. 1927 Lahore 71 (2)

DALIP SINGH, J.

Prem Das—Auction-purchaser—Petitioner.

v.

Gokal Chand and *others*—Judgment-debtors and Decree-holders—Respondents.

Civil Revision Petition No. 535 of 1925, Decided on 22nd October 1926, from an order of the Dist. J., Ambala, D/- 17th July 1925.

* *Civil P. C., O. 21, R. 92—Refusal to confirm sale is not appealable but revision lies if there is no application under O. 21, Rr. 89, 90 or 91—Civil P. C., S. 115.*

There is no appeal from the order of the Court refusing to confirm the sale but refusal to confirm a sale in the absence of an application under Rr, 89, 90 or 91 is a material irregularity and revision will lie. [P 71 C2, P 72 C 1]

Shamair Chand—for Petitioner.

Judgment—Certain property was sold in execution of a money-decree on the 14th April 1925. On the 29th May 1925, the Court refused to confirm the sale because it was not satisfied that service on the judgment-debtors had been duly effected. I find on the record that previously in this very execution application snbstituted service had been ordered by the predecessor of the learned Subordinate Judge. I find further that the decree itself was obtained on the substituted service. There is before me today an affidavit by the process-server that one of the respondents has been duly served and the other two are concealing themselves. Copy of the summonses has been affixed on the doors of their houses. Mr. Chandu Lal Counsel for the appellant has also stated before me that he knows personally that the judgment-debtors are evading service. In the circumstances I see no reason why the case should not be proceeded with. The lower appellate Court held that there was no appeal from the order of the Court refusing to confirm the sale. I consider that this is correct because the Court did not purport to act under O. 21, R. 92, and as the auction-purchaser was applying for confirmation the matter could be held to come under S. 47, Civil P. C., (see also *N. K. R. R. M. Chetty Firm* v. *Subraya Mudaliar* (1) on this point. The first revision application, therefore, fails and

(1) A. I. R, 1925 Rang. 271=3 Rang. 131.

is dismissed but *N. K. R. R. M. Chetty Firm* v. *Subraya Mudaliar* (1) lays dawn that such a proceeding on the part of the executing Court is a material irregularity because O. 21, R. 92 lays down expressly that the Court shall confirm the sale in the absence of any application under Rr. 89, 90 or 91. This being so, I accept the second revision application, set aside the order of the learned Subordinate Judge and confirm the sale and direct him to proceed with the matter in accordance with the law.

G. B. J. *Revision allowed.*

A. I. R. 1927 Lahore 72

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Shankar Das and *another* — Defendants—Appellants.

v.

Firm Dittoo Ram Idan—Plaintiff—Respondent.

First Appeal No 2232 of 1922, Decided on 30th November 1926, from the decree of the Sr. Sub-J., Ferozepore, D/- 13th July 1922.

Negotiable Instruments Act (26 *of* 1881), *S.* 76 (*d*) — *Hundi drawn on himself by drawer— Presentation on exact date for payment is not necessary.*

Under the provisions of S. 76, Cl. (d) the presentation on the exact date of the maturity of the hundi is not necessary when the drawer and the drawee are one and the same person, as in such a case no question of damage arises on account of the non presentation on the due date: *A. I. R.* 1922 *All.* 279 *Foll.* [P 73 C 1, 2]

Nand Lal and *Amolak Ram Kapur*—for Appellants.

Fakir Chand and *Jagan Nath Bhandari*—for Respondent.

Agha Haidar, J.—This appeal arises out of a suit brought by the plaintiff-firm against Shankar Das, Defendant No. 1, and Fateh Chand, Defendant No. 2, father and son, respectively, for a sum of Rs. 5.150 due on a hundi which the defendant had drawn upon themselves in favour of the plaintiff-firm, the period of payment being 301 days. The date of the hundi is Sawan Sudi 1, Sambat 1977, corresponding to the 16th of July 1920. The period of payment expired on the 8th of June 1921, and two or four days after, according to the plaintiff, the hundi was presented for payment to the defendants through Chauth Mal Gopi Kishan, but they did not pay the amount under it. The plaintiff served a notice upon the defendants, but to no purpose. The plaintiff-firm claimed Rs. 5,000, as the principal amount, plus Rs. 150 interest at the rate of Re. 1 per cent. per mensem.

The defendants contested the suit. They admitted that the hundi was drawn by Shankar Das, Defendant No. 1, but they pleaded that no valid consideration passed under it. They alleged that Fateh Chand, Defendant No. 2, alone with the firm of Shankar Ram-Parja Ram, entered into badni transactions with the firm known and styled as Aidan-Lachhmi Narain and that the plaintiff-firm was in fact a mere alias for the firm Aidan Lachhmi Narain and the hundi was in fact obtained by the plaintiff-firm in their own name in order to conceal the badni transactions between the defendants and the firm of Aidan-Lachhmi Narain. In effect they pleaded that the badni transactions being void and unenforceable at law the plaintiff-firm could not bring an action upon the hundi. A plea was also taken that as the hundi was not paid exactly on the expiry of the period fixed the plaintiff-firm could not sue on it, seeing that its presentation took place two or four days after the date of maturity. The claim of the plaintiff-firm as regards interest is also denied. The trial Court decreed the plaintiff's suit for the principal sum, but allowed interest only at the rate of Re. 0-8-0 per cent per mensem.

The defendants have come up in appeal to this Court and have repeated the contentions raised by them in the Court below. The main point argued by their learned counsel was that no actual cash consideration passed under the hundi, but that it was merely in lieu of certain wagering contracts called badni transactions. But we have got definite evidence on the point that actual money was paid by the plaintiff-firm in lieu of the hundi. A sum of Rs. 7,500 was originally advanced in cash under two hundis by the plaintiff-firm to the defendants. The defendants made certain payments towards that amount and the present hundi for Rs. 5,000 was subsequently drawn by the defendants in favour of the plaintiff-firm. The evidence of Ramji Lal or Ramji Das, who

was examined on commission on behalf of the defendants themselves, puts the matter beyond doubt and clearly proves that the payments under all those hundis were made in cash.

It may be that the plaintiff-firm advanced the amount due under the hundi to the defendants who themselves paid it to the firm of Aidan-Lachmi Narain in satisfaction of debts incurred by the defendants in badni transactions, but it is clear that in a case like this the defendants cannot turn round and deny their liability by pleading that the plaintiff cannot recover because the money was utilized for the satisfaction of certain debts due to third parties in connexion with wagering contracts. The respondent has printed a supplementary record which contains extracts from nakal bahi, rokar and khata bahis, and the entries therein completely support the plaintiff's case on this point. In fact Ramji Das, in his evidence, has merely amplified the entries contained in the supplementary record so that there is no manner of doubt that the defendants, while executing this hundi in favour of the plaintiff-firm were doing so in lieu of cash consideration and not merely in satisfaction of the debts incurred in forward contracts, as they are called, and under which no cash consideration passes.

A point was also raised that the plaintiff-firm is only an alias of the firm of Aidan-Lachhmi Narain. Beyond the fact that a certain person, namely, Sheopat Rai, was interested in both the firms we have no reason to suppose that the two firms were one and the same. They must be treated as separate firms in the absence of any reliable or definite evidence to the contrary.

It was further argued in appeal that, as the hundi was not presented on the due date, the plaintiff-firm could not bring the suit, and reliance was placed upon S. 64 of the Negotiable Instruments Act (26 of 1881). This point, however, is covered by the authority of the case reported as *Pachkauri Lal* v. *Mul Chand* (1). This case is very similar to the one now before us, and it was held there that under the provisions of S. 76, Cl. (d), of the Negotiable Instruments Act the presentation on the exact date of the maturity of the hundi was not necessary when the drawer and the drawee are one and the same person. In such a case no question of damage arises on account of the non-presentation on the due date. They knew when the hundi was executed, and also the due date of payment thereunder, and on the expiry of the period they knew that it had not been paid.

As to the plea of interest, there is no reason why the plaintiff should have been deprived of the use of the money legally due to him. He is entitled to be compensated for the loss which may be deemed to have been caused to him by the defendants withholding the money due under the hundi. The trial Court has allowed Re. 0-8-0 per cent. per mensem as interest, and we are not prepared to disturb this finding.

The result is that we confirm the decree of the Court below and dismiss the appeal with costs.

R. D. *Appeal dismissed.*

(1) A. I. R. 1922 All. 279=44 All. 554.

A. I. R. 1927 Lahore 73

ADDISON, J.

Pohla Singh—Plaintiff—Petitioner.

v.

Jamal Din—Defendant—Respondent.

Civil Revision Petition No. 293 of 1926, Decided on 2nd October 1926, from a decree of the Sr. Sub-J., Amritsar, D/- 14th December 1925.

Civil P. C., S. 115—Setting up new case by appellate Court—Revision lies.

Appellate Court setting up a new case for the defendant is acting with material irregularity and a revision lies from its decision. [P 74 C 1]

Muhammad Monier—for Petitioner.

Kidar Nath Chopra—for Respondent.

Judgment.—The plaintiff sued for the recovery of Rs. 260 on a promissory note. The defendant denied the claim and stated that if the thumb mark was really his it must have been obtained by the plaintiff fraudulently in collusion with the scribe at the time when the mortgage-deed which was entered into the next day, was being written. He also added that the plaintiff owed him Rs. 1,000 on three mortgage-deeds, one of which was executed the next day, and that, therefore, there was no necessity for him to borrow money from the plain-

tiff. The trial Court found that the case set up by the defendant as regards fraud in obtaining his signature had not been made out, as the scribe who wrote the promissory-note was not the same as the scribe who wrote the mortgage-deed the following day. The defendant produced two witnesses who stated that the defendant put his thumb mark not to a written paper but to a blank one on which a lease was to be written later, whereas the defendant's own case was not that it was a blank paper. Execution was, therefore, held to be duly proved and the trial Court further found that the defendant had not established that the promissory note was without consideration. On appeal the Senior Subordinate Judge held that the promissory note was executed, but that it was done fictitiously in order to include a fictitious item in the mortgage deed which was executed the next day. Against this decision this revision petition has been admitted.

It is clear that the lower appellate Court set up a new case for the defendant. It was not his case that he executed the promissory note fictitiously in order to include a fictitious item in the mortgage-deed which was executed the next day. This it should not have done. The mortgage-deed of the next day mentions that a sum of Rs. 200 or so had been previously advanced. The only conclusion that can be drawn is that this promissory note formed part of what was stated to have been previously advanced. It was for the defendant to establish that it was without consideration and he failed to do so. The lower appellate Court acted with material irregularity, and accept the petition and restore the decree of the trial Court with costs throught.

R. D. *Petition accepted.*

A. I. R. 1927 Lahore 74

FFORDE AND ADDISON, JJ.

Arjan—Accused—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 891 of 1926, Decided on 3rd November 1926, from an order of the S. J., Karnal, D/- 3rd August 1926.

Criminal trial—Evidence—Motive alone is not sufficient to base conviction.

The motive in itself is quite inadequate to sustain a conviction unless there are other grounds upon which it could rightly be had. [P. 75, C. 1]

Shamair Chand—for Appellant.

R. C. Soni for *Govt. Advocate*—for Respondent.

Fforde, J.—The appellant Arjan was tried with seven other persons for the murder of one Parbhu. The other seven persons have been acquitted and the appellant has been convicted and sentenced to transportation for life.

It is alleged that Arjan made a karewa marriage with a certain Mt. Jiwani who is the step-mother of the murdered youth, and the motive for the murder is said to be the desire of Arjan to get rid of the boy in order that Mt. Jiwani should get possession of the whole of the land thereby giving the appellant an opportunity to benefit.

On the morning of the 27th May 1924, the body of the deceased was found partly burnt and with a hole in the neck in which were pieces of metal. On the day that the corpse was discovered the appellant made a statement at the Police Station, the material part of which is in these words:

I, Arjan, with Ind Raj Lambardar went to the spot and found him, Parbhu, dead. I up to now have no suspicion about the death, nor am I able to know how the death has come about.

It is upon this statement coupled with the fact that the appellant was in a position to gain by the death of Parbhu, that the conviction against him has been mainly based. The learned Sessions Judge interpreted this statement to read as a report that Parbhu had committed suicide. (The judgment then examined the evidence and finding that it was worthless proceeded.) The only thing which remains is the fact that the appellant does stand to gain by the death of the murdered boy. But in most cases of

death somebody stands to gain, and all that can be said is that there is some motive for Arjan to get rid of the boy. The motive in itself is of course quite inadequate to sustain a conviction unless there are other grounds upon which it could rightly be had.

The other ground relied upon by the trial Judge is the statement at the thana to which I have already referred. As I have said the learned Sessions Judge regards it as a highly incriminating document owing to the fact that he reads that statement as being a report by Arjan that the deceased had committed suicide, whereas it was perfectly obvious that he could not have killed himself in the manner in which he was obviously killed and subsequently burnt his own body. All that the appellant's statement, in my opinion, amounts to is this: that he had found the deceased's body, and that he had no suspicion as to how his death was brought about or as to who had caused it. It is of course a fact that he did not give a description of the condition of the body, which circumstance may rightly be commented upon. But in view of the fact that a lambardar had accompanied him to the spot when he discovered it, and in view of the fact that the Police themselves would naturally go to the scene and see the condition the body was in, it was really unnecessary for the appellant to give a detailed description of the body and the omission to describe its condition was in no way important. The approver's evidence has been rejected for very sufficient reasons, which are set out in the learned Sessions Judge's judgment.

There remains no other evidence to base a charge of murder upon. I may point out that the assessors were unanimous in coming to the conclusion that the case had not been proved against any of the persons on trial. For the reasons given I am of opinion that the case has not been established with that reasonable certainty which the law requires, and I would accordingly accept the appeal, set aside the conviction and sentence and direct that the appellant be discharged from custody.

Addison, J.—I concur.

G. B. J. *Appeal accepted.*

A. I. R. 1927 Lahore 75

COLDSTREAM, J.

Ram Labhaya and *others*—Plaintiffs—Appellants.

v.

Kartar Singh and *others*—Defendants—Respondents.

Second Appeal No. 809 of 1926, Decided on 30th November 1926, from the decree of the Dist. J., Attock, D/- 15th December 1925.

Mortgage—Redemption—Death of Mukararidar mortgagor without heirs—Mortgage is not extinguished—Equity of redemption vests in proprietor.

A mortgage by a mukararidar is not extinguished on the death of the mortgagor without heirs. The proprietor, by virtue of reversion, becomes the owner of the land in whom the equity of redemption vests. [P. 77, C. 2]

Nand Lal—for Appellants.

Shamair Chand—for Respondents.

Coldstream, J.—The suit out of which this appeal arises was instituted by two proprietors of two areas of land in village Shahbazpur of Pindigheb tehsil measuring 15½ kannals and 3 marlas respectively for the redemption of these areas from mortgage. The plaintiffs alleged that one Gaman who held the lands as mukarraridar had mortgaged his mukarraridari rights to the predecessors-in-interest of the first twenty-seven defendants for Rs. 108, and that on Gaman's death the rights had passed to his widow and, after her death, there being no nearer heir to succeed to them, had been recorded in the land revenue records as having reverted to the plaintiffs, the proprietors of the land. The similar plot had, so it was stated by the plaintiffs, been recorded at the Settlement of 1880 as in possession of the defendants' predecessors as mukarraridars instead of as mortgagees as they really were. The proprietors other than the plaintiffs were joined as pro forma defendants (28—51). The suit was contested (in argument at any rate) on the grounds, (1) that the mortgage having been extinguished by the death of the mortgagor (their being no reversioners entitled to succeed under S. 59 of the Punjab Tenancy Act) the contesting defendants had been holding possession for more than twelve years adversely to the plaintiffs whose suit, therefore, was barred under Art. 144 of the Indian

Limitation Act; and (2) that the smaller area was not under mortgage along with some larger area.

The first Court framed only three issues:

(1) Is the plaintiffs' suit within time?

(2) Can a prayer for possession of the ihata chah (the smaller area) be included in this suit?

(3) What sum should the plaintiff pay on redemption?

The learned Sub-Judge held that the suit was governed by Art. 148 of the Limitation Act and was within time, and that the mortgage included the smaller area, the entry of 1880 being an error and unauthorized. He granted a preliminary decree accordingly. An appeal by the majority of the contesting defendants was dismissed by the learned District Judge, and against this dismissal the defendants have preferred this second appeal. The memorandum of appeal puts forward no less than nineteen grounds, but beyond reading them through at length Dr. Nand Lal has not addressed any argument to the Court in support of others than the following, namely: (1) that the suit was barred by limitation, (2) that an issue ought to have been struck and decided on the questions whether there existed any heirs entitled to succeed to Gaman's rights and whether in their presence the plaintiffs had a locus standi for the suit; and (3) that the plaintiffs were wrongly held to be mukarraridars in succession to Gaman. Dr. Nand Lal now asks me to remand the case for a decision upon the issue whether the plaintiffs had a locus standi to institute the suit.

I first dispose of the second of these grounds. In their written pleas the defendants stated that heirs of Gaman were in existence, that his rights did not devolve upon the proprietors in their presence, and plaintiffs proprietor had no right to sue. No distinct issue upon this plea was struck, but it is clearly apparent that the plea was abandoned at the trial. The plaint in its final form was presented in March 1922, and the pleas were filed on 7th November of that year. On the 21st November 1922, certain persons applied to be made parties alleging that they and several others, not named, were heirs of Gaman. The Sub-Judge made a regular enquiry and finding that they were not heirs rejected the application. The issues were struck on the 1st March 1923, there being none upon the questions whether there were reversioners entitled to sue or whether the plaintiffs had a right to sue. The defendants from the beginning to the end of the proceedings have not named any of the alleged heirs and Dr. Nand Lal admits that he is unable to name any persons other than the plaintiffs entitled to redeem the mortgage.

The mortgage by Gaman has never been denied. No witness was asked by defendants to name any heir, nor has any witness stated that there was an heir in existence. The trial lasted for nearly eight months after the issues were struck and it was open to the defendants to ask for an issue. It is obvious that the point was present before the parties, for a long period was spent in the inquiry into the application of 21st November 1922, and the plaintiffs proved the mutation of land succeeding to Gaman's rights. In their written pleas defendants admitted that plaintiffs were recorded as mukarariдars, but stated that they had no knowledge whether they really were. It would not in these circumstances have been just in my opinion to remand the case and I think that the learned District Judge was right in refusing to do so.

The point as to limitation does not appear to have been argued before the lower appellate Court except in so far as it was contended that the plaintiffs could not sue as mortgagors. A suit for redemptiou of the mortgage was within time. The land was first mortgaged, no doubt, in 1860, but there was a dispute over the mortgage in 1863. The dispute was settled by a compromise in Court by which not only was the mortgage continued, but apparently on conditions entirely different from those of the original hypothecation. The first Court was, I think, right in regarding the compromise as superseding the original hypothecation. But even if the suit be regarded as based upon the contract of 1860, it is clear from the records that in 1863 the mortgagees not only admitted the mortgage but undertook to allow proportionate redemption on part payment of the debt. There is ample authority that such an admission extends time under the provisions of S. 19 of the Limitation Act.

It remains to be decided whether there s any force in Dr. Nand Lal's contention

that the plaintiffs could not redeem because the mortgage was extinguished on the death of Gaman without reversioners other than the proprietors, and, consequently, the suit could only be one for possession against trespassers which suit was barred by limitation.

The nature of a mukararidari right has never been completely and clearly defined. That a mukararidar is not an owner but a tenant was decided after reference to previous decisions to this Court by the judgment reported in *Kanshi Ram* v. *Shah Nawaz* (1). But though there is little doubt that a mukararidar could, if he wished, prove that he had a right of occupancy under S. 8 of the Punjab Tenancy Act, his tenancy is not, until he has done so, governed by the provisions of the Act relating to occupancy tenants: *Nawab Khan* v. *Seva Dass* (2). Thus it has been held that the tenancy is alienable (see 74 *P. R.* 1879) and succession to it is not restricted to a collateral tracing his descent from the common ancestor of the last tenant and himself: *Maya Das* v. *Aulia Khan* (3). A mukararidar has been described as a tenant with a right of occupancy of a peculiarly exalted kind, the question of succession being governed by custom: *Maya Das* v. *Aulia Khan* (3). The ruling last cited was on the question whether succession was limited to descendants of a common ancestor of the last tenant and the collateral claiming succession.

Now Dr. Nand Lal has cited no authority for his contention that on the death of a mukararidar his mortgagees become owners of the land and the proprietor's right to redeem is forfeited. When the appeal first came before the learned District Judge he dismissed it on the ground that the appellants had refused to join as respondents the representatives of a deceased pro forma defendant. An appeal against this dismissal was preferred to this Court and Jai Lal, J., in remanding the appeal for decision on its merits remarked that the plaintiffs in this case cannot be called the heirs of the land by virtue of reversion. They are, therefore, the owners of the deceased mukararidar. They became owners of the land in whom the equity of redemption vests. It was laid down by the Chief Court in 79 *P. R.* 1878 that on the death of an occupancy tenant without heirs the interest of a mortgagee from the tenant ceased with the interest of the mortgagor. But that ruling was based on the fact that an occupancy tenancy does not devolve upon a proprietor under S. 59 of the Tenancy Act, but under the express proviso thereto is extinguished. As already remarked, that S. 59 is not applicable to mukararidari tenancy and the appllicants have not attempted to prove under S. 8 that they have occupancy rights. Now the facts that, since 1884, the right of redemption has been recorded as vested in the plaintiffs and that the contesting defendants or their predecessors have never sought to have the entry in the records altered supports an inference that by custom a mortgage by a mukarraridar is not extinguished on the death of the mortgagor without heirs. If however the rights were extinguished it appears to me that the mortgagees became either tenants at will or trespassers. It has never been contended that they were tenants and that the suit is triable only by a revenue Court. If they were mere trespassers, the landlords are prima facie entitled to a decree for possession free of encumbrance, unless their suit is barred by limitation. According to the revenue records from 1884 onwards the contesting defendant's possession of the larger area has been that of mortgagees, and in 1920 they admitted that they were mortgagees (mutation 555 of 1920): Dr. Nand Lal has not moreover attempted in his argument to support a plea of adverse possession. My conclusion is that the suit was not barred by limitation. Dr. Nand Lal has not advanced any clear reason for holding that the mutation order of 1884 was incorrect.

This disposes of all the arguments addressed to me in this appeal which is dismissed with costs.

R. D. *Appeal dismissed.*

(1) A. I. R. 1923 Lah. 295.
(2) [1908] 42 P. R. 1908=87 P.W.R. 1908=187 P. L. R. 1908.
(3) [1896] 10 P. R. 1896 Rev.

* A. I. R. 1927 Lahore 78 (1)

JAI LAL, J.

Babu Ram—Plaintiff—Petitioner.

v.

Nathu Ram—Defendant—Respondent.

Civil Revision Petition No. 384 of 1926, Decided on 29th October 1926, from a decree of the Small Cause Court J., Dasuha, D/- 24th March 1926.

* *Oaths Act, Ss. 8 and 10—Party agreeing to abide by oath of certain person—Consent subsequently withdrawn—Court should either administer the oath and decide on that or proceed according to law with appropriate inference from party's refusal.*

Where a party to a suit agrees to abide by the oath of a particular person but subsequently declines to abide by it, the Court should either proceed to administer the oath and decide the case in accordance therewith, or should accept the plaintiff's alleged refusal to abide by the oath and drawing such inference from the refusal as is permissive proceed with the trial of the case in accordance with law. [P 78 C 1]

Shamair Chand—for Petitioner.

Anant Ram Khosla for *N. C. Pandit*—for Respondent.

Judgment.—The petitioner instituted a suit for the recovery of Rs. 49-15-3 against the defendant, who denied the claim. The plaintiff thereupon agreed to abide by the oath of one Babu Ram. Apparently this was agreed to by the defendant and the Court appointed a local Commissioner to administer the oath to Babu Ram. The Commissioner, however, made a report to the Court that before him the plaintiff had declined to abide by the oath and consequently that he did not administer the oath. Thereupon the Court dismissed the plaintiff's suit.

It is contended on behalf of the petitioner that the Court below was not justified in dismissing the suit. Either it should have proceeded to administer the oath and to decide the case in accordance therewith, or should have accepted the plaintiff's alleged refusal to abide by the oath drawing such inference from the refusal as is permissive and then proceeded with the trial of the case in accordance with law.

The counsel for the respondent is unable to show any good reasons against the validity of these assertions. In fact he practically concedes that there is force in them.

I may note that the plaintiff denies that he refused to abide by the oath and states that he is still prepared to abide by it.

I accept this petition, set aside the decree of the Judge of the Small Cause Court and remand the case to him with direction to proceed with the suit in accordance with law with due regard to the above observations. The costs will abide the result.

G. B. J. *Petition accepted.*

A. I. R. 1927 Lahore 78 (2)

FFORDE, J.

Chanan Singh—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 527 of 1926, Decided on 12th November 1926, from the order of the Addl. S. J., Lahore, D/- 1st April 1926.

Evidence Act, Ss. 30 and 133—It is unsafe to base conviction on the uncorroborated statement of approver—Production of dang from a field or stains of human blood on accused is not corroboration—Evidence Act S. 114, Ill (b).

It is not safe to base a conviction upon the evidence of such an approver who obviously is deeply interested in putting responsibility for the offence upon shoulders other than his own, unless there is some independent evidence to corroborate his story in material particulars. The mere fact that the approver produced a spear and a dang from a field and he stated that the spear was used by the accused is not corroboration of the approver's story; so also the fact that the accused was stained with human blood, does not corroborate the approver's story. [P 79 C 1,2]

Nand Lal—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—The appellant and one Ajaib Singh have been tried under S. 302, I. P. C., of having caused the death of Sunder and Indar Singh. The learned Sessions Judge has held that, so far as the death of Sundar is concerned, the appellant and Ajaib Singh were acting in the exercise of the right of self-defence, and that they did not exceed that right, and, accordingly, could not be held guilty of any offence. The learned Sessions Judge, however, held that Chanan Singh was legally liable for the death of Indar Singh. I find it somewhat difficult to understand the exact meaning of some portions of the learned Session Judge's judgment. He says for

instance in referring to Indar Singh's death :

My finding, therefore, is that although Chanan Singh had the right of private defence, extending to the voluntary causing of death, that right was exceeded, but that it cannot be affirmed that the excess was intentional. His offence, therefore, so far as the death of Indar Singh was concerned fell within the purview of S. 304, Part 1, that is culpable homicide not amounting to murder.

In an earlier portion of his judgment he says :

As Indar Singh was trying to snatch the dang from Mangta, and he had already wielded his sangha twice, an apprehension of grievous hurt was, of course, reasonable, but it is clear that Chanan Singh in causing the injuries in question exceeded the right of private defence. There were now three against one and I cannot possibly avoid the conclusion that the accused could defend himself, also his companions without having recourse to the amount of violence which he employed.

Then he goes on :

I am, however, not prepared to hold that the act was maliciously excessive or vindictively unnecessary. It may have been brought about on account of the natural want of judgment, which a person cannot be expected to possess at a moment of great excitement, or may have been brought about because of the exaggerated sense of danger or of the right out of all proportions to the real requirement of the case.

It is hard to understand from these observations what the learned Sessions Judge intended to convey as to the legal position of the appellant or exactly what his intention was when inflicting the injury which is alleged to have caused the death of Indar Singh.

The case for the Crown rests entirely upon the uncorroborated evidence of Mangta, the approver, who admittedly took part in the affray. The learned Sessions Judge seems to have been of opinion that because the approver produced a spear and a dang from a field, and because he stated in his evidence that the spear was used by Chanan Singh the production of the spear is corroboration of the approver's story. This is obviously unsound reasoning—he also took into consideration the facts, and I presume that he had used it to corroborate the approver's story, that Chanan Singh as also Ajaib Singh, were stained with human blood. This, however, does not corroborate the approver's story that Chanan Singh was responsible for the death of Indar Singh. It only means that he undoubtedly took part in the affray. I can find no corroboration throughout the whole of the evidence of the approver's story that Chanan Singh used a spear which caused the death of Indar Singh. In my opinion it will not be safe to base a conviction upon the evidence of such a person as Mangta, who obviously is deeply interested in putting responsibility for this offence upon shoulders other than his own, unless there is some independent evidence to corroborate his story in material particulars.

In these circumstances I am driven to accept this appeal, set aside the conviction and sentence, and direct that the appellant be realeased from custody.

It follows that the revision application must also be dismssed.

R. D. *Appeal accepted.*

A. I. R. 1927 Lahore 79

AGHA HAIDAR, J.

Yaru—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 870 of 1926, Decided on 8th November 1926, from an order of the S. J., Shahpur, D/- 24th June 1926.

Criminal trial—Evidence—Document not evidence does not become so by formal proof—Document prepared by police during investigation is not evidence.

Documents prepared by police during the course of investigation are not evidence and they do not become so after they have been formally proved by witnesses. A document which is not evidence does not become so by being formally proved and exhibited in the case.

[P. 79; C. 2, P. 80, C. 1]

Judgment.—Yaru has been convicted and sentenced to a term of five years' rigorous imprisonment including three month's solitary confinement and action has also been taken by the learned Sessions Judge under S. 565, Criminal P. C. He has appealed from jail. The charge against him was under S. 379 read with S. 75, Indian Penal Code. He had three previous convictions against him, the last conviction being dated the 28th August 1919, under S. 379/75 for three years' rigorous imprisonment.

I noticed on going through the record that certain documents which the police—in this case a Head Constable—had prepared during the course of investigation have been treated as evidence in that the witnesses who have come forward on behalf of the prosecution have

been formally called upon to prove them by the identification of the signatures which they affixed upon them. This course was entirely erroneous and illegal and the learned Sessions Judge was mistaken in considering that those documents were evidence and could be looked into after they had been formally proved by witnesses. A document which is not evidence does not become so by being formally proved and exhibited in the case. One of these documents, Exhibit P. B, is specially referred to in the order of the Sessions Judge. The procedure was, to say the least of it, extremely irregular and it is to be hoped that it would not be repeated.

However, I have gone through the record carefully and, in my opinion, after eliminating these documents from consideration the guilt of the accused is proved by the prosecution witnesses and all the links in the chain of evidence against him are complete. Accused is an old man, and, according to the record. not in robust health; but having regard to his previous history it cannot be said that the sentence passed upon him is unduly severe. The appeal is dismissed.

G. B. J. *Appeal dismissed.*

A. I. R. 1927 Lahore 80 (1)

SHADI LAL, C. J.

Shiba Mal and *another*—Plaintiffs—Petitioners.

v.

Rup Narain — Defendant — Respondent.

Misc. Petition No. 459 of 1926, Decided on 26th October 1926, for transfer of the case from the Court of the Sr. Sub-J., Delhi.

Civil P. C., S. 24—Defendant having influence in the town is no ground.

The mere ground that the defendant is a man of influence in the town is not sufficient to transfer the case to some other place.

[P. 80, C. 2]

Tek Chand and *Pyare Lal*—for Petitioners.

Sardha Ram and *Kishan Dyal*—for Respondent.

Order.—I have listened to the arguments advanced by the learned counsel on both sides, and have reached the conclusion that no adequate ground for the transfer of the case to another district has been established. The defendant is no doubt, an Honorary Magistrate of the First Class, and appears to be a man of influence at Delhi; but there is no reason why the Senior Subordinate Judge, who is an experienced judicial officer, should not be able to try the case in an impartial manner.

I dismiss the application for transfer. The trial Judge should take special care to ensure that all proceedings taken by him are strictly in accordance with law, and he should do nothing which may create a reasonable apprehension in the mind of either of the parties that he will not have a fair and impartial trial in his Court.

G. B. J. *Petition dismissed.*

A. I. R. 1927 Lahore 80 (2)

SHADI LAL, C. J.

Rahm Ghani—Accused—Petitioner.

v.

Fazal Elahi—Complainant—Respondent.

Criminal Revision Petition No. 1091 of 1926, Decided on 29th October 1926, from the order of the Dist. Mag., Gujrat, D/- 26th June 1926.

Criminal P. C., S. 528 — Transfer without notice to opposite party is not illegal.

An order of transfer without giving notice to the opposite party, though not desirable, is not illegal. [P. 80, C. 2]

Zaffrullah Khan—for Petitioner.

M. L. Puri—for Respondent.

Judgment.—While I consider that the order of transfer should not have been made without giving notice to the opposite party. I am not prepared to hold that such an order is illegal. I have heard the arguments advanced on both sides and do not see any adequate ground for quashing the order passed by the District Magistrate. I, however, direct the Magistrate to try the case, not in a summary way, but in accordance with the ordinary procedure.

G. B. J. *Petition dismissed.*

A. I. R. 1927 Lahore 81

JAI LAL, J.,

Maula Bakhsh and *another*—Defendants—Appellants.

v.

Imam Din and *others*—Plaintiffs—Respondents.

Second Appeal No. 364 of 1925, Decided on 3rd November 1926, from the decree of the Sr. Sub-J., Gurdaspur, D/- 30th October 1925.

Mortgage—Mortgagor effecting mortgage and dying—Second mortgage by his major son acting for minors—Third mortgage by widow acting for minor sons—Suit for redemption by second mortgagee—Sons supporting his claim—Plea by first mortgagee of incapacity of major son effecting the second mortgage was disallowed.

A mortgagor effected a mortgage and died. His major son, acting for himself and his minor sons, effected a second mortgage and then a third mortgage was effected by the widow of the mortgagor acting for the minor sons; second mortgagee brought a suit for redemption of the first mortgage, in which objection was taken by the first mortgagee that the second mortgage was invalid on the ground as the major son could not validly effect a mortgage for the minors; the sons supported the plaintiff's claim.

Held; that the first mortgagee cannot question the validity of the second mortgage in face of the sons' acceptance of the second mortgage in pleadings. [P. 81, C. 2]

Dev Raj Sawhney—for Appellants.

M. L. Puri—for Respondents.

Jai Lal, J.—Sultan Bakshsh mortgaged the property in suit to Defendants Nos. 1 to 4 about twenty years ago. He died and Defendants Nos. 5 to 8, his sons, succeeded to his estate. On the 5th of January 1922 Taj Din, Defendant No. 5, who was of age acting on his own behalf and as guardian of his three minor brothers, mortgaged the same property in favour of the plaintiffs. Then, on the 4th of May 1922, the mother of Defendants Nos. 6 to 8, acting as their guardian, mortgaged the same property to Defendants Nos. 1 to 4. The amounts of the mortgages were Rs. 200, Rs. 500 and Rs. 400 respectively, and it appears that the first mortgage was with possession. On the 28th of May 1923 the plaintiffs brought a suit for the redemption of the first mortgage in their capacity as the second mortgagees. They impleaded the prior mortgagees and the owner of the property as defendants. Defendants Nos. 5 to 8 supported the plaintiffs' claim, but the Defendants Nos. 1 to 4, the mortgagees, contested the suit on the ground that Defendant No. 5 Taj Din was not the legal guardian of Defendants Nos. 6 to 8 and, therefore, the mortgage of the minors' share in favour of the plaintiffs was invalid and that the plaintiffs were not entitled to redeem the first mortgage as Defendants Nos. 1 to 4 were also subsequent mortgagees of the property in relation to the plaintiffs. The plaintiffs thereupon raised the plea that the mortgage in favour of Defendants Nos. 1 to 4 was invalid. The trial Court granted a decree to the plaintffs for redemption of the mortgage. The Senior Sub-Judge, on appeal, dismissed the appeal.

On behalf of Defendants Nos. 1 to 4 it is contended before me that the mortgage in favour of the plaintiffs, in so far as the shares of the minors are concerned being invalid, the plaintiffs could be deemed to be the mortgagees only of the rights of Taj Din and therefore could not redeem the entire mortgage in favour of Defendants Nos. 1 to 4. There is no force in this contention because in the first instance Defendants Nos. 6 to 8 having accepted the mortgage in their pleadings it was net open to Defendants Nos. 1 to 4 to raise the question of the validity of that mortgage on the ground of the alleged incapacity of Taj Din to act as the guardian of the minors. In view of the above opinion it is not necessary for me to consider the plea raised on behalf of the plaintiffs that the validity of the mortgage could not be attacked in the preseut suit by Defendants Nos. 1 to 4, and that a separate suit to rescind the mortgage should have been instituted by them, though it appears to me that this plea is opposed to *Sajjad Ali* v. *Muhammad Zulfikar Ali Khan* (1). For the purposes of this suit, therefore, the second mortgage in favour of the plaintiffs must be deemed to be valid. The plaintiffs, therefore, are the puisne mortgagees in relation to Defendants Nos. 1 to 4 of the entire property mortgaged and are, therefore, entitled to maintain this suit for redemption. Thus the contention of the learned counsel for the appellants that the integrity of the mortgage having been broken the plaintiffs are entitled to redeem only the share of Taj Din falls to the ground.

(1) [1916] 83 P. R. 1916=33 I. C. 943=125 P. W. R. 1916.

The learned counsel then urged that a decree in favour of the plaintiffs would merely lead to a multiplicity of suits as they could immediately file a suit against the plaintiffs and Defendants Nos. 5 to 8 for redemption of the second mortgage by virtue of their being mortgagees of the shares of the three minor sons of Sultan Bakhsh. This objection also is devoid of force because the appellants have a separate cause of action on the alleged mortgage of the 4th of May 1922 and it may be open to the plaintiffs to question the validity of that mortgage. In fact an issue was raised and decided against the appellants by the trial Court, but it has rightly been held by the Senior Sub- Judge that the question does not arise in the present case.

I dismiss this appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 82

FFORDE AND CAMPBELL, JJ.

Ram Saran—Defendant—Appellant.

v.

Mt. Punjab Kaur and *another*—Plaintiffs—Respondents.

Second Appeal No. 1546 of 1922 Decided on 19th May 1926, from the decree of the Dist. J., Ludhiana, D/- 2nd May 1922.

Custom—Punjab—Jats of Ludhiana district—Widow of pre-deceased grandson is entitled to share equally with sons.

Amongst the Jats of the Ludhiana District the widow of a grandson of a deceased owner of property is entitled to share equally in his property with his sons. [P 82 C 2]

Balwant Rai—for Appellant.

Badri Das—for Respondents.

Judgment.—The appellant is a son of Bishen Singh deceased and the respondent is the widow of Basanta, one of Bishen Singh's grandsons. Both Basanta and his father had predeceased Bishen Singh.

On the death of Bishen Singh his land was mutated in the name of the appellant, and the suit out of which this appeal arises was thereafter brought by the respondent claiming possession of this land on the ground that by a special custom obtaining amongst the Jats of Ludhiana district the widows of predeceased sons and grandsons of a male proprietor are entitled to share equally in his property with his sons. The trial Court gave a decree in favour of the respondent, finding that this custom had been established, and this decree was affirmed on appeal to the District Judge.

The only question which arises for our determination in this appeal is whether amongst the Jats of the Ludhiana district the widow of a grandson of a deceased owner of property is entitled to share equally in his property with his sons. The principal evidence relied upon by the respondent in her suit was the Riwaj-i-am of the Ludhiana district, compiled by Mr. J. M. Dunnet, dated the 6th of July 1911. On page 69 of this volume under the heading; "Right of Representation" appears this question (36): "Where a deceased leaves sons and also sons of deceased sons, are the latter entitled to a share as well as the former?"

Answer: There is no question about this. The right of succession by representation is established and admitted among all tribes. It extends to the recognition of daughters-in-law and granddaughters-in-law in presence of sons. In this respect all Muhammadans disregard the Shara. The custom is so well established (it has also the sanction of 91 Punjab Record, 1879) that I need not quote examples beyond instances where grand daughters-in-law succeeded.

Three examples are then given. This piece of evidence in favour of the respondent placed the onus upon the appellant to show that the custom as alleged in this riwaj-i-am was not followed by the parties to this litigation. This onus the appellant has wholly failed to discharge. The instances upon which he has relied have obviously no bearing upon the question at issue. On the other hand in a recent judgment of a Division Bench of this Court reported in *Jagin Singh* v. *Mt. Santi* (1) it was held that the entry in the riwaj-i-am of the Ludhiana district being in favour of a sonless daughter-in-law succeeding along with son, the onus of proving that he was entitled to succeed to the exclusion of the daughter-in-law was on him and that he had failed to discharge that onus. The riwaj-i-am there referred to

(1) A. I. R. 1922 Lah. 389=3 Lah. 101.

is the above mentioned riwaj-i-am by Mr. Dunnet and it appears to me that that decision concludes this case. That also was a case of Jats of Ludhiana District, and the same point was there raised as has been raised in the present suit, with this exception, that the claimant in that case was the widow of a deceased son; whereas, in the present case, she is the widow of a grandson.

It was admitted in both the lower Courts that on this question of custom there is no difference between the case of a daughter-in law and a grand daughter-in law, but counsel for the appellant refuses to accept this admission made by a counsel for his client in the lower Courts and he urges that there is a distinction. In support of his argument, however, he has failed to produce any evidence whatsoever, and as the entry in the riwaj-i-am in this regard has not been rebutted, the respondent would be entitled to succeed in her contention even if there were no other evidence on the record. In *Jagin Singh* v. *Mt. Santi* (1) the judgment states that the riwaj-i-am is not supported by instances, it having apparently been overlooked that in fact three instances are given under Question 36. The riwaj-i-am, therefore, is an even stronger and more conclusive piece of evidence than it was deemed to be in that case.

As the onus cast on the appellant of proving that a grand daughter-in-law is excluded by the son has not been discharged, the appeal must fail, and I would accordingly dismiss it with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 83

JAI LAL, J.

Sawan Singh—Plaintiff—Petitioner.

v.

Surain Singh and *others*—Defendants—Respondents.

Civil Revision Petition No. 242 of 1926, Decided on 10th November 1926, from a decree of the 4th Cl. Sub-J., Guardaspur, D/- 7th November 1925.

Civil P. C., O. 7, R. 13—Plaint in previous suit rejected as not amended within time allowed for amendment after it was returned—Such rejection is no bar to a fresh suit on the same cause of action—Civil P. C., O. 6, R. 18.

Order 6, R. 18 of the Civil P. C. only prohibits an amendment of the plaint after the expiry of the time fixed therefor by the Court or the law. [P 83, C 2]

A suit which is bad for multifariousness falls under R. 11 (d) of O. 7, Civil P. C., and so if a plaint is rejected on this ground as not amended within the time allowed, the plaintiff is not precluded from bringing a fresh suit on the same cause of action merely on account of such rejection. [P 83, C 2]

J. N. Bhandari—for Petitioner.

G. S. Salarya—for Respondents.

Judgment.—The plaint in the previous suit brought by the plaintiff on the same cause of action was rejected on the ground that it was not amended within the time fixed by the Court. It appears that objection was taken to it on the score of multifariousness and, therefore, the plaint was returned for amendment. The plaintiff then instituted the suit out of which these proceedings have arisen on the same cause of action. The suit has been dismissed by the lower Court on the ground that a fresh suit does not lie under O. 6, R. 18, Civil P. C. I do not think that this rule prohibits a fresh suit being brought on the same cause of action when the plaint has not been amended within the time fixed by the Court or the law. All that that order prohibits is an amendment of the plaint after the expiry of the time. The law applicable to the present case is O. 7, R. 13, which provides that if a plaint is rejected for any ground mentioned in the previous rules the plaintiff shall not be precluded from presenting a fresh plaint in respect of the same cause of action merely on account of such rejection. O. 7, R. 11 (d) authorizes the rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law. The suit which is bad for multi fariousness falls under this clause and therefore, the plaint was rejected under, O. 7, R. 11, Civil P. C.

In my opinion, the reason given by the Judge, Small Cause Court, for dismissal of the suit are not sound and I accept this petition, set aside the decree of the lower Court and remand the case to him for disposal of the suit in accordance with law. The petitioner will have his costs in this Court.

J.V. *Case remanded.*

A. I. R. 1927 Lahore 84

JAI LAL, J.

Kanhya Lal and *others*—Judgment debtors—Appellants.

v.

Megh Raj and *others*—Decree-holders and Vendees—Respondents.

Misc. First Appeal No. 1331 of 1926, Decided on 12th November 1926, from an order of the Sr. Sub-J., Ferozepore, D/- 8th May 1926.

(a) *Civil P. C., O. 21, R. 66—Omission to issue notice is material irregularity.*

Omission to issue notice is a material irregularity. [P. 84C. 9]

(b) *Civil P. C., O. 21, R. 90—Execution—Sale in—Material irregularity and consequent substantial injury both but not either is a good ground for quashing it—Plea of oral adjustment untenable under R. 90 (obiter).*

Omission to issue a notice under O. 21, R. 66 though a material irregularity, must result in substantial injury, before a Court sale can be set aside under O. 21, R. 90.

In seeking to set aside an execution sale under O. 21, R. 90, the judgment-debtor cannot at any rate object to it on the ground that the decree is orally adjusted. [P. 84, C. 2]

Fakir Chand—for Appellants.

Jaggan Nath Bhandari—for Respondents.

Judgment.—Immovable property belonging to the appellant was sold on the 7th and 8th April 1926, in execution of a decree. Objections were filed by him on the 19th April on the ground of material irregularity in publishing and conducting the sale and also on the ground of substantial injury suffered by him. Twenty-ninth April 1926 was the next date fixed by the Executing Court. On that date the judgment-debtor and the decree-holder both were present and the latter filed a written reply to the objections of the former. Thereupon the Court fixed the 8th May 1926, for confirmation of the sale and the decision on the objections. The Court further ordered that the officer who conducted the sale should be summoned for the date fixed. On the 8th May statements of the decree-holder, the judgment-debtor and one of the purchasers were recorded and then the Court passed the order under appeal by which it confirmed the sale holding that there was no material irregularity in publishing and conducting it and that the judgment-debtor had not established that the had suffered any material injury.

The main ground on which the order of the Senior Sub-Judge is attacked before me is that no opportunity was given to the appellant to substantiate his objections in spite of a request for the adjournment of the case for that purpose. I have already stated that on the 29th April the Senior Sub-Judge had expressly fixed the next date for 'decision of the objections' by the judgment-debtor and, therefore, the latter had sufficient notice that the case would be concluded on the 8th May. He had summoned no witness for that day nor is there any note by the Senior Sub-Judge that he asked for an adjournment on the 8th May though in the judgment the learned Judge has remarked that he did not think it necessary to adjourn the case for enquiry into such a flimsy matter and, therefore, disposed of the objections without further delay against the judgment-debtor.

In my opinion even if the request was made for the adjournment of the case on the 8th May the learned Judge was fully justified in refusing to accede to it.

It was then contended by the learned counsel that non-compliance with the provisions of O. 21, R. 66, Civil P. C., is not a mere irregularity in publishing the sale but is an illegality which makes the sale void ab initio. No authority was cited in support of this proposition which on the face of it has no force. In my opinion omission to issue a notice under O. 21, R. 66, is an irregularity such as is contemplated by O. 21, R. 90. The judgment-debtor failed to show that he suffered substantial injury by the alleged material irregularities. Under the circumstances it is unnecessary to consider whether there were material irregularities in publishing the sale though on that point I am not disposed to agree with the conclusions of the Senior Sub-Judge.

Another objection raised by the judgment-debtor was that the decree had been adjusted orally by the decree-holder by accepting a smaller amount. I am unable to see how such an objection could be raised under O.21, R. 90. In any case there is no proof of such an adjustment and the conclusion of the learned Senior Sub-Judge is correct.

I dismiss this appeal but make no order as to costs.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 85

SHADI LAL, C. J.

Emperor

v.

Ishar Singh—Accused—Respondent.

Criminal Case No. 319 of 1925, Decided on 17th February 1925, reported by the Dist. Mag., Gujranwala, on 12th February 1925.

Criminal P. C., S. 438—Reference by District Magistrate against Sessions Judge's order is incompetent.

A District Magistrate is not empowered to make a reference to the High Court questioning the propriety of a judgment by a Sessions Judge: 41 *Bom.* 47 and 23 *Cal.* 250, *Foll.*

[P 85, C 2]

Referring order. — The order of the learned Sessions Judge as much as it refers to the period of detention in the lock-up to be counted in the period of imprisonment is illegal: vide *Bhagel Singh* v. *Emperor* (1) and *Emperor* v. *Asghar Ali* (2) and instructions issued in the Register High Court Letter No. 6780-G. dated the 20th December 1921.

There is sufficient evidence on the record to show that Ishar Singh assisted in the management of the Diwan (meeting) and procession (moving meeting) and, therefore, he was guilty of an offence described in the first part of S. 17 (2).

The learned Sessions Judge has held that it has been proved that the accused was preaching and supporting the entire propaganda of the Shromani Gurdwara Parbandik Committee, Amritsar. I submit that the word 'promoting' as interpreted in *Bahadur Singh* v. *Emperor* (3) by his Lordship Justice Zafar Ali, Judge of the Lahore High Court, does not cover the case of Ishar Singh. The diaries of Amar Singh (P. W. No. 3) and the statement of Rahmat Din (P. W. No. 4) coupled with the further evidence of Sardari Mal (P. W. No. 7) and Mul Raj (P. W. No. 9) established beyond any shadow of doubt that Ishar Singh was the convener, organizer and manager of all the Diwans and meetings. The diary (Ex. P. L.) of Fazal Ilahi (P. W. No. 10) also proves that the procession started from the Clock-Tower and Ishar Singh accused was managing it. Thus it would appear that before the crowd assumed the formation of a military type or that of a procession it was organized by people amongst whom Ishar Singh also made a conspicuous appearance. Thus from the side of facts it has been proved that Ishar Singh before the conducting of any Diwan or meeting or the formation of a procession was one of the organizers, conveners and managers and retained this position by subsequently managing and controlling it throughout the day when it paraded in the bazaars.

The learned Sessions Judge has not given any reasons for showing leniency to the appellant. The order passed by the Additional District Magistrate was already lenient enough.

Under the above circumstances I beg to recommend that the conviction of Ishar Singh should be altered to one under the first part of S. 17 (2) of the Criminal Law Amendment Act and that the Sessions Judge's order as to counting of the period of detention in the lock-up in the period of imprisonment may be declared illegal. I further recommend that adequate punishment may be awarded in this case because there are no good reasons forthcoming for showing any leniency to the accused.

Registrar's Remarks.—In *Emperor* v. *John Francis Lobo* (4) it was held following *Queen-Empress* v. *Karamdi* (5 that a District Magistrate is not empowered to make a reference to the High Court questioning the propriety of a judgment by a Sessions Judge.

Decline to entertain this reference and return the record.

Order.

Shadi Lal, C. J.—I agree.

G.B. *Record returned.*

(1) [1907] 9 P. W. R. 1907, Cr.
(2) [1919] 27 P. R. Cr. 1919=52 I. C. 604=20 Cr. L. J. 684.
(3) A. I. R. 1923 Lah. 842.
(4) [1917] 41 Bom. 47=36 I. C. 577=18 Bom L. R. 796.
(5) [1896] 23 Cal. 250.

A. I. R. 1927 Lahore 86

FFORDE AND CAMPBELL, JJ.

Sidhrami and *others*—Plaintiffs—Appellants.

v.

Kharku and *others*—Defendants—Respondents.

Second Appeal No. 1339 of 1922, Decided on 25th May 1926, from the decree of the Dist. J., Hoshiarpur, D/- 20th February 1922.

Custom—Punjab—Bhojkis of Palampur, Kangra district, are not agriculturists.

Bhojkis in the Palampur tahsil of the Kangra district are a priestly tribe and they are not governed by agricultural custom: 27 *P. R.*, 1880, *Rel. on.* [P 86 C 1]

Ghulam Rasul—for Appellants.

Mehr Chand Mahajan—for Respondents.

Judgment.—The suit is by a first cousin to contest a gift in favour of the donor's alleged sister's sons. The suit has been dismissed by both Courts below, and the plaintiff has come here on second appeal furnished with a certificate under S. 41 (3) of the Punjab Courts Act enabling him to agitate the question whether Bhojkis in the Palampur tahsil of the Kangra district are governed by agricultural custom.

According to the Kangra District Gazetteer, page 69, the Pujaris of the shrines in the Kangra and Simla Hills have grown into a distinct caste which is said to have originated in a mixture of Nais, Brahmans, Rajputs, and Jogis who all intermarried. The Pujaris of the big shrines in the Kangra district, such as Jawalamukhi and Bhawan, are called Bhojkis. The Bhojkis are the hereditary priests of these and other temples, but their claim, sometimes made, to be Brahmans has not been established.

The case for the plaintiff-appellant is based upon Middleton's Customary Law of the Kangra District which presumably reproduce accurately the riwaj-i-am, and according to the answer to Question 92 on page 153 a gift to a sister's son requires the consent of the male lineal descendants or near collaterals, and if there are none, requires no consent. This book of Customary Law does not state the particular tribes to which the riwaj-i-am relates; but it has been argued before us on the strength of eight references to Bhojkis in the book that the riwaj-i-am must embody the customs observed by the Bhojkis.

On page 10 an instance is quoted of Rs. 250 being paid for the breach of a Bhojki betrothal. This has no significance.

On page 56 an instance is quoted where succession to a Bhojki of the Kangra Tahsil took place by the Chundwand rule. Much reliance is placed upon this entry by the learned counsel for the appellant.

On page 62 it appears that a Bhojki of Jawalamukhi tried to exclude one of his six sons unsuccessfully. The son sued and got his share. This does not help the appellant.

On page 65 a Bhojki predeceased son's widow is quoted as succeeding under the special custom described in the answer to Question 43.

On page 82 the Bhojkis of Kangra tahsil are reported to have declared that widows are entitled to life estates even if their husbands lived jointly with their brothers. This is not necessarily repugnant to Hindu Law, which recognizes the rights of such widow to maintenance.

On page 121 a Bhojki is said to have lost his rights of succession by keeping a Chamar woman, an incident which indicates adherence not to custom but to the strict tenets of the Hindu religion.

On page 143 a husband is reported to have succeeded to his wife's special property but no other details are given and this instance is inconclusive.

Finally, on page 158 a decision by the Divisional Judge is mentioned which is stated to have set aside at the instance of brothers a gift of ancestral land to a daughter or a son-in-law by a Bhojki of Kangra. This decision was searched for unsuccessfully by the trial Court in this case.

It is contended for the appellant that these allusions to Bhojkis in the riwaj-i-am give rise to a presumption that they were a tribe whose customs are recorded in it and that the answers to Question 92 above quoted, although unsupported by instances as regards Bhojkis casts upon the defendant the onus of proving that it does not state a rule applicable to all Bhojkis of the Kangra district including the parties. In my view the presumption, if it arises, is rebutted by the evidence given in this case by the plaintiff himself. That evidence proves that

the Bhojkis are a priestly class and that the present parties are attached as Pujaris to a temple called Asa Puri or, at any rate, that the Pujaris of that temple are recruited from among the parties' kinsmen. The priestly character of the Bhojki tribe or community is emphasized in a decision by the Chief Court in *Bhag Mal* v. *Sant* (1). The plaintiff's witnesses have stated that the Bhojkis of the locality plough with their own hands and "mostly follow agriculture," but not one of those witnesses has ventured to say that they have abandoned Hindu Law and followed custom. The profession of the plaintiff himself is proved by the admission of his own witnesses to be shop-keeping, and there is no evidence that Bhojkis have abandoned their hereditary priestly occupations and have merged themselves in an agricultural community. On the other hand witnesses for the defendants have declared that these Bhojkis follow Hindu Law and there must necessarily be a strong presumption that a Hindu priestly class does so. There is no evidence about the extent of the plaintiff's land, if any, or about its capacity to support him or his family; and without definite instances of Bhojkis following the custom set up, of which there are none, I am unable to disturb the concurrent decisions of the Courts below.

The appeal must fail and is dismissed with costs.

G.B. *Appeal dismissed.*

(1) [1880] 27 P. R. 1880.

A. I. R. 1927 Lahore 87

COLDSTREAM, J.

Bhala Singh and *another*—Plaintiffs—Appellants.

v.

Udham Singh and *others*—Defendants—Respondents.

Second Appeal No. 747 of 1926, Decided on 25th November 1926, from the decree of the Dist. J., Hoshiarpur, D/- 15th December 1925.

Civil P. C., O. 22, R. 4—Joint relief—Death of some defendants—Suit abates in toto.

Where the object of the plaintiffs is to get an order which will force the revenue authorities to partition the shamilat land in dispute and the authorities refused partition apparently on the ground that the land had been set apart for the use of the jagirdars who employed it as a camping grou d etc.,

Held: that the relief sought for can only be a joint relief against the contesting defendants whose rights in the land attach to them as a body and are not individually partible, and the death of some of the defendants causes the abatement of the suit in toto: 41 *P. R.* 1915 and 67 *P. R.* 1919, *Rel. on.* [P 88 C 1]

Sheo Narain—for Appellants.

Faqir Chand—for Respondents.

Judgment.—In April 1908 a number of proprietors of the village Kariana, thana Hariana, in the Hoshiarpur district, instituted a suit against 14 persons who claimed to have certain rights as jagirdars, joining with them as defendants pro forma the remainlng proprietors of the village, for a declaration that an area of 143 kanals 11 marlas of shamilat land in the village was owned by, and in possession of the plaintiffs and the pro forma defendants (Nos. 15 to 40) and that the jagirdars Defendants (Nos. 1 to 14) had no right to the land except in so far as they were entitled to an area of 6 kanals, proportionate to the area of khewat land which they had purchased in the village. To the possession of an area of 6 kanals the Defendants Nos. 1 to 14 were admitted to be entitled as proprietors of the khewat land they had purchased. The suit was dismissed on the 23rd February 1909. The decree was confirmed by the Divisional Judge of Hoshiarpur, but the Chief Court on 5th November 1913 accepted an application for revision and remanded the case for re-decision. On the 10th April 1915, the case was postponed by the trying Court on account of the war. After the official end of the war the Court summoned the parties to continue the litigation on 2nd June 1922. There were further adjournments. Meanwhile two of the contesting defendants and several of the pro forma defendants had died, and an application was presented by the plaintiffs on the 12th Novembor 1923, for bringing their representatives on to the record. The Sub-Judge, 4th Class, struck an issue in the following words:

> Had plaintiffs any sufficient cause for not givi g the petition within six months of the deaths of those whose list is filed here by plaintiffs? The suit should not abate.

He found that the plaintiffs had failed to prove a sufficient cause and he dismissed the suit. On appeal the District Judge of Hoshiarpur agreed with the first Court in holding that there was no

ground for extending limitation for bringing on record the representatives of the dead defendants. As regards the statement the learned Judge remarked as follows: It was not argued before me that the whole suit did not abate. The interest of all the contesting defendants was identical and joint. I am, therefore, of opinion that the order of the Sub-Judge is correct. He dismissed the appeal.

Against this dismissal the plaintiffs have come to this Court on second appeal through Pandit Sheo Narain who states that he is unable to show any reason why limitation should have been extended so as to allow the representatives of the deceased to be brought on the record and he frankly gives up all grounds of appeal mentioned in the memorandum except one, namely, that the lower appellate Court was wrong in holding that the entire suit had abated. He asks that the suit be allowed to continue against the remaining defendants. Mr. Faqir Chand for the respondents points out that this ground was apparently given up before the lower appellate Court and objects to its entertainment now. I see by reference to the grounds of the appeal to the District Judge that the point now urged by Mr. Sheo Narain was not even mentioned in the memorandum. In the circumstances I think that Mr. Faqir Chand's objection has force and that Mr. Sheo Narain is not entitled to a hearing upon the matter now. I have, however, heard what he has to say on the merits and am of opinion that in any case the order of the lower appellate Court on the matter of abatement was correct.

It appears from the record of this old suit that the object of the plaintiffs is to get an order which will force the revenue authorities to partition the shamilat land in dispute. These authorities in 1856 and in 1893 and again in 1907 refused partition apparently on the ground that the land had been set apart for the use of the jagirdars who employed it as a camping ground etc. It seems to me that the relief sought for can only be a joint relief against the contesting defendants whose rights in the land attach to them as a body and are not individually partible. A somewhat parallel case was dealt with in the ruling *Hadu* v. *Lala* (1) which was followed in *Jamna* v. *Sarjit* (2). The appeal fails and is dismissed with costs.

R.D. *Appeal dismissed.*

(1) [1915] 41 P.R. 1915=15 P.L.R. 1914=21 I.C. 951=16 P.W.R. 1914.

(2) [1919] 67 P.R. 1919=52 I.C. 510.

A. I. R. 1927 Lahore 88

BROADWAY, J.

Ghulam Muhammad — Accused— Appellant.

v.

The Crown—Opposite Party.

Criminal Appeal No. 364 of 1926, Decided on 1st June 1926, from the order of the Dist. Mag., Attock, D/- 20th March 1926.

Penal Code, S. 71—Offences under Ss. 376 and 366—Separate sentences can be passed.

A charge under S. 366 involves different elements and different questions of fact from a charge under 376, and therefore separate sentences for offences under Ss. 366 and 376 are not against the provisions of S. 71, I. P. C.: 8 *Bom. L. R.* 120, *Foll.* [P. 89, C. 1]

Sleem—for Appellant.

Ram Lal—for the Crown.

Broadway, J.—Ghulam, Muhammad, son of Subedar Dost Muhammad Khan, was tried along with three others on charges under Ss. 366 and 376, Indian Penal Code for having kidnapped and raped Mt. Lal Devi, a married girl of 13 years of age. Ghulam Muhammad was convicted under both the sections, his companions being discharged. He was sentenced to seven years' rigorous imprisonment under 366 and four years' rigorous imprisonment under S. 376, Indian Penal Code, the sentences to run consecutively. (After discussing the facts the judgment proceeded :) It was next urged by Mr. Sleem that although the District Magistrate was legally entitled to convict the appellant under Ss. 366 and 376, Indian Penal Code, he acted illegally, and against the provisions of S. 71, Indian Penal Code, in passing separate sentences. He also urged that the sentences passed were excessive. As to the latter point, I am of opinion, that the sentences are by no means excessive. On the former question Mr. Sleem urged that inasmuch as the offence under S. 366 contemplates kidnapping or abduction with the intention of subjecting the per-

son abducted to illicit intercourse, the commission of illicit intercourse must be regarded as a part of the same transaction, and therefore for purposes of punishment must be treated as one offence. On the other hand Mr. Ram Lal referred to the case of *Labh Singh* v. *Emperor* (1), a decision of Moti Sagar, J., in which it was held that the offences under Ss. 458 and 376 were separately punishable. After careful consideration it seems to me that the offence of kidnapping was complete as soon as the girl had been carried away. That the offences are separate was pointed out in the case of *Emperor* v. *Sakharam Ganu* (2), where it was held that it was not competent to a Judge in appeal to alter a charge under S. 376 to one under S. 366, Indian Penal Code, because a charge under this section involves different elements and different questions of fact from a charge under S. 376. It appears to me that Ghulam Muhammad had brought himself within the purview of S. 366 the moment he forcibly carried away Mt. Lal Devi with the intention provided by that section, and he has therefore, rightly been convicted and sentenced under S. 366, Indian Penal Code.

As to the question of rape it has been strenuously urged by Mr. Sleem that the evidence in support of this charge consists only of the girl's statement unsupported by any medical evidence or by any other direct testimony. Now, the story told by the girl is a straightforward one. She says that she was taken from the pond to the house of a barber and locked into a room with the appellant, that he threatened her with death, closed her mouth, and after the search party had been sent away by the barber she was undressed by the appellant and subjected to sexual intercourse. She then goes on to say that she was taken at night to another dhok and placed with the appellant in another house, and there the appellant again undressed her and himself and on four separate occasions subjected her to sexual intercourse.

Mr. Sleem has urged that on this point her evidence should not be accepted inasmuch as she had denied to the Inspector that any rape had been committed. Her denial in the circumstances is not surprising. She is a high caste Hindu girl, recently married, of good position; and to admit that she had been raped would involve her in very serious consequences. The statement of the Deputy Superintendent of Police is perfectly clear and is to the effect that she did definitely state that she had been raped when she appeared before him at Basal on the 28th October, and he ascribes her later denial of the fact to the circumstance that her relatives expressed their unwillingness to press this charge of rape. In this aspect of the case the Deputy Superintendent of Police has shown himself grossly ignorant of the law and to my mind incompetent as a controlling investigating officer. How far his action was influenced by the position of the appellant's father it is impossible to say. But after giving careful consideration to the evidence of the girl I find it impossible to take a view different from that taken by the learned District Magistrate, and must, therefore, hold that Mt. Lal Devi's statement that she was raped by the appellant is correct.

The offence is a very serious one and I must, therefore, dismiss the appeal.

D.D. *Appeal dismissed.*

(1) A. I. R. 1923 Lah. 291.
(2) [1905] 8 Bom. L. R. 120.

A. I. R. 1927 Lahore 89

BROADWAY AND FFORDE, JJ.

Ram Jas and *others*—Defendants—Appellants.

v.

Shahab-ud-din and *another*—Plaintiffs—Respondents.

Second Appeal No. 977 of 1922, Decided on 20th April 1926, from a decree of the Dist. J., Hoshiarpur, D/- 22nd December 1921.

(a) *Evidence Act, S. 91—Pro-note inadmissible—Suit cannot be decreed on the basis of original consideration if pro-note and debt formed one transaction.*

When a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself, and when that negotiable instrument is inadmisslble in evidence the suit must fail : 63 *P. R.* 1917 and *A. I. R.* 1922 *Lah.* 307, *Foll.*

[P. 90, C. 2]

(b) *Transfer of Property Act, S. 130—Assignment.*

A pro-note was endorsed as follows : "Pay to S or order as per copy of accounts attached herewith without recourse."

Held: that it was an assignment of the negotiable instrument only and not an assignment of the debt. [P. 90, C. 1]

Badri Das—for Appellants.

Mool Chand—for Respondents.

Broadway, J.—When the Doaba Bank Limited, Amritsar, went into liquidation the firm of Maya Mal-Ram Jas was shown in its books as indebted to it. The liquidator of the Bank purported to sell this debt to one Shahab-ud-Din who instituted a suit for recovery of the amount said to be due by the said firm. The amount claimed was Rs. 1,333-12-1. This claim has been decreed by the Courts below and the defendants have come up in second appeal attacking the decree so far as it relates to a sum of Rs. 600 and interest thereon.

On behalf of the appellants Mr. Badri Das has urged that the claim was really based on a promissory-note dated the 19th October 1910, which had been endorsed over to Shahab-ud-Din by the liquidator, and that inasmuch as there was a defect in the promissory-note, which rendered it inadmissible, the claim, so far as the sum of Rs. 600 was concerned, could not be decreed. A reference to the endorsement on the back of the promissory-note for Rs. 600 shows that the liquidator, on the 15th September 1914, endorsed thereon as follows:

Pay to Shahab-ud-Din or order as per copy of accounts attached herewith without recourse.

This, according to Mr. Mool Chand for the respondents, amounted to an assignment of the debt. It is, clear, however, that it is an assignment of the amount due under the promissory-note alone and as the document in question is a negotiable instrument it really is an assignment of a negotiable instrument. Mr. Mool Chand then urged that the plaintiffs in this case could fall back on the original consideration.

This matter has been the subject of a number of decisions in all the High Courts in this country. The most recent of the decisions that have been brought to our notice, so far as this Court is concerned, are *Bhag Bhari* v. *Gujar Mal* (1) and *Chandra Singh* v. *Amritsar Banking Company* (2). In these it has been clearly laid down that when the loan has been granted on the security of a negotiable instrument there is no cause of action independent of the negotiable instrument itself, and when that negotiable instrument is inadmissible in evidence the suit must fail. It seems to me that these authorities conclude the question. It is clear that in the present case the loan granted was on the security of this promissory-note and as this promissory-note has been found to be inadmissible in evidence there is no cause of action independent of it on which the plaintiff can fall back. I would, therefore, accept this appeal and modify the decree by reducing the amount by a sum of Rs. 713 with costs in proportion.

Fforde, J.—I agree.

D.D. *Appeal accepted.*

(1) [1917] 63 P. R. 1917=38 I. C. 623=40 P. W. R. 1917.

(2) A. I. R. 1922 Lah. 307.

A. I. R. 1927 Lahore 90

LEROSSIGNOL, J.

Jawala—Plaintiff—Appellant.

v.

Waryaman and *another*—Defendants—Respondents.

Second Appeal No. 2160 of 1925, Decided on 2nd February 1925, from a decree of the Dist. J., Hoshiarpore, D/- 27th June 1925.

Registration Act, S. 49—The Registration Law can be ignored only when equities are very clear.

The Registration Law can be ignored only when the equities on the other side are very clear. An unregistered deed of exchange affecting immovable property of more than Rs. 100 cannot be admitted in evidence nor can it be acted upon: 42 *Cal.* 801, *Dist.* [P. 91, C. 2]

Fakir Chand—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—This second appeal arises out of an action for recovery of 4½ marlas of land being the half of Khasra No. 1058. Admittedly, the field belonged jointly to plaintiff and defendants but in 1922 the defendants brought a suit for possession of the 4½ marlas now in suit under S. 9 of the Specific Relief Act on the allegation that there had been a private partition; that the area in dispute had fallen to their share; and that the present plaintiff had shortly before suit taken possession illegally by depositing his manure upon it.

The present defendants succeeded in that suit and the present suit was then instituted by the present plaintiff for

recovery of the land. The defence was that the plaintiff had effected an exchange of the land in suit by taking the defendants' half of another joint property. In support of their contention the defendants produced what purported to be a deed of exchange, but that document was unregistered and being unregistered, was held to be inadmissible in evidence by the trial Court which decreed for the plaintiff.

In appeal the learned District Judge agreed that the document required registration but it could be referred to for purposes of title by application of the equitable doctrine of part-performance as enunciated in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1), and, holding that the document had been acted upon, the learned District Judge dismissed the plaintiff's suit. The learned Judge says that the defendants built a hut on their half of the field because they thought that the area in dispute would be available for their use. The learned Judge presumably means that they thought they would be able to use the area in dispute as a Court yard of their hut. He also finds that the plaintiff, in accordance with the exchange, had taken possession of the defendants' half of the other joint haveli. In my opinion the circumstances of this case and of the Calcutta case are vastly different. In *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) it was held that even though a document is ineffective to prove a contract, an agreement if carried out by the acts and conduct of the parties will be upheld by the Courts on equitable grounds because such conduct has altered the circumstances of the parties and estoppel is crea ed.

In this case it is difficult to see how the circumstances of the parties have altered. Great capital is made of the circumstances that the plaintiff is now in possession of the defendants' half of another joint property, but sight is lost of the circumstance that before the alleged exchange that property also was in the joint possession of both the plaintiff and the defendants. Similarly, but for the exchange alleged, the field in dispute is the joint property of the plaintiff and the defendants.

In this case there is not a series of acts on the part of the parties extending over a considerable time such as would justify the Courts in basing their decree, not upon the contract, but upon those acts. The Registration Law can be ignored only when the equities on the other side are very clear. In this case the property alleged to be conveyed by the document produced by the defendants is more than Rs. 100 in value. Until it is registered it cannot affect any property nor be received in evidence of any transaction affecting immovable property and I hold that the exchange is not proved.

I, therefore, accept the appeal and setting aside the decree of the Court below, restore that of the trial Court with costs throughout.

R.D. *Appeal accepted.*

(1) [1915] 42 Cal. 801 = 28 I. C. 930 = 42 I. A. 1 (P. C.).

A. I. R. 1927 Lahore 91

BROADWAY, J.

Changi—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 869 of 1926, Decided on 30th September 1926, from an order of the S. J., Karnal, D/- 15th May 1926.

Penal Code, S. 498—Abduction.

When the woman is an active abettor in her own abduction, the sentence should be a light one. [P 91, C 2]

Shamair Chand—for Petitioner.

Abdul Rashid—for Opposite Party.

Judgment.—I do not see any reason to interfere with the conviction, but the question of sentence needs consideration. It appears that the complainant Molia had married his deceased brother's widow Mt. Surti. In marriages of this sort, as pointed out by the learned Sessions Judge, the woman has no say of any kind, and the result often is that she gladly goes off with a lover. It has often been held that when the woman is an active abettor in her own abduction the sentence should be a light one.

In the present case in all probability Mt. Surti was by no means willing to marry the complainant and there seems every reason to believe that she actively abetted her own abduction. In these circumstances I think the sentence already undergone will meet the required

ments of the law and I reduce the sentence of imprisonment accordingly. The sentence of fine will stand.

R.D. *Sentence reduced.*

A. I. R. 1927 Lahore 92

MARTINEAU AND DALIP SINGH, JJ.

(*Firm*) *Amba Prosad-Gopi Nath*—Plaintiffs—Appellants.

v.

(*Firm*) *Jawala Dat-Ramkanwar*—Defendants—Respondents.

Second Appeal No. 1000 of 1925, Decided on 16th February 1926, from a decree of the Dist. J., Delhi, D/- 23rd December 1924.

(*a*) *Limitation Act, S.* 5—*Delay in filing first Court's judgment due to mistake of pleader—Time was extended.*

Where the delay in filing the copy of the first Court's judgment was due to the fact that the pleader in his reminder for a copy stated by mistake that a copy of the decree was wanted instead of mentioning that a copy of the judgment was required, but the original application was only for a copy of the judgment,

Held: there was sufficient cause to excuse the delay. [P. 92, C. 2]

(*b*) *Limitation Act, Art.* 115—*Suit for damages for non-delivery of the goods—Indivisible contract for several lots—Limitation starts from date of delivery of last lot—Contract Act, S.* 73.

Where the contract for the supply of several lots of goods is an entire and not an instalment contract, limitation in respect of all lots would run from the date when the last lot was due to arrive: 43 *Cal.* 305, *Dist.* [P. 93, C. 1]

Jagannath Aggarwal—for Appellants.

Sardha Ram—for Respondents.

Judgment.—A preliminary objection is taken for the respondent that this appeal is time-barred, as, although it was filed on the 31st March 1925, it was not accompanied by a copy of the first Court's judgment, and that copy was not put in till the 17th April, after the expiry of the period of limitation, the 9th April being the last date on which the appeal could have been filed. The appellants had first applied on the 26th February for copies of the lower appellate Court's judgment and decree, and these were completed on the 4th March and delivered to the appellants by value payable post on the 17th. On the 21st March an application was made by the appellant Amba Parshad's vakil for an urgent copy of the first Court's judgment. The preparation of the copy was delayed, and it appears that on the 31st March the appellant's vakil called attention to the matter, but in his reminder spoke of a copy of the decree being required, with the result that on the 3rd April a copy of the decree was supplied to the appellant's vakil instead of a copy of the judgment. On this coming to the notice of the appellant Amba Pershad he wired to his vakil to apply again for a copy of the first Court's judgment, and the latter made an application on the 8th April, obtained the copy on the 14th, and filed it in Court on the 17th.

The appellants had a sufficient reason for not applying for a copy of the first Court's judgment until they had obtained a copy of the judgment of the lower appellate Court, which it was necessary for them to see in order to decide whether they should file a second appeal. Their vakil was no doubt to blame for the mistake in saying on the 31st March that a copy of the first Court's decree was required, but on the other hand the application of the 21st March had been for a copy of the first Court's judgment and not for a copy of the decree. When ultimately a copy of the judgment was obtained on the 14th April, very little time was lost in filing it. We think, taking all the circumstances into consideration, that there was sufficient cause for the copy of the trial Court's judgment not being filed within the prescribed period of limitation, and the appeal may, therefore, be admitted under S. 5 of the Limitation Act.

The suit out of which the appeal has arisen was one for damages for non-delivery of goods which the defendants had contracted to sell to the plaintiff. The contract was for the sale of 11 bales of mulls at Rs. 4-15-6 per piece, at Karachi, godown, according to the Karachi System November (1916) shipment, 4 lots, 60 days' grace, at eight annas discount, forwarding charges at four annas a piece, delivery of goods to be taken against payment on arrival of railway receipt. The question involved in the case is one of limitation. It is not disputed that the words "November (1916) shipment, four lots" meant that the goods were to be shipped in four monthly lots commencing from November 1916. Allowing two months' grace, four months for the transit of the goods

from England to Karachi, and one month for their conveyance from Karachi to Delhi, the Courts below have found that the due date for the first lot of goods was the end of June 1917, and that the suit, which was instituted more than three years after that date, namely, on the 15th July 1920, was barred by limitation so far as the first lot of goods was concerned, but within time as regards the remaining three lots, which were to be delivered in July, August and September respectively. The Subordinate Judge passed a decree for Rs. 1,057. The District Judge on appeal enhanced the amount to Rs. 1,150-12-0 and allowed interest on that amount from the date of his decree at 6 per cent. per annum.

In this second appeal, which has been filed by the plaintiffs it is contended on their behalf: (i) that it has been shown by the evidence of the salesman of the firm of Ralli Brothers, the importers of the goods, that the first lot of goods, i.e. those of the November shipment, were arriving in India up to September 1917, and that the suit in regard to that lot is consequently within time; and (ii) that even if that has not been shown, still the whole suit is within time, as the contract was not an instalment contract, but was an entire contract for the four lots of goods, so that time in respect of all four lots would run from the date when the last lot was due to arrive.

With regard to the first point the evidence of the salesman of Ralli Brothers is not very clear, as, although he has said that the goods of the shipments from November 1916 to February 1917 reached Karachi up to the 8th September 1917, he has not made a statement in regard to the goods of the November shipment in particular. But we think that the second contention is correct, and it is supported by a judgment of a Division Bench of this Court reported in *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Pershad* (1) in which it was held that a contract for the sale of certain goods "November lot 3 grace 60 days" was an indivisible one and that the due date did not arrive until the last shipment under the contract reached Karachi. Mr. Sardha Ram for the respondents points out that it is stated in Cl. 7 of the printed form of indent that each shipment is to be treated as a separate contract. But it was only the sold note, executed by the defendants, which was written on that form, the form being the one used by the Hindustani Mercantile Association, and the printed form was not used for the bought note (D-1), which was executed by the plaintiffs. Cl. 7 of the printed form of the indent cannot, therefore, be held to be binding on the plaintiffs.

Counsel for the respondents has relied on *Bilasiram Thakarsidass* v. *Ezekiel Abraham Gubbay* (2), but that ruling cannot be taken as a guide for the decision of the present case, for there it was a consideration of the particular terms of the contract and of the conduct of the parties and the circumstances which led the Court to the conclusion that delivery of the goods in instalments had been contemplated. Similarly other rulings cited before us in cases relating to contracts in which the goods were to be delivered at particular times or in a particular manner are of no assistance in the present case. In the contract in this case it was not mentioned that the goods were to be delivered on any particular date or dates, and we can see no reason for supposing that the parties intended that each lot was to be delivered separately. The defendants have, in our opinion, failed to show that they could not have tendered the goods of the November shipment at the time when the remaining shipments were due and we hold, therefore, that the whole suit is within time.

The damages have to be calculated with reference to the rate prevailing in September 1917, the last month in which the goods could have been delivered. That rate was Rs. 6-8-6 per piece. The damages work out at more than Rs. 2,057, which is the amount claimed by the plaintiffs. Nothing has been said in argument in regard to the eleventh ground of appeal.

We accept the appeal and alter the decree to one for Rs. 2,057 with interest thereon at Rs. 6 per cent. per annum from the date of the lower appellate Court's decree till realization. The respondents will pay the appellants' costs proportionately in all the Courts.

G.B. *Appeal allowed.*

(1) A. I. R. 1925 Lah. 513.

(2) [1916] 43 Cal. 305=23 C. L. J. 62=33 I. C. 1=20 C. W. N. 240.

A. I. R. 1927 Lahore 94

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Muhammad Hassan and *another*—Defendants—Appellants.

v.

Inayat Hussain and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 564 of 1920, Decided on 6th December 1926, from the decree of the Sr. Sub-J., Delhi, D/- 28th November 1919.

Civil P. C., O. 22, Rr. 3 and 11—"Legal representative" includes one or several persons.

The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person: 16 *All.* 211; 30 *All.* 117; 3 *A. L. J.* 719; 7 *Mad. L. T.* 43; and 1 *Lah.* 481, *Rel. on.* [P. 95, C. 1]

Niaz Muhammad and *Umar Bikhsh*—for Appellants.

Oertel and *Muhammad Amin*—for Respondents.

Judgment.—This appeal arises out of a suit brought by a lady Mt. Amir Begam, in which she prayed that a declaratory decree may be passed in her favour against the defendants and she may be held entitled to 16 siham out of a total of 96 siham in the income accruing from the Dargah Hazrat Sayad Hassan Rasul Numa situated in Mauza Banskoli in the district of Delhi. The principal defendant was one Ahmad Hassan who contested the suit. There were also other defendants among whom we need mention only Nazir Hussain. Under an order dated the 6th March 1918 Nazir Hussain was transposed from the array of the defendants and was made a plaintiff in the suit. Ahmad Hassan, in his written statement, traversed the pleas contained in the plaint and further pleaded that the plaintiff and her ancestors were not entitled to the income of the Dargah and that her suit was barred under the provisions of S. 11 of the Civil P. C. He also pleaded that income of the Dargah was waqf and therefore incapable of enjoyment in separate shares. There was the further plea that the combined office of Sajjada Nashin and Mutwalli had all along devolved upon the eldest male descendant of the Mutwalli and that the defendant was the Mutwalli and Sajjada Nashin of the Dargah. A plea as to the jurisdiction of the Court was also taken. A number of issues were framed by the learned Senior Subordinate Judge and they were all decided against the defendant and the suit of the plaintiffs was decreed in the following terms:

It is ordered and hereby declared that the plaintiffs have a right to share in the offerings of the Dargah Hazrat Sayad Hassan Rasul Numa, their shares being respectively 16/96ths and 18¾/96ths.

that is to say, the share of Mt. Amir Begam was 16/96ths and that of Nazir Hussain was 18¾/96ths.

It appears that Ahmad Hassan, the contesting defendant died, some time after the decree of the trial Court was passed. An appeal was preferred by his son Muhammad Hassan and his nephew Ali Hassan. Ahmad Hassan, however, had a daughter named Sadia Begum, and we find that she was not impleaded in the appeal. Mt. Amir Begum, the plaintiff-respondent, died during the pendency of the appeal. and the appellant's counsel says that he put in an application for the substitution of the names of her legal representatives on the 23rd October, 1920. We do not know when this lady died, and the application mentioned by the appellants' learned counsel in his arguments could not be traced on the file. He, however, filed in the office, on the 25th November 1926, a document which purports to be a duplicate copy of the said application dated the 23rd October 1920. This copy is not accompanied by any affidavit, and we cannot accept it at this stage, several years after the death of Mt. Amir Begum. We find, however, the name of Inayat Hussain, one of the legal representatives of Mt. Amir Begum, in the title of the present appeal, but, as stated above, we do not know when and under what circumstances the name of Inayat Hussain was brought on the record. Under these circumstances we hold that so far as Mt. Amir Begum was concerned the present appeal abates. The result is that the decree of the Court below in favour of Mt. Amir Begum in respect of 16/96ths share stands and has become final.

Now remains the question as to whether or not the present appeal abates against Nazir Hussain, plaintiff-respondent, having regard to the fact that only two out of three legal representatives of Ahmad Hassan, the defendant in the Court below, are before the Court as appellants. We have to look into the provisions of O. 22, R. 3 of the Civil P. C.

read with R. 11 of the same Order. Now, when a party dies, then, in order that the suit or the appeal may proceed, it is necessary that his legal representatives should be brought on the record within the prescribed period of limitation. The question is about the meaning of the expression "legal representative." These words mean the representation before the Court of the plenary interest of the deceased party. Sometimes that interest may be represented by a single individual, but it may also be represented by a number of persons as the case may be. But there should be a complete representation of the interests of the deceased person, whether through a single individual or through a number of persons, so that there cannot be a partial representation of that interest. In other words, the expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. This view is supported by at least three reported cases of the Allahabad High Court, namely *Ghamandi Lal* v. *Amir Begum* (1); *Haidar Hussain* v. *Abdul Ahad* (2); *Fazal Muhammad Khan* v. *Habibullah Khan* (3). It may be noted that this view is not opposed to the law as laid down in the cases of *Abdul Rahman* v. *Shahab-ud-Din* (4) and *Mallapragada* v. *Lingam Viraragava* (5).

In this view of the case we find that the full and complete interest of Ahmad Hassan, deceased was not represented in appeal before the Court in that the name of Mt. Saida Begum, his daughter, is not included in the array of appellants. If she was unwilling to appear as a party appellant it was open to the two legal representatives, who appear as appellants, to implead her as a respondent. This has not been done.

The result is that one of the legal representatives not having been impleaded, and the whole interest of Ahmad-Hassan not having been represented by the two appellants before this Court the whole appeal abates against Nazir Hussain also. We accordingly dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) [1894] 16 All. 211=(1894) A. W. N 22.
(2) [1908] 30 All. 117=5 A. L. J. 62=(1908) A. W. N. 41.
(3) [1903] 3 A. L. J. 719.
(4) [1920] 1 Lah. 481=55 I. C. 883.
(5) [1910] 20 M. L. J. 393=5 I. C. 514=7 M. L. T. 43.

A. I. R. 1927 Lahore 95

ZAFAR ALI, J.

Mul Singh and *another*—Decree-holders—Appellants.

v.

Mt. Lakshmi Devi and *others*—Respondents.

Miscellaneous First Appeal No. 2511 of 1925, Decided on 16th June 1926, from an order of the Dist. J., Jhelum, D/- 13th July 1925.

Provincial Insolvency Act (1920), *Ss. 53 and 54—Court cannot pass an order under S. 53 or 54 unless transferrer is adjudged insolvent.*

Unless a person is adjudged insolvent, the Insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void. In other words, no order under S. 53 or S. 54 of the Insolvency Act can be made unless the transferrer has been adjudged insolvent.

[P. 96, C. 1]

Man Singh—for Appellants.

Gobind Ram Khanna—for Respondents.

Judgment.—This is an appeal against an order of the District Judge of Jhelum dismissing a petition presented by certain creditors of one Uttam Chand for his adjudication as an insolvent. Uttam Chand was convicted of murder and was executed after the presentation of the petition and the creditors in whose favour he had made certain transfers of property opposed the petition on three grounds which were embodied by the District Judge in the following issues: (1) Whether in view of the death of Uttam Chand, the applicants have now any locus standi to proceed with the petition for adjudicating Uttam Chand insolvent? (2) Whether, if held that the applicants are entitled to proceed, the sales by Uttam Chand in favour of the other respondents Thakar Das, etc., constitute an act of insolvency under S. 6? (3) If the said sales are held to constitute an act of insolvency whether they can now be set aside in view of the fact that Uttam Chand has died?

The findings of the learned District Judge on the above issues were as follows: (1) That the insolvency proceed-

ings could be continued as provided by S. 17 of the Insolvency Act. (2) That the sales of the property took place on the 18th of December 1923, and the application for the adjudication of Uttam Chand as insolvent was filed on the 6th February 1924. The petitioning creditors had obtained two decrees against him prior to the date of the institution of the application so that prima facie the sales would appear to have constituted an act of insolvency under S. 6 (b), there being nothing to show that the sales were fraudulent. This appears to be self-contradictory, but what the District Judge meant evidently was that the sales fell under Cl. (b) of S. 6 and not under Cl. (c). (3) That the sales should not be set aside as the purchasers acted in good faith, etc.

The issue as stated above was whether the sales could be set aside in view of the fact that Uttam Chand had died.

Counsel for the appellants contends that having decided the first two issues in favour of the petitioners, the learned District Judge should have proceeded to make an order of adjudication before deciding issue (3). This contention is correct and must prevail. Unless a person is adjudged insolvent, the Insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void In other words, no order under S. 53 or S. 54 of the Insolvency Act can be made unless the transferrer has been adjudged insolvent. The order of the District Judge in respect of issue (3) is, therefore, ultra vires.

I accept the appeal set aside the order of the District Judge and remand the case to be dealt with in accordance with law.

R.D. *Order set aside.*

A. I. R. 1927 Lahore 96

MARTINEAU, J.

Asa Nand—Plaintiff—Appellant.

v.

Mahmud and *others* — Defendants—Respondents.

Second Appeal No. 1047 of 1925, Decided on 24th July 1925, from a decree of the Dist. J., Dera Ghazi Khan, D/- 26th January 1925.

Practice—New case—Decision on point not raised by parties is bad.

Court ought not to decide a case on a point not raised by parties. [P 96, C 2]

M. L. Puri—for Appellant.

M. A. Ghani—for Respondents.

Judgment.—The plaintiff sued for possession of a house by right of pre-emption on the ground that his house adjoined the house in suit and had a common entrance with it from the street. The contesting defendant, whose house was also contiguous to the house in suit, denied that the plaintiff had a superior right and pleaded that he had a right of way through the compound of the house in suit.

The Subordinate Judge gave the plaintiff a decree, finding that his house and the house in suit had a common entrance from the street and that the plaintiff had, therefore, a superior claim under the fourth clause of S. 16 of the Pre-emption Act, but the District Judge has reversed the decree and dismissed the suit, finding that the defendant's house as well as the plaintiff's has a common entrance with the house in suit from the street, and that, therefore, the parties have equal rights. The plaintiff has filed a second appeal.

The defendant did not plead either in the trial Court or in his grounds of appeal in the lower appellate Court that his house and the house in suit had a common entrance, and the lower appellate Court was wrong in deciding the case on a point which had not been raised. Moreover the defendant is not a joint owner of the compound in which the plaintiff's house and the house in suit are, and the District Judge has found as a fact, that he has no right of of way over the compound as his use of it has been only permissive. There is, therefore, no entrance to the defendant's house through that compound.

It is contended for the defendant that the plaintiff's house and the house in suit have not got a common entrance, but the trial Court's finding on the point was not contested in the lower appellate Court.

I accept the appeal, reverse the lower appellate Court's decree, and restore the decree of the trial Court. The respondent Mahmud will pay the appellant's costs throughout.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 97

FFORDE AND CAMPBELL, JJ.

Shahamad—Defendant—Appellant.

v.

Salabat and others — Plaintiffs and Defendants—Respondents.

Second Appeal No. 2535 of 1922, Decided on 7th June 1926, from the decree of the. Dist. J., Lyallpur, D/- 26th June 1922.

Limitation Act, S. 6 — Extended period can only be claimed by one entitled to institute the suit at the time when limitation begins.

The extended period under S. 6 can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned : 22 *P. R.* 1907 ; 108 *P. R.* 1907, and *A.I.R.* 1925 *P. C.* 33, *Foll.* [P 97, C 2]

R. C. Soni for *M. Sleem*—for Appellant.

B. A. Cooper—for Respondents.

Campbell, J.—Two brothers effected a sale of ancestral land by registered deed, dated the 24th of July 1907. On the 24th February 1920 a declaratory suit was brought by the sons of the alienors for a declaration that the sale should not affect their reversionary rights. These sons were Salabat and Waryam, sons of Sultan and Karam and Beg, sons of Wali Dad.

The question for decision in the second appeal which arises out of the suit is whether the suit was brought within limitation. The lower appellate Court held that Salabat, who is admittedly of age, was not under 21 years of age on the date of the institution of the suit. This is a finding of fact and is final so far as Salabat is concerned.

The ages of the other plaintiffs, as given in the plaint were : Waryam eight years, Karam seven, and Beg four years. The learned District Judge has held in regard to them that they were born after the alienation, but that, since there was at the time of the alienation in existence a male reversioner, i. e., Salabat, who could impugn the sale, therefore the after-born sons were competent to do so. The question whether the suit of such after-born sons was within time seems to have been glossed over by the learned District Judge, and there is no distinct finding on it. The learned District Judge, however, treated the suit as within time and gave the plaintiffs a decree.

The first point taken on second appeal is that the suit of these three minor plaintiffs is out of time and this contention must prevail. The law governing the case is contained in the Punjab Act I of 1900, and the period of limitation for the suit was 12 years from the date of attestation of the mutation. There is nothing in the judgments of the lower Courts to show what this date was, but it appears to have been admitted throughout the proceedings to be a date more than twelve years previous to the institution of the suit. Salabat was alive at the time of the alienation and also at the time of mutation and hence time began to run in favour of the vendees from that date.

Under S. 9 of the Limitation Act the subsequent births of other sons could not stop the running of time. It was stated in *Umra* v. *Ghulam* (1) that although a reversioner born after an alienation has been made is under certain conditions undoubtedly competent to contest its validity, he can only do so if the period of limitation has not expired before the date of his birth and if his suit is brought within the period prescribed by law. The same decision was given in *Inayat Khan* v. *Shabu* (2), and it has recently been pointed out by their Lordships of the Judicial Committee in *Ranodip Singh* v. *Parmeshwar Parshad* (3), that the extended period under S. 6 of the Limitation Act can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. These three minor plaintiffs, not being in existence at the time of the mutation, were not so entitled, and they were only permitted to sue before the expiry of 12 years from the date of the mutation through a next friend.

The appeal is accepted and the suit is dismissed with costs throughout as barred by time.

R.D. *Appeal accepted.*

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(1) [1907] 22 P. R. 1907=89 P. W. R. 1907=27 P. L. R. 1908.
(2) [1907] 108 P. R. 1907.
(3) A. I. R. 1925 P. C. 33=47 All. 165.

Oaths Act. The learned counsel for the appellant before me states that in this the learned District Judge was wrong and that the proceedings before the trial Court were tantamount to a compromise of the suit the plaintiffs having undertaken not to produce their evidence and to rely upon the statement of Mauji alone. He cited *Himanchal Singh* v. *Jatwar Singh* (1) ; *Ram Sunder Misra* v. *Jai Karan Singh* (2) and *Sita Ram* v. *Peare* (3); as authorities in his support and contended that the burden of proof being on the plaintiffs and Mauji, on whose evidence alone the plaintiffs relied, having professed ignorance of the correctness or otherwise of the plaintiffs failed to prove their case. The principle underlying this contention of the learned counsel is fully borne out by the cases cited above. The plaintiffs having undertaken to establish their case by the evidence of Mauji who did not support their case the suit was rightly dismissed by the trial Court.

Accepting this appeal I set aside the decree of the District Judge and restore that of the Subordinate Judge. Under lhe peculiar circumstances of the case I leave the parties to bear their own costs throughout.

G.B. *Appeal accepted.*

(1) A. I. R. 1924 All. 570=46 All. 710.
(2) A. I. R. 1925 All. 271=47 All. 456.
(3) A. I. R. 1925 All. 558=47 All. 921.

A. I. R. 1927 Lahore 100

COLDSTREAM, J.

Shib Das—Decree-holder—Appellant.

v.

Bulaki Mal & Sons and *another*—Decree-holders — Judgment-Debtor — Respondents.

Misc. Second Appeal No. 1471 and Misc. No. 371 of 1926, Decided on 20th October 1926, from the order of the Addl. Dist. J., Lahore, D/- 4th March 1926.

Civil P. C., Ss. 47 and 73—Order ostensibly one under S. 73 but as a fact deciding matter under S. 47 (1)—Appeal lies—Civil P. C., S. 73.

No appeal lies against an order passed wholly and simply under S. 73 of the Code. But an order which does, as a fact, decide a matter covered by S. 47 (1) may, although it be passed ostensibly under S. 73, be the subject of appeal : 39 *Mad.* 570 and 31 *M. L. J.* 820, *Rel. on.*

[P 101 C 2]

Therefore, where an order forbidding amendment does not merely decide that a decree-holder is not entitled to share rateably with other decree-holders in the assets after attachment, but it dismisses the application for execution in toto, such an order is appealable under S. 47. (1). [P 101 C 2]

Gobind Ram Khanna—for Appellant.

Jai Gopal Sethi—for Respondents.

Judgment.—Shib Das, the appellant, held a decree against Feroz Din, the second respondent. The first respondent, Bulaki Mal & Sons, also held two decrees against Feroz Din. In execution of the decree of Shib Das and certain other judgment-creditors the maximum attachable proportion of the Feroz Din's salary was attached and was to be rateably distributed. On 18th February 1924, and 28th May 1925, Bulaki Mal & Sons put in prescribed printed forms of application for execution of their two decrees. The heading of column 10 of this form reproduces in the vernacular Cl. (j) of sub-R. (2) of R. 11 of O. 21 of the Civil P. C. ("the mode in which the assistance of the Court is required"). Instead of entering in this column the words "by attachment and rateable distribution of pay" the words entered in the first application were "by rateable distribution with the cases of Ram Das and Shib Das, etc., decree-holders" and in the second application "by rateable distribution of the judgment-debtor's money which has been received in the Court by attachment."

These execution applications were received and registered for hearing along with other applications for rateable distribution. On the 6th October 1925, Shib Das objected to the entertainment of these applications on the ground that the provisions of Cl. (j) of O. 21, R. 11 had not been complied with. Bulaki Mal & Sons applied to be allowed to amend their execution applications on the 27th November 1925.

On the 30th November the Court dismissed the execution application as not being in accordance with the rule and on the 1st December it dismissed the application for amendment on the authority of *Asgar Ali* v. *Troilokya Nath Ghose* (1). Bulaki Mal appealed to the Additional District Judge, Lahore, who on the 4th March 1926, accepted the appeal and setting aside the order of 1st December

(1) [1890) 17 Cal. 631 (F. B.).

1925 allowed the rateable distribution prayed for.

Against this order Shib Das has appealed on the grounds that (1) an order under O. 21, R. 17 was not appealable and that the lower appellate Court ought to have considered this plea which was raised before it as a preliminary objection; (2) that there was in fact no appeal against the order of the 30th November and rateable distribution should not have been allowed; (3) that the order of the District Judge is contrary to the provisions of S. 73 of the Procedure Code; and (4) that the proposed amendment was merely the addition of the word "attachment" which would still fail to satisfy the requirements of O. 21, R. 11, sub-R. (2), Cl. (j).

I find no force in the fourth ground above. Had amendment been allowed I think the condition of the provisions of Cl. (j) of O. 21, R. 11 would have been sufficiently satisfied; for it was the salary of Feroz Din which was under attachment in the cases specified by Bulaki Mal in Column 10. The ground is purely technical and immaterial. In this connexion the remarks by Broadway, J., at the end of *Kanji Mal* v. *Kidar Nath* (2) appear apposite here.

The first ground mentioned above is the one most strongly urged by Mr. Gobind Ram who contends that the matter decided by the orders of the executing Court was not one arising between the parties in the suit but affected the rights inter se of the decree-holders only and were not, therefore, appealable under S. 47 of the Procedure Code.

The rulings cited in support of this argument relate to cases in which the only question involved was whether after attachment assets should or should not be shared. Such was the nature of the dispute in *Ram Chunder* v. *Hamiron* (3) and *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (4). Mr. Gobind Ram also puts forward a Single Bench judgment of this Court in *Janki Nath* v. *Ross* (C. A. No. 2157 of 1925, decided on 22nd January 1926). The circumstances dealt with by that judgment are not stated in the judgment which, therefore, offers no certain guide in the present case.

It is authoritatively settled that no appeal lies against an order passed wholly and simply under S. 73 of the Code. But there is authority for Mr. Sethi's contention that an order which does, as a fact, decide a matter covered by S. 47 (1) of the Code may, although it be passed ostensibly under S. 73, be the subject of appeal. Such authority is furnished by the rulings of the Madras High Court in *Venkataperumal* v. *Venkata Reddi* (5) and *Venkatakrishna Patter* v. *Venkatakrishna Patter* (6).

Now had the order appealed against forbidding amendment merely decided that Bulaki Mal & Co. were not entitled to share rateably with other decree-holders in the assets after attachment, the case would have been different. But the order did more than this for it dismissed Bulaki Mal's application for execution in toto.

Such an order appears to me clearly to be one deciding a matter arising between the decree-holder and the judgment-debtor, and, therefore, appealable under the provisions of S. 47 (1) of the Code. (After dealing with points not material for our report his Lordship allowed the appeal).

G. B. *Appeal accepted.*

(2) [1919] 32 P. W. R. (1919)=49 I. C. 982.
(3) [1907] 6 C. L. J. 487=11 C. W. N. 433.
(4) [1915] 42 Cal. 1=27 I. C. 644=19 C. W. N. 1202.
(5) [1915] 39 Mad. 570=29 M. L. J. 96=29 I. C. 231=(1915) M. W. N. 334.
(6) [1917] 31 M. L. J. 820=37 I. C. 900=5 L. W. 354.

A. I. R. 1927 Lahore 101

SHADI LAL, C. J.

Ghulam Murtaza Khan.— Plaintiff—Petitioner.

v.

Fazal Ilahi Khan and *others*—Defendants—Respondents.

Civil Revision No. 521 of 1926, Decided on 6th December 1926, from the order of the Small Cause Court J., Jullundur, D/- 8th June 1926.

Limitation Act, Art. 67—Mortgage of house, under attachment—A Suit by mortgagee to enforce personal security—Art. 67 applies—Limitation Act, Art. 97.

Where a house was mortgaged while under attachment, a suit by mortgagee to enforce the personal security is governed by Art. 67, the mortgage being void altogether. Art. 97 does not apply to such a case. [P 102 C 1]

Feroze-ud-Din—for Petitioner.
Muhammad Amin—for Respondents.

Judgment.—The house mortgaged by Defendant No. 1 and his brothers to the plaintiff predecessor-in-interest in 1921 was, at that time, under attachment in execution of a decree obtained against the mortgagors. It is therefore clear that the mortgage was void as against all claims enforceable under the attachment, vide S. 64 of the Civil P. C.

The plaintiff now seeks to enforce only the personal liability of the mortgagors, and the suit must be regarded as one brought on a bond, to which article 67 of the Limitation Act applies. It is not disputed that under that Article the claim was barred by time, but the learned counsel for the petitioner contends that Article 97 governs the case. No reasons, however, have been shown in support of the contention that consideration existed at the time of the execution of the bond and that that consideration failed subsequently.

For the aforesaid reason I see no valid ground for interference in revision. The application is accordingly dismissed with costs.

D.D. *Application dismissed.*

A. I. R. 1927 Lahore 102

FFORDE AND ADDISON, JJ.

King-Emperor—Petitioner.

v.

Bakhshan—Accused—Respondent.

Criminal Revision No. 640 of 1926, Decided on 14th July 1926, reported by the Dist. Mag., Multan, on 20th April 1926.

Criminal P. C., S. 562—Second Class Magistrate can invoke in the Punjab : **5 Lah. 36=A.I.R. 1924 Lah. 454=81 I.C. 948, Overruled.**

Magistrates of the 2nd Class are competent to invoke the provisions of S. 562 in the Punjab.: **5 Lah. 36=A. I. R. 1924 Lah. 454=81 I. C. 948, Overruled.** [P. 102, C. 2]

R. C. Soni for *Govt. Advocate*—for the Crown.

Fforde, J.—The facts out of which this revision has arisen may be stated shortly : One Bakhshan was on the 25th of February 1926, convicted of theft under the provisions of S. 379 of the Indian Penal Code by a Magistrate invested with Second Class powers. The Magistrate applying the provisions of S. 562 of the Code of Criminal Procedure directed that the offender be released on his entering into a bond with surety in the sum of Rs. 200, to appear and receive sentence when called upon during a period of six months, and in the mean time to keep the peace and be of good behaviour.

The District Magistrate has under the provisions of S. 438 of the Code of Criminal Procedure reported the matter to this Court, with a recommendation that the order of the trial Magistrate be set aside, and the case remanded for a fresh order to be passed in accordance with law. The learned District Magistrate has adopted this course by reason of a judgment of Moti Sagar, J., in *Crown* v. *Jawali and Sri Ram* (1). The learned Judge in that case held that a Second Class Magistrate was not competent to act under the provisions of S. 562, and that his proper course would have been to have submitted the case to a First Class Magistrate, or a Sub-Divisional Magistrate, for orders with his report, if he was of the opinion that the case was a fit one for the exercise of powers under that section ; and he accordinly remanded the case to the trial Magistrate to take the proper steps. The learned Judge in coming to this conclusion was not informed that Magistrates of the Second Class have been specially empowered by the Local Government to exercise the powers conferred by S. 562 of the Code of Criminal Procedure. This is a matter upon which the District Magistrate in that case should have satisfied himself before taking steps under S. 438 of the Criminal Procedure Code. The notification in question is contained in part 1 of the Punjab Government Gazette of April 22, 1910, at page 303. The notification itself which is dated the 18th of April 1910, and numbered 431 (Home) reads as follows :

> The Lieutenant-Governor of the Punjab is hereby pleased to invest all Magistrates of the Second Class in the Punjab with the power to exercise all or any of the powers conferred upon a Court by the provision of S. 562 of the Code of Criminal Procedure, 1898.

As it is perfectly clear from this notification that Magistrates of the Second Class are competent to invoke the provisions of S. 562 of the Code of Criminal Procedure, it follows that in the present case the trial Magistract has acted with

(1) A. I. R. 1924 Lah. 454=5 Lah. 36.

perfect propriety and in accordance with law. His order therefore must stand, and the recommendation of the District Magistrate be refused.

Addison, J.—I agree.

R.D. *Recommendation refused.*

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* A. I. R. 1927 Lahore 103

SHADI LAL, C. J., AND AGHA HAIDAR, J

H. B. Morton—Plaintiff—Appellant.

v.

E. Woodfall and *others*—Defendants—Respondents.

First Appeal No. 3095 of 1922, Decided on 3rd December 1926, from the decree of the 1st Cl. Sub-J., Delhi, D/- 30th August 1922.

** (a) Contract Act, Ss. 95 and 96—Mere taking personal security by vendor is not tantamount to abandonment of lien—It is a question of fact—Burden of proof rests on party denying lien—Consideration partly cash and partly shares—Vendor has no lien for the amount of shares.*

If a vendor has not received the whole or a portion of the purchase money, a lien is created in his favour, and he cannot be deemed to have abandoned it by a mere personal contract to defer payment of a portion of the purchase money or to take the purchase money by instalments, or by taking a mere personal security for the purchase money, e. g. a promissory note, a bill of exchange or a bond. Whether the vendor has relinquished his lien is in every case a question of intention to be gathered from all the circumstances of the case, and the onus rests on the person denying the right of the vendor to prove a clear and manifest intention to relinquish that right.

Where the consideration consisted partly of money and party of shares and for that portion of the consideration which was represented by shares the vendor did not intend to rely on the security of the estate but on the shares of the company.

Held : that the arrangement is inconsistent with the vendor's lien in so far as the value of the shares was concerned, and that he has no lien on the estate : *Brentwood Brick and Coal Company*, (1877) 4 *Ch. D.* 562, *Foll.* [P 104 C 1]

(b) Civil P. C., O. 6, R. 17—Amendment can be allowed at any stage.

The law confers a wide discretion upon the Court to allow amendment at any stage of the proceedings. [P 104 C 2]

Moti Sagar, Des Raj Sawhney and *Bishan Narain*—for Appellant.

Shamair Chand, Jagan Nath Bhandari and *Parkash Chand* — for Respondents.

Shadi Lal, C. J.—By an indenture dated the 22nd July 1920, the plaintiff, Mrs. Morton, conveyed to the defendants, Mr. E. Woodfall and the Indian Printing and Publishing Company Limited, certain premises, a printing press and a newspaper called "The Morning Post." The deed contained a covenant that the vendor had agreed to sell to the aforesaid vendees the property mentioned above "for the sum of Rs. 1,00,000 payable as hereinafter mentioned," that is to say, Rs. 60,000, on or before the execution of these presents, Rs. 20,000 within three months of the date hereof together with interest till payment at the rate of 5 per cent. per annum, and transfer or allotment of two thousand fully paid up shares of the said Indian Printing and Publishing Company Limited before 30th September 1920. The vendees paid Rs. 60,000 at once and Rs. 20,000 in April 1921. The dispute is now confined to the remaining portion of the consideration for the sale. Mrs. Morton seeks to recover Rs. 20,000, with interest thereon, and also claims a lien upon the estate for the amount due to her.

The claim made by the plaintiff has been disallowed by the Subordinate Judge, and the main question debated before us is whether Rs. 20,000 should be held to be an unpaid portion of the purchase money and should constitute a charge on the property. The right of the vendor to a lien is founded upon a rule of equity, but, as pointed out by their Lordships of the Privy Council in *Webb* v. *Macpherson* (1), the vendor's lien given by the Courts of equity is different in its origin and nature from the charge which a vendor obtains under S. 55, sub-S. (4), Cl. (b) of the Transfer of Property Act (IV of 1882). The statute creates a presumption in favour of the existence of such charge, and the presumption can be displaced only by proving a contract express or implied, which is inconsistent with the continuance of the charge.

The Transfer of Property Act has not been extended to the Punjab, and an unpaid vendor in this Province cannot invoke the statutory right given by the aforesaid section, but can rely only upon the general principles of equity. A perusal of the sale-deed, however, shows that consideration for the conveyance was not Rs. 1,00,000 in cash, but

(1) [1904] 31 Cal. 57=30 I. A, 238=8 C. W. N. 41=8 Sar. 554 (P. C.).

Rs. 80,000 in cash and 2,000 fully paid up shares. It is true that the deed contains a recital to the effect that the consideration was Rs. 1,00,000 but the recital declares at the same time that the amount was to be paid in the manner described in the operative clause, and when we come to the operative part of the document we find that the price was to be paid partly in cash and partly in shares. It is indisputable that the vendor could not ask the vendees to give her Rs. 20,000, in lieu of shares, and that the vendees would have discharged their obligtion if they had given her 2,000 shares before the prescribed date. Up to that date she was entitled only to the shares and could not demand any money instead of those shares.

It is true that if a vendor has not received the whole or a portion of the purchase money a lien is created in his favour, and he cannot be deemed to have abandoned it by a mere personal contract to defer payment of a portion of the purchase money or to take the purchase money by instalments, or by taking a mere personal security for the purchase money, e. g., a promissory note, a bill of exchange or a bond. Whether the vendor has relinquished his lien is in every case a question of intention to be gathered from all the circumstances of the case, and the onus rests upon the person denying the right of the vendor to prove a clear and manifest intention to relinquish that right.

The consideration in the present case consisted, as stated above partly of money and party of shares; and it is obvious that for that portion of the consideration which was represented by shares the vendor did not intend to rely on the security of the estate but on the shares of the company. This arrangement was, in our opinion inconsistent with the vendor's lien in so far as the value of the shares was concerned. The facts of the case appear to be similar to those of *Brentwood Brich and Coal Company* (2). In that case the consideration consisted of £8,000 to be paid in the manner therein after mentioned namely "the sum of £6,000 in cash, and the further sum of £2,000 by delivery of 400 shares." The Court of Appeal decided that the nature of the contract was such as to exclude the vendor's lien, and that the latter had consequently no lien on the estate.

We accordingly hold that the plaintiff was in pursuance of the covenant in the sale deed, entitled only to 2000 shares and that she cannot claim Rs. 20,000 as a portion of the purchase money. Nor can she claim a lien on the property for the amount which may be found to be due to her. At the same time it is clear that the defendants did not carry out their promise to assign or allot to her before the 30th September 1920, 2000 fully paid up shares of the company; and she would therefore be entitled to damages for the breach of the contract.

The action brought by the plaintiff was for the recovery of a sum of money, and. though that sum was described in the plaint as an unpaid portion of the purchase money, it could be claimed as damages for the breach of the contract. It is true that a slight amendment of the plaint is necessary to adjudicate upon that claim, but the law, as enacted in O. 6, R. 17 of the Civil Procedure Code, confers a wide discretion upon the Court to allow amendment at any stage of the proceedings. The real question in controversy between the parties relates to the amount which the plaintiff is entitled to recover from the defendants, and this question should be determined finally in the present suit and a multiplicity of proceedings should be avoided.

A preliminary objection to the hearing of the appeal was taken on the ground that the memorandum of appeal was not accompanied with a copy of the judgment disposing of issues Nos. 7 and 8 in favour of the plaintiff; but we considered this objection to be untenable. The judgment which accompanied the memorandum of appeal is a self-contained document and embodies a finding on each of the aforesaid issues, though it does not contain the reason therefor. We accordingly overrule the objection.

The result of the above discussion is that we accept the appeal and remit the case to the Subordinate Judge who is directed to allow an amendment of the plaint and to decide the suit after determining the issue as to damages. The parties will be allowed to produce evidence on this issue. The costs of this Court shall he costs in the cause.

R.D. *Case remitted.*

(2) [1877] 4 Ch. D. 562=46 L. J. Ch. 554=36 L. T. 343=25 W. R. 481.

A. I. R. 1927 Lahore 105

ADDISON, J.

Fattah—Defendant—Appellant.

v.

Nabi Bakhsh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1779 of 1926, Decided on 11th January 1927, from the decree of the Dist. J., Campbellpore, D/- 10th April 1926.

Punjab Pre-emption Act, S. 15—Mahomedan female vendor holding lands in her own right—Her husband's agnates are not necessarily her agnates.

Where a Mohemedan widow holds lands i her own right, i. e., as full owner the agnates of her husband are not necessarily her agnates.

The explanation to S. 15 applies only in the case of sale by a female of land to which she has succeeded on a life tenure through her husband, son, brother or father. It follows, that the female vendor's agnates must necessarily be the same as those of her brother or father, but the agnates of her husband are not her agnates.

[P 105 C 2]

Shamair Chand—for Appellant.

Nanak Chand—for Respondents

Addison, J.—The following pedigree table will help to explain this appeal:

Nur Mohamed

Muhammad.	Murid.	Sheikh Mohd.
Ghulam Mohd.	Fazal Din	Ilahi Bux
	Widow	
	Mst. Mohammad Bibi	Nabi Bux
	Vendor.	Plaintiff.

Mt. Muhammad Bibi who appears to have minor daughters alive many years ago was given land in full ownership in lieu of her dower by her father-in-law, Murid. She sold this property to three different persons and the plaintiff, who is an agnate of her husband, instituted three suits for possession of the land sold by means of pre-emption. The trial Court dismissed all three suits on the ground that the only evidence produced by the plaintiff was that he was an agnate of the widow's husband and that he did not prove that he was an heir of the widow. On appeal it was admitted before the District Judge that the plaintiff was not an agnate of the vendor though he was of her deceased husband. The District Judge also stated in his judgment that no evidence was adduced by the plaintiff to prove that he was the heir of the vendor except that the pedigree table given above was established. On that finding clearly the District Judge should have dismissed the appeals, but as counsel for the appellant contended before him that Khojas followed Hindu Law in matters of succession and that, therefore, the heirs of vendor's deceased husband were her heirs he accepted the appeals and remanded the suits under O. 41, R. 23, Civil P. C., for redecision on the merits after giving the plaintiff a further opportunity to establish this. Against his decision these three second appeals have been preferred here. The plaintiff stated in his plaint that he was an agnate and heir of the vendor and also a member of the Khoja tribe, whereas the vendees were not. It was on these grounds that he claimed pre-emption. The fact that he was an agnate and heir of the vendor was denied.

The issue framed was whether the plaintiff had a superior right of pre-emption to that of the vendees. All that plaintiff did was to prove that he was an agnate of the widow's husband. As the widow held the land in her own right, i. e., was its full owner, the fact that he was an agnate of her husband proved nothing, The explanation to S. 15 of the Punjab Pre-emption Act applies only in the case of sale by a female of land to which she has succeeded on a life tenure through her husband, son, brother or father. It follows, that the vendor's agnates must necessarily be the same as those of her brother or father, but the agnates of husband are not her agnates, see page 47 of Ellis Law of Pre-emption, 5th edition. As the plaintiff knew what he had to prove and utterly failed to prove that he was either an agnate or an heir of the vendor the District Judge undoubtedly erred in accepting the appeals and sending them back so as to give the plaintiff a further opportunity to produce evidence which he had not tried in the first instance to produce. The argument put forward before the District Judge that Khojas followed Hindu Law in matters of succession appears to be a mere afterthought as it is not even mentioned in the grounds of appeal before the District Judge. I have no hesitation in accepting these three appeals. I set aside the orders of the District Judge and restore the orders of the trial Court dismissing the suits with costs throughout.

G.B. *Appeals allowed.*

* A. I. R. 1927 Lahore 106

ADDISON, J.

Amin Chand and *others*—Plaintiffs—Appellants.

v.

Khiali and *others*—Defendants—Respondents.

Second Appeal No. 1918 of 1926, Decided on 15th January 1927, from the decree of the Dist. J., Hissar, D/- 21st May 1926.

(a) Limitation Act, S. 15 — Execution of decree—Order giving time for payment cannot be excluded.

An order merely giving time to judgment-debtor for payment is not an order staying execution or an injunction and S. 15 does not apply in such a case: 40 *All.* 198, *Foll.* [P. 106, C. 2, P. 107, C. 1]

(b) Limitation Act, Art. 182 (5) and (6)—Applica ion by only one of several joint decree-holders is also covered by Cl. (5)—Application not in accordance with law—Issue of notice under O. 21, R. 22, gives fresh start for limitation—Civil P. C., O. 21, R. 22.

The mere fact that an application for execution is made by one of several joint decree-holders does not take it out of the purview of Cl. (5) of Art. 182. [P. 107, C. 1]

Further where the application is not in accordance with law a notice issued under R. 22 of O. 21, would be a step which would give a fresh start for limitation under Cl. (6) of Art. 182: *A. I. R.* 1926 *Pat.* 160, *Rel. on.* [P. 107, C. 1]

Shamair Chand—for Appellants.

Nanwan Mal—for Respondents.

Addison, J.—The firm Ram Parshad-Ram Richpal obtained a money decree against one Man Singh. On the 16th July 1917 the firm sold by a registered deed the decree in favour of four persons, namely Amin Chand, Bucha Mal, Piare Lal and Ram Karan, who constitute a joint Hindu family, though the sale was in the name of the four individuals. On the 20th July 1922, Bucha Mal one of the vendees, applied for execution of the decree, clearly stating that it had been sold to him and the three others. Notice issued under O. 21, R. 16, Civil P. C., and on the 28th July 1922 the decree-holder and the judgment-debtor along with Bucha Mal were present. The sale was admitted. The judgment-debtor stated that he had paid Rs. 700 and he asked for time up to the 4th November 1922 to pay the balance of Rs. 800. Bucha Mal had no objection and the Court passed an order to the effect that transfer was sanctioned in favour of the petitioner and that at his request the execution proceedings were consigned to the record room.

Ram Karan, another of the vendees, next applied for execution of the decree on the 14th July 1925. It would appear that by this time Bucha Mal, who first applied, was dead. The petition was dismissed in default on the 20th July 1925 and there the order should have ended. The Court, however, also went on to say that the petitioner could not take out execution as the transfer had already been effected.

Then on the 19th August 1925, the three vendees other than Bucha Mal along with Bucha Mal's son applied for execution. It was contended that this application was time-barred. The executing Court held that it was not time-barred but on appeal the District Judge held that it was. Against his decision this second appeal has been presented.

It was first argued that time should be held to commence to run from the 4th November 1922 as the judgment-debtor was given time up to then on the 28th July 1922 to pay. If that argument is accepted the application of the 19th August 1923 which is in dispute is clearly within time apart altogether from Ram Karan's application of the 14th July 1925. The argument is based on S. 15 of the Limitation Act. It seems to me, however, that it cannot be held that the application for the execution of the decree dated the 20th July 1922, was stayed by an injunction or order so as to extend the time up to the 4th November 1922. It is true that the judgment-debtor asked for time up to then and the decree-holder had no objection, so that the executing Court at the request of the decree-holder consigned the proceedings to the record room. But this was not an order or an injunction, in my opinion, staying the execution. In this connexion see *Thakamoyi Dasai* v. *Nadiar Chand Palmal* (1) which is in point. It was held there that it was essential to point out the injunction or order staying the execution and in the present case there was no such injunction or order. Further, it was held in *Jurawan Pasi* v. *Mahabir Dhar Dube* (2) that an order merely giving time for payment is not an order staying exec-

(1) [1916] 36 I. C. 939.
(2) [1918] 40 All. 198=44 I. C. 24=16 A. L. J. 71.

tion or an injunction and that S. 15 of the Limitation Act did not apply in such a case. I therefore hold thas the period between the 28th July 1922 and the 4th November 1922 cannot be excluded in computing the period of limitation.

It was next argued that in any case Ram Karan's application of the 14th July 1925 brought the present application of the 19th August 1925 within limitation. It was held by the Patna High Court in *Jagendra Prasad Naryan Sinha* v. *Mangal Prasad Sahu* (3) that an execution application was one made in accordance with law within the meaning of Art. 182 (5) of Sch. I of the Limitation Act if the particulars required by Rr. 11 to 15 of O. 21 of the Civil P. C. were mentioned in the application. The mere fact that the application was made by one of several joint decree-holders did not take it out of the purview of Cl. 5 of Art. 182.

It was further held that where the application for execution was not in accordance with law a notice issued under R. 22 of O. 21 would be a step which would give a fresh start for limitation under Cl. 6 of Art. 182 of Sch. I to the Limitation Act. In the present case a notice issued upon the application of the 20th July 1922 under O. 21, R. 16. According to *Jagannath* v. *Shrinewas* (4) that would be a step in aid of execution. It follows therefore that the application of the 20th July 1922 was a step-in-aid of execution although it was not mentioned in it specifically that the application was on behalf of all the transferees as required by O. 21, R. 15 of the Civil P. C.

It has next to be decided as to what actually happend on this application of the 20th July 1922. Only one transferee applied to execute the decree and his application was a step-in-aid though he did not specifically state that he was executing on behalf of all the four transferees. But he clearly stated in that application that the transfer had been effected in favour of himself and the other three. In my opinion that was an application asking for the transfer to be made in the name of all the four transferees and it was merely a clerical mistake that the Court recorded the order that the transfer was sanctioned in favour of the petitioner. This order should thus be treated as transfering the decree in the names of all the four persons whom the petitioner clearly mentioned as being the transferees.

That being the case, there is no doubt that the application of Ram Karan dated the 14th July 1925, was a good application as it was presented within time. It follows that the application now in dispute dated the 19th August 1925, is also within time.

Even if it be held that the order of transfer made by the Court was in favour of Bucha Mal, then the application of Ram Karan also to execute the decree on the ground that he was a transferee would be competent and would be for the reasons given above a step-in-aid of the execution. See in particular *Jagannath* v. *Shriniwas* (4). Ram Karan's application dated the 14th July 1925, was to the effect that he was a purchaser, that he should be allowed to execute the decree. In that view also his application would save limitation.

For the various reasons given I hold that the application in question was presented within time. I therefore accept the appeal and setting aside the order of the District Judge, restore with costs throughout the order of the executing Court holding that the application was within limitation, The executing Court will now proceed with execution.

G.B. *Appeal allowed.*

(3) A. I. R. 1926 Pat. 160.
(4) A. I. R. 1925 Nag. 362.

A. I. R. 1927 Lahore 107

ZAFAR ALI, J.

Sheo Ram and *others*—Defendants—Appellants.

v.

Mam Raj—Plaintiff—Respondent.

Second Appeal No. 1581 of 1926, Decided on 2nd December 1926, from a decree of the Sr. Sub-J., Rohtak, D/- 4th March 1926.

Hindu Law—Partition—Partial partition—Presumption of complete partition arises.

Where a partial partition is proved, the presumption is that there has been a complete partition both as to parties and property. [P. 108, C. 1].

N. C. Mehra—for Appellants.

Shamair Chand—for Respondent.

Judgment.—The only question for determination in this second appeal is-

whether the finding of fact arrived at by the lower appellate Court is correct in view of the Hindu Law on the point. That law as stated in S. 270 (4) of Mulla's Hindu Law runs thus:

> Where a partial partition is proved, the presumption is that there has been a complete partition both as to parties and property.

Now the facts are briefly as below :

Shiv Ram, Defendant No. 3, is a collateral of the two brothers who figured as Defendants Nos. 4 and 5 in the Court. All these were at one time joint owners of some agricultural land as well as two houses and it was admitted that the land was partitioned. So the presumption under the Hindu Law was that the houses had also been partitioned. This presumption receives support from two circumstances, viz., (1) that Shiv Ram Defendant No. 3 mortgaged one house and left the village, and (2) that Defendants Nos. 2 and 3 and their widowed mother jointly sold the other house representing that they were the sole owners thereof. The lower appellate Court was, therefore, justified in concluding that Defendants No. 2 and 3 (and their widowed mother) were owners of the whole house, when they sold it. There is, therefore, no ground for interfering with the judgment of the lower appellate Court, and I dismiss the appeal with costs.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 108

JAI LAL, J.

Ghulam Husain—Applicant—Appellant.

v.

Rameshwar Das and *others*—Defendants—Respondents.

Misc. First Appeal No. 2749 of 1925, Decided on 15th November 1926, from an order of the Dist. J., Jhelum, D/- 22nd July 1925.

(a) *Provincial Insolvency Act* (1920), *S.* 10—*Debts payable whether alone or jointly with others amounting to Rs.* 500—*Debtor can present an application.*

A person is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs. 500. [P 108 C 2]

(b) *Provincial Insolvency Act* (1920), *S.* 53—*Question of fraudulent transfer should be considered at the time of realising the debtor's assets.*

Questions relating to the alleged fraudulent transfers by the applicant do not arise at the time of his being declared an insolvent but they are more appropriate for determination when the question arises of realising his assets. [P 109 C 1]

Shambu Lal for *Mohammad Alam*—for Appellant.

Gobind Ram Khanna—for Respondents.

Judgment.—The appellant presented an application for being adjudicated an insolvent. He alleged that his debts amounted to Rs. 3,265 out of which Rs. 1,695 were alleged to be due jointly from himself and his brother. He stated that he was unable to pay these debts and the only property of any value that he showed in his list of assets is ⅓rd share in 56 kanals 17 marlas of land which was alleged to have been mortgaged by him to Mohammad Waris for Rs. 913. This Mohammad Waris is a brother-in-law of the appellant. Another ground in support of the application was that the appellant had been arrested in execution of a decree. No issue, however, was framed on this last ground of the application and consequently no evidence was led in support of it.

The District Judge held that the only debts that could be taken into consideration in determining the amount of debts due from the applicant were the debts due from him alone and not those that were due jointly from him with others. He came to the conclusion that the only amount that had been proved to be due from him alone was about Rs. 300 due to Lakhmi Das creditor who was examined in Court and stated that he had instituted a suit for Rs. 500 against the applicant and his brotder jointly and for Rs. 300 against the former alone. In my opinion the applicant is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs. 500. This is practically the only ground on which the District Judge has dismissed the application as he has practically given no finding as to the value of the assets of the applicant. In any case there was the further ground that the applicant was under arrest and this is proved by a copy of the warrant of arrest with the report thereon which he filed with the memorandum of appeal.

I consider that there are good grounds for accepting the copy at this stage because the District Judge did not frame an issue on the point. There are prima facie grounds to hold that the applicant is unable to pay his debts. I hold that Ghulam Husain has proved that he was entitled to present an application for insolvency and should, therefore, have been adjudicated an insolvent.

I accept this appeal and adjudicate the applicant an insolvent and remand the case to the District Judge to proceed with the insolvency proceedings in accordance with law. The questions relating to the alleged fraudulent transfers by the applicant do not really arise at this stage. They are more appropriate for determination when the question arises of realising his assets. There will be no order as to costs of this appeal.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 109

CAMPBELL, J.

Emperor—Appellant.

v.

Abdur Rahman — Accused — Respondent.

Criminal Appeal No. 181 of 1926, Decided on 6th December 1926, from an order of the 1st Cl. Mag., Jullundur, D/- 24th November 1925.

Criminal P. C., S. 537 — Appeal against acquittal—Court not competent to condone a defective charge.

When a Court of appeal is dealing with an appeal against an acquittal there is no provision of the Code under which a defect in the charge can be condoned. [P 109, C 2]

C. H. Carden Noad—for Appellant.
Shuja-ud-Din—for Respondent.

Judgment.—Abdul Rahman was tried on a charge under S. 409, Indian Penal Code, by K. S. Sheikh Nawab Ali Qureshi, Magistrate, First Class, Jullundur, and by judgment, dated the 24th November 1925, was acquitted. An appeal against the acquittal was filed by the Local Government and this was heard on the 15th November 1926, by a Division Bench consisting of the late Mr. Justice Martineau and myself. Our decision was pronounced in Court at the conclusion of the hearing and was that the appeal be accepted and the respondent retried on a charge framed in the Court below. Our reasons were to be recorded later almost immediately Mr. Justice Martneau was incapacitated by the illness which subsequently proved fatal, and it falls to me now to record those reasons.

The contention in appeal was that on the learned Magistrate's own finding there should have been a conviction under S. 409, Indian Penal Cede, or at any rate under S. 406 and that the reasons given by the Magistrate for acquittal could be at the most reasons for mitigation of sentence. We found this argument to be not without force but the obstacle to our proceeding further was that the learned counsel for the respondent submitted that his client was at a disadvantage in showing cause against conviction because the charge did not contain the particulars required by S. 222 (2), Criminal P. C., The learned Magistrate's judgment is misleading on this matter. It commences by stating that the accused Abdur Rahman was charged under S. 409, Indian Penal Code, with criminal breach of trust in respect of a sum of Rs. 4,258-14-4 made up of seven items which were detailed. In point of fact these items are not detailed in the charge and no total sum is specified. Under S. 222 (2), in a charge of criminal breach of trust the gross sum in respect of which the offence is alleged to have been committed should be stated as well as the dates between which the offence is alleged to have been committed. It is not necessary to specify particular items or exact dates. S. 535 (1) and S. 537 (a), Criminal P. C., make it quite clear that when a Court of appeal has before it the question of confirming or setting aside a conviction an omission by the trial Magistrate to frame a charge or an error or irregularity in the charge is no ground for setting aside a conviction unless a failure of justice has in fact been occasioned by such omission, error or irregularity. When, however, a Court of appeal is dealing with an appeal against an acquittal there is no corresponding provision of the Code under which a defect in the charge can be condoned and indeed no such provision could very well be framed.

We, therefore, decided that the conviction and sentence must be set aside and the trial must re-commence from the stage at which the charge was framed on a new charge to be drawn in strict compliance with the terms of S. 222 (2). The respondent will remain on the bail allowed by this Court until further orders by the trying Magistrate.

J.V. *Re-trial ordered.*

✻ A. I. R. 1927 Lahore 110

CAMPBELL AND ADDISON, JJ.

Gurdial Singh—Decree-holder—Appellant.

v.

Gurbakhsh Singh and *others*—Judgment-debtors—Respondents.

Miscellaneous First Appeal No. 1213 of 1925, Decided on 12th July 1926, from the order of the Sr. Sub-J., Lahore, D/- 3rd February 1925.

✻ *Civil P. C., O. 21, R. 16—Assignment of decree in writing—No other person than such assignee can apply for execution.*

Where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him, can apply for execution of the decree under the terms of O. 21, R. 16: *A. I. R.* 1925 *Mad.* 701, *Foll.* [P. 110, C. 2]

Tek Chand, Jagan Nath Aggarwal and *Dharam Das Suri*—for Appellant.

Badri Das—for Respondent No. 1.

D. C. Ralli for *Amar Nath* and *Daulat Ram*—for other Respondents.

Campbell, J.—On the 26th February 1915 Daulat Ram obtained a decree against Guranditta Mal. On the 18th February 1919 Daulat Ram died leaving a son Gurbakhsh Singh by a pre-deceased wife and a widow named Mt. Raj Kumari.

A posthumous son was born later named Rajindar Kumar and he is now dead. On the 9th September 1919 Gurbakhsh Singh representing himself to be the only heir of his deceased father Daulat Ram executed a registered deed in favour of Ram Singh Kabli assigning to him that portion of the decree which remained unsatisfied, for Rs. 80,000. On the 25th January 1921, Gurbakhsh Singh filed an application for execution of the decree making no mention of the assignee. This application remained pending and on the 4th February 1924 Gurdial Singh presented an application under O. 21, R. 16 alleging that the assignment in favour of Ram Singh by Gurbakhsh Singh was benami and that he was the real transferee and prayed that his name should be substituted as decree-holder in place of that of Gurbakhsh Singh.

Objections were raised to this application and eventually it was rejected by order of the Court dated the 3rd February 1925. Gurdial Singh has presented the present appeal.

It is doubtful whether the application fulfils the requirements of O. 21, R. 16, as an application for execution of the decree but assuming it to do so it was nevertheless incompetent since there was no transfer by assignment in writing in favour of Gurdial Singh. It has been recently ruled by the Madras High Court *Palaniappa Chetty* v. *Subramania Chettiar* (1), that where a decree has been transferred to a particular person under an instrument in writing no other person claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him can apply for execution of the decree under the terms of O. 21, R. 16, Code of Civil Procedure. We agree with this interpretation of the rule and it seems to us that the Legislature has deliberately provided that in an execution Court only that person claiming to be an assignee of a decree shall be recognized who is able to produce a written instrument of assignment in his favour and that there shall be no facilities for prolonging execution proceedings by investigations into complicated disputes between a decree-holder and an alleged assignee or between rival assignees. It would often happen that the judgment-debtor is not concerned at all with the merits of such a dispute but only with its duration.

We dismiss the appeal with costs.

G. B. *Appeal dismissed.*

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(1) A. I. R. 1925 Mad. 701=48 Mad. 553.

A. I. R. 1927 Lahore 111

JAI LAL, J.

Hukam Chand—Appellant.

v.

Ganga Ram and *others*—Respondents.

Misc. First Appeal No. 1018 of 1926, Decided on 9th November 1926, from the order of the Dist. J., Jullundur, D/- 12th February 1926.

Provincial Insolvency Act, Ss. 24 (1) and 25—Insolvency Court can enquire into the existence of a debt.

The Provincial Insolvency Act does contemplate an enquiry by the Insolvency Court as to the existence of a debt; hence the dismissal of an insolvency petition on the ground that it cannot be granted until the petitioning creditor had proved his claims in a regular suit, was wrong in law : 181 *P. R.* 1883, *Dist.*

(P 111, C 2)

Badri Das—for Appellant.

Mehr Chand Mahajan—for Respondents.

Judgment. — The appellant Hukam Chand presented a petition of insolvency against four brothers. Ganga Ram, Hukam Chand, Girdhari Lal and Ram Rattan, alleging that they all owed him a debt of about Rs. 23,000 in round figures and that to the best of his belief they owed Rs. 4,000 to other creditors, that their property was worth about Rs. 15,000 and that they had committed an act of insolvency inasmuch as they had fraudulently transferred some of their immovable property to different persons mentioned in the petition.

On the date of the hearing of the petition Hukum Chand, respondent, did not, appear but an objection in writing was raised on behalf of the other respondents that no debt was due from them to the petitioner and that they were not joint with Hukam Chand and were not, therefore, liable for the money due from him to the appellant. They claim that the petitioner should be directed to prove his status as their creditor by a civil suit.

The learned District Judge dismissed the petition holding that it could not be granted until the petitioner had proved in a regular suit that the sum claimed by him was due to him. In the opinion of the learned District Judge the petitioner was avoiding the payment of proper Court-fee on a plaint in a regular suit and was asking the Court to hold a summary enquiry to get an order that the debt was due.

The petitioner Hukam Chand has presented this appeal and it is contended on his behalf that the order of the District Judge is opposed to the express provisions of Ss. 24 and 25 of the Provincial Insolvency Act. S. 24 (1) provides " that in the date fixed for the hearing of the petition the Court shall require proof (a) that the creditor * * * * is entitled to present the petition". S. 25 provides that " in the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition * * * * it shall dismiss the petition." It is contended that these two sections clearly contemplate an enquiry by the insolvency Court into the right of the petitioning creditor to present the petition and that one of the necessary qualifications of that right is the existence of a debt of Rs. 500 or more, payable to the petitioner by the alleged insolvent.

In my opinion the contention of the learned counsel is correct. The Act does contemplate an enquiry by the Court as to the existence of the debt, otherwise any debtor may defeat the creditor's insolvency petition merely by denying the existence of the debt claimed by the petitioning creditor and thereby frustrate the whole object of the petition to the great detriment to the interest of the creditors. The learned counsel for the respondents cited *Mohr Singh* v. *Lonkra Mal* (1), but that judgment relates to a case under the Punjab Laws Act, the corresponding provisions of which were different from the Provincial Insolvency Act. In the reported case the learned Judges appear to have followed the English Law. No other ground is otherwise stated for the view that

the ordinary rule is that if a question of disputed liability arises in the course of insolvency proceedings under the Punjab Laws Act it is not to be adjudicated upon by the Court of insolvency but left to the civil Courts to determine in the ordinary way.

In the English statute and in the Act which governs the cases of insolvency petitions in the Presidency towns express provisions are contained conferring power on the insolvency Courts either to determine the disputed questions themselves or to stay (but not to dismiss)

(1) [1883] P. R. 181.

the insolvency proceedings pending decision of such questions by the ordinary Courts after complying with certain procedure relating to taking of security etc. from the debtor, but there is no similar provision in the Provincial Insolvency Act.

I hold, therefore, that the view of the learned District Judge is wrong and that he was bound to make enquiry as to the right of the petitioning creditor to present the petition which included an enquiry as to the existence of the debt alleged to be due to him.

I accept this appeal, set aside the order of the District Judge and remand the case to him for decision on the merits. The costs of this appeal will abide the result.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 112

HARRISON, J.

Mukand Lal—Plaintiff—Appellant.

v.

Mt. Lorindi Bai—Defendant—Respondent.

Second Appeal No. 1093 of 1924, Decided on 8th January 1925, from a decree of the Dist. J., Dera Ghazi Khan, D/- 18th January 1924.

Civil P. C., S. 11—*Objection to attachment in execution by both plaintiff and defendant, each urging his own title—Executing Court deciding question of title in defendant's favour—Subsequent suit for possession on the ground of subsequent purchase from vendor is barred even though the vendor was not party to execution proceedings.*

Plaintiff and defendant both objected to the attachment of a plot of land in execution of a decree, each contending that the site belonged to him and it was decided that the site belonged to the defendant as owner ; in a suit by plaintiff for possession on the ground of his subsequent purchase from the vendor, Municipality,

Held : that the question of title was res judicata by reason of the executing Court's decision even though the Municipality was not a party to those proceedings. [P 112, C 2]

S. Mukerji for *Har Gopal* — for Appellant.

Mukand Lal Puri—for Respondent.

Judgment.—The facts of this case are that Government made over a certain area to the Municipal Committee of Dera Ghazi Khan with a view to the building of a new abadi. Plots were sold by the Municipal Committee and the land in suit is the frontage of one of those plots. One Pritam Das obtained a decree against one Bosa and after his death in 1918 applied that this frontage should be sold in execution of his decree. Objections were lodged by Mt. Lorindi Bai, the widow of Bosa and defendant in this case, and also by the plaintiff Mukand Lal. Both contended that the site belonged to them. It was decided by the District Judge on the 12th of June 1918 that Mt. Lorindi Bai had herself purchased this site from the Municipality and that it could not, therefore, be attached or sold. On the 18th of October 1917 the Municipality passed a mutation order entering the name of Mt. Lorindi Bai as the owner of this site and on the 1st of December 1917 granted permission to her to build upon it. In spite of this fact, acting on very peculiar advice given by the Government Pleader and accepted by the Deputy Commissioner, the Municipality while admitting that the title was doubtful and pointing out the fact to the plaintiff sold it to Mukand Lal, for Re. 1-8 it being clearly explained that he took all risks and would not be compensated if it were found that he had wasted his Re. 1-8. He now brings this suit and is met by the decision of the District Judge in a suit, to which he was a party, to the effect that the defendant had acquired a good title from the Municipality.

His contention is that because the Municipality was not impleaded in those proceedings the decision does not bind him, as vendee from the Municipality. Whether it binds the Municipality or not it, must certainly bind him, in my opinion and it operates as res judicata. Knowing that this decision had been given he deliberately bought a bad title and he has only himself to blame. The Deputy Commissioner's order shows the rights sold as being Government rights. As a matter of fact they were the rights of the Municipality and this Mr. Mukerji admits, that is to say, the plaintiff's vendor and that of Mt. Lorindi Bai were one and the same. In spite of this fact he contends that he is now entitled to insist on strict proof of the payment of consideration by Mt. Lorindi Bai, although the matter has been finally adjudicated upon as between him and her by the District Judge, and it was

decided in that litigation that Mt. Lorindi Bai had acquired a clear title and that the rights of the Municipality had automatically become extinct. Had he purchased the title of some person other than the vendor to Mt. Lorindi Bai. there might be some force in his contention that he can re-agitate the question as being a different person from that person who took part in the previous litigation but the vendor from whom he has been fit to purchase, and who behaved in this peculiar manner in selling to him, is the very person whose right, title and interest were held in that previous litigation to have been transferred to and vested in Mt. Lorindi Bai, and therefore, extinguished for all time. As between him and her it has been found that her title is good and his must be bad, and it was held that his present vendor had no subsisting title at the time he sold.

I find that it is a clear case of *res judicata* and dismiss the appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 113

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Hari Singh—Defendant—Appellant.

v.

Harnam Singh and *others* — Plaintiffs and Defendant—Respondents.

First Appeal No. 1447 of 1922, Decided on 23rd November 1926, from the decree of the Sr. Sub-J., Gurdaspur, D/- 30th March 1922.

(a) Custom (Punjab) — Alienation — Consideration consisting of prior debts due to same creditor—Necessity for prior debts must be shown.

Where a mortgage is for consideration consisting of prior debts due to the same creditor, it is incumbent upon the mortgagee to prove that not only were they prior debts due to him, but that there was necessity for them: 65 *P. R.* 1900 (*F. B.*), *Foll.* [P 114 C 1]

(b) Contract Act., S. 74—No interest if debt is paid in time—For default four annas per rupee per harvest to be charged—Provision is penal.

The terms of the mortgage deed in suit provided that if the money was paid by Jeth Sambat 1968 no interest would be charged but, in case of default interest at the rate of four annas per rupee per harvest would be payable from the date of execution of the bond in suit.

Held: that this provision is a penalty under S. 74. [P 114 C 2]

(c) Custom (Punjab)—Alienation — Necessity for high rate of interest also must be proved.

It is incumbent on those who support a mortgage executed by the manager of a joint Hindu family to show that not only there was necessity for the loan, but that there was also necessity to borrow money at the high rate of interest claimed by the mortgagee: 41 *All.* 571 (*P. C.*) *Foll.* This principle also applies to cases under Punjab custom. [P 114 C 2]

N. C. Mehra and *Farrukh Hussain*—for Appellant.

Muhammad Amin and *B. A. Cooper*—for Respondents.

Shadi Lal, C. J.—This appeal arises out of a suit brought by the sons of the mortgagor for a declaration that the mortgage executed by their father Gurdit Singh, Defendant No. 1, on the 26th of April 1918, in favour of Hari Singh, Defendant No. 2, was fictitious, without consideration and without legal necessity and, therefore, not binding upon their rights of inheritance as the property mortgaged was ancestral. These allegations were controverted by the contesting defendant, Hari Singh, who pleaded that the mortgage was for consideration and for valid necessity and that a part of the consideration went towards the discharge of prior mortgage debts. The defendant also denied that the property was ancestral. This last plea was overruled by the Court below and in appeal no argument was addressed to us on this question. The mortgage money mentioned and detailed in the bond was Rs. 6,870 and the Court below held that the mortgage was valid and binding upon the plaintiffs to the extent of Rs. 5,670 only.

The defendant has come up in appeal to this Court and has challenged the findings of the Court below in so far as they are against him. He argues that the Court below ought not to have disallowed the following items: *vide next page.*

As regards (1), (2) and (3): this part of the case would be governed by the law as laid down by a Full Bench of the Punjab Chief Court in the case of *Devi Ditta* v. *Saudagar Singh* (1). These items were due to the mortgagee himself under two prior mortgages in his own favour and in order to bind the reversioners, it is incumbent on the mortgagee to prove that not only they were

(1) [1900] 65 P. R. 1900=322 P. L. R. 1900 (F. B.).

(1) Rs. 80 due under a bond dated the 21st of January 1914 executed by Gurdit Singh, Defendant No. 1, in favour of Hari Singh, defendant-appellant, (Ex. D-2) ;	Allowed credit for in the mortgage bond dated the 21st January 1914. (Ex. D-3)	All these three items allowed credit for in the bond in suit dated the 26th April 1918.
(2) Rs. 200 due under a bond dated the 20th January 1911 executed by Gurdit Singh in favour of the appellant Hari Singh.		
(3) Rs. 260 due under a bond, dated the 20th June 1910, executed by Gurdit Singh in favour of Hari Singh, appellant.		
(4) Stipulated rate of interest on Rs. 600 due under the bond dated the 19th January 1911 allowed credit for in Ex. D-3 and eventually in the bond in suit.		

prior debts due to him, but that there was necessity for them.

As to the Item No. (1) represented by the bond (Ex. D-2), dated the 21st January 1914, it was for a sum of Rs. 80 only. It was argued on behalf of the appellant that this was borrowed by Gurdit Singh in order to pay off arrears of Government revenue, but we agree with the Court below that the evidence on this point is not reliable. Moreover, we have the fact that the revenue was to be paid on the 15th of January 1914 while the document is dated the 21st of January 1914. We hold that, though consideration did pass under this bond, no necessity for the loan has been made out.

Now remain two items, (2) and (3), under the bond (Ex. D/3), dated the 21st of January 1914, included in the bond in suit. Ex. D/3 was for a total sum of Rs. 1,950 and it included three items under three different bonds : (1), dated the 19th of January 1911 for Rs. 600; (2) due under the bond, dated the 20th of January 1911 for Rs. 200 ; and (3) dated the 20th of June 1910 for Rs. 260. The Court below has allowed Rs. 600 due under the bond dated the 19th of January 1911 and we are not concerned with it. As regards the last two bonds, although their execution and the passing of consideration under them are proved no necessity for them has been established. There are vague statements that under the document of the 20th January 1911 for Rs. 200 the money was taken for payment of debts due to some creditors, but such creditors have not been produced and the Court below has rightly disallowed this item. In the same way there is no satisfactory evidence beyond the recitals in the document, dated the 20th of June 1910, for Rs. 200 that the money was required for the purchase of bullocks and other household expenses. In the absence of any reliable evidence in support of the recitals the Court below was justified in not accepting them as sufficient proof of the necessity of the loan.

As regards Item No. (4) : no plea was taken in the grounds of appeal against the order of the Court reducing the stipulated rate of interest on Rs. 600 due under a mortgage bond, dated the 19th January 1911, but we allowed counsel for the appellant to argue this point. The terms of the mortgage deed in suit provided that if the money was paid by Jeth Sambat 1968 no interest would be charged, but in default interest at the rate of four annas per rupee per harvest would be payable from the date of execution of the bond in suit. The Court below has treated this provision as a penalty under S. 74, Indian Contract Act and has reduced the rate of interest to two per cent. per mensem. This reduction of interest can further be justified on another principle of law laid down by their Lordships of the Privy Council in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2) In that case their Lordships have held that it was incumbent on those who support a mortgage executed by the manager of a joint Hindu family to show that not only there was necessity for the loan, but that there was also necessity to borrow money at the high rate of interest claimed by the mortgagee. It is true that the case before their Lordships of the Privy Council was governed by the law of the Mitakshara, but the principle enunciated therein applies to the present case. We are satisfied that the mortgagee Hari Singh has not been able to establish that there was any valid necessity for borrowing money at such a high rate of interest. We hold that the learned

(2) [1919] 41 All. 571=50 I. C. 434=46 I. A. 145 (P. C.).

Judge of the Court below was justified in reducing the rate of interest to two per cent. per mensem. On these findings we confirm the decree of the Court below and dismiss the appeal with costs.

R.D. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 115

FFORDE AND CAMPBELL, JJ.

Hari Singh—Defendant—Appellant.

v.

Firm Karam Chand-Kanshi Ram—Plaintiffs—Respondents.

First Appeal No. 433 of 1923, Decided on 13th May 1926, from the decree of the Senior Sub-J., Sargodha, D/- 13th January 1923.

(a) *Civil P. C., O. 30, R. 4—R. 4 applies only to suits brought in firm's name—S. 45, Contract Act, is not modified by Civil P. C., except as in O. 30—Contract Act, S. 45.*

Section 45 of the Indian Contract Act has not been modified by the Civil P. C., save as appears in O. 30, which is confined to cases where suits are brought not by individuals but in the name of the firm under which they are trading : 28 *C. L. J.* 268, *Ref.* [P 117, C 1]

(b) *Civil P. C., O. 13, R. 4—R. 4 must be strictly complied with.*

The provisions of O. 13, R. 4, must be strictly complied with. The endorsement should bear the name of the person tendering the document in evidence and the date on which it was so tendered. Merely by stamping the documents with the date on which they were filed in Court, they do not ipso facto become evidence in the case without any formal proof : *A. I. R.* 1924 *Lah.* 548 and 5 *Lah.* 227, *Foll.* [P 117, C 2]

M. S. Bhagat and *Gobind Ram Khanna* for *Dev Raj Sawhney*—for Appellant.

Gokal Chand Narang and *Jiwan Lal Kapur*—for Respondents.

Judgment.—This appeal arises out of a suit brought by a firm known as Karam Chand-Kanshi Ram against one Hari Singh for damages for breach of contract. The contract in question is a document in writing, dated the 11th May 1918, and purports to have been entered into between Jairam Das and Dhari Ram on the one side and Hari Singh, who is the appellant in this appeal, on the other.

Mr. Bhagat, who appears for the appellant, has raised the objection that the respondent firm are no parties to that contract, and, therefore, have no right to sue on foot of it.

Dr. G. C. Narang, on the other hand, contends that the contract although purporting to have been entered into by Dhari Ram and Jai Ram, was in fact executed by these persons on behalf of the firm Karam Chand-Kanshi Ram of which firm he alleges Jai Ram Das and Dhari Ram were partners at the date of the contract. Dr. Narang further contends that even if it be found that the respondent firm was not a party to this contract, one of the contracting parties, Dhari Ram is a plaintiff in the present suit, and accordingly the suit is maintainable by him alone. His third contention is that assuming that the firm Karam Chand-Kanshi Ram were not originally parties to the contract sued upon, the contract was subsequently varied by the introduction of this firm as a party.

So far as the first contention is concerned, it is obvious from a perusal of the contract itself and the conduct of the parties, that the agreement of the 11th May 1918, was entered into by Jai Ram Das and Dhari Ram on the one hand and Hari Singh on the other, and the only other person contemplated as having any interest whatsoever in this agreement is a certain Sawan Mal, who is described as a co-partner of Jai Ram Das and Dhari Ram and for whose liability on foot of the contract these two persons hold themselves responsible. (The judgment then recited portions from the agreement and after discussing the evidence continued.) In my opinion the respondent firm has entirely failed to show that they were in any way privy to the contract upon the foot of which they now sue.

The suggestion that there were some sort of novation of this contract in their favour is equally unsupported by any evidence. No witness has been produced in support of this aspect of the case. Not one word to that effect was uttered by Mr. Bahadur Chand in his evidence in Court and the only document relied upon by Dr. Narang in support of this proposition is a document referred to as Ex. P-82 which purports to be a copy of an extract from a register kept by the firm Karam Chand-Kanshi Ram, which extract purports to be signed by Ajudhia Parshad as agent of the appellant. This document has not been proved. The register itself as I have already stated, has been excluded from evidence by the trial Judge, and it is hard to see how under these circumstances an alleged extract can be used as evidence of an agreement by the

appellant to accept the respondent firm as parties to the contract in addition to or substitution for the original parties. Ajudhia Parshad in giving evidence as a witness for the respondents stated :

I was never in charge of bhusa transactions. Harnam Singh was in charge but I used to supervise his work twice a week and I used to sign the plaintiffs' register from time to time.

This reference to the register was objected to by counsel for the appellant as the document itself had been excluded. The witness, however, was allowed to be examined in regard to this document, and he added :

On pages 4, 7, 8 and 9 the signatures of mine appear in Urdu and English. The number of bundles is correct. I was not responsible for writing by "the plaintiff."

In other words his evidence amounts to this that when a document showing the number of bundles brought to the factory was put before him he signed his name as admitting the correctness of the number, and added that the entry in the column of remarks on page 9 in this register was not in his hand. Even assuming that this document is properly before us it is wholly insufficient to prove that the appellant agreed to accept the respondent firm as a contracting party either in addition to or substitution for Messrs. Jai Ram Das and Dhari Ram.

Dr. Narang's remaining argument is that even if the respondent firm is not entitled to sue on foot of the contract in question Dhari Ram one of the parties to it being also a party to the suit, is entitled to sue, and that the action is maintainable by him alone. As against this, S. 45 of the Indian Contract Act provides that one of two joint promisees cannot claim a right of performance of a contract without joining his co-promisee, or upon the latter's death, his representative. This section has been modified by the provisions of O. 30 of the Code of Civil Procedure (Act 5 of 1908), R. 1 of which provides that partners may sue or be sued in the name of their firm of which they were partners at the time of the accruing of the action. R. 4 of the same order provides that notwithstanding anything contained in S. 45 of the Indian Contract Act where two or more persons may sue or be sued in the name of a firm and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. Dr. Narang urges in his alternative argument that even if the respondent firm are not entitled to sue, Dhari Ram can bring his action as a partner in the firm Jai Ram Das-Dhari Ram. The first objection to this is that it has not been shown that there ever was such a firm as Jai Ram Das-Dhari Ram. But even assuming that the contract was with these individuals as such a firm, the suit has not been brought in that firm's name, and, accordingly, the provisions of R. 4 of O. 30 are not applicable. O. 30 of the Civil Procedure Code enables a firm's name to be used instead of the names of the partners composing that firm, as a convenient method for denoting the persons who constitute the firm at the time when the name is used, and, therefore, when a suit is brought in the name of a firm it is precisely as though it were brought in the name of all the partners.

By using the name of the firm the effect is to bring all the partners before the Court, and when that is done O. 30, R. 4 permits a partner to sue in this character though some of his co-partners may have died before the suit was instituted, and, if the suit has been instituted permits it to be continued without the joinder of the legal representatives of a partner who may have died during its pendency. But these rules only apply when suits are brought in a firm's name. The rules do not enable one of several co-contractors to sue in his own individual name. Prior to the Civil Procedure Code of 1908 there was much conflict of authority in the Conrts in India as to the effect of S. 45 of the Indian Contract Act. Some of the Courts held that it had not the effect of preventing one partner suing alone on foot of a contract made with a partnership firm, whilst other Courts, notably the High Court of Calcutta took the contrary view. In *Manmohan Panday* v. *Bidhu Bhusan Ray Chowdhury* (1) a Division Bench of the High Court of Calcutta held that where a suit was brought by six plaintiffs jointly and not in the name of their firm and one of the plaintiffs had died and his legal representatives had not been substituted for him within the time allowed by law, the suit must fail. Chatterjee, J., in the course of his judgment observed :

(1) [1918] 28 C. L. J. 268=48 I. C. 309.

Order 30, R. 4, does not help the appellants, as that rule applies only to a case where the suit is brought in the name of the firm.

We have, however, been referred to a Division Bench judgment of this Court in *Mool Chand* v. *Mool Chand* (2) in the course of which appear the following observations which are strongly relied upon by Dr. Narang :

The rule of law now seems to be firmly established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit.

These observations, however, are qualified by the previous paragraph which is as follows :

The view of the majority of the High Courts has now been adopted in O. 30, R. 4, Civil Procedure Code, 1908, which declares that the legal representatives of the deceased partner are not necessary parties to suits brought in the name of the firm.

I am unable to accept the view that the clear effect of S. 45 of the Indian Contract Act has been modified by the Civil Procedure Code, save as appears in O. 30, which is confined to cases where suits are brought not by individuals but in the name of the firm under which they are trading. Accordingly as the firm of Karam Chand-Kanshi Ram is not a party to the contract sued upon, Dhari Ram can at the best only be regarded as suing on his own behalf and as his co-promisee has not joined in the action and it is too late to add his personal representative at this stage, as a suit by such person would now be barred by limitation, Dhari Ram's suit, if otherwise maintainable in the present form must fail.

Before concluding I feel bound to refer to the manner in which the documentary evidence was dealt with by the trial Judge. In no instance does he appear to have complied with the provisions of O. 13, R. 4, Civil P. C., or to have observed the ordinary rules applicable to the admission of secondary evidence. The respondents attempted to prove their case by producing a great number of letters written by themselves to third persons, mostly their own employees. They also produced their own registers. Many of these letters were copies, some bearing no signature. A typical example appears in the evidence of Mehta Bahadur Chand, a member of the respondent's firm, who states :

I file the whole correspondence in this case P-1 to P-82. All these are genuine documents.

These documents comprise telegrams, post cards, copies of notices, copies of letters written to third persons and include a whole mass of matter which could not possibly be evidence against the appellant. No attempt was made to prove those documents individually, but the stamp of the Court was affixed, with one or two exceptions to each one, the stamp purporting to be the endorsement required by O. 13, R. 4. The date of the endorsement, however, is in each case the 1st of May 1920, which is the date when the plaint was filed. The date when the witness who purports to prove these documents was called was the 6th of June 1921. It is obvious, therefore, that the endorsement upon all these documents was affixed at the time when they were filed in the Court with the plaint. O. 13, R. 4, requires that the endorsement should amongst other requirements, bear the name of the person producing the document and the date on which it is produced which means the name of the person tendering the document in evidence and the date on which it was so tendered. The trial Judge appears to have thought that provided documents were stamped with the date on which they were filed in Court, they ipso facto became evidence in the case without any formal proof. The Judge who wrote the judgment in this case is not the person who tried it and apparently he was under the impression that all documents which appeared on the file whether proved or not were available as material upon which he could base his judgment, and his judgment has been based mainly upon such material. As I have pointed out even documents which have been excluded by the trial Judge as inadmissible in evidence have been relied upon by his successor as a basis for his conclusion. In view of the conclusion I have arrived at upon the competency of this suit it is unnecessary to discuss the merits of the case or to refer in any further detail to the evidence. This Court has in *Secretary of State* v. *Sharimati Sarla Devi Chawdhrani* (3) referred to the observations of their Lordships of the Privy Council

(2) A. I. R. 1923 Lah. 197.

(3) A. I. R. 1924 Lah. 548=5 Lah. 227.

as to the necessity of a strict compliance with the provisions of O. 13, R. 4, Civil P. C. Had it been necessary for us to deal with the evidence it would have been impossible to do so upon the present record as hardly a single document has been admitted in accordance with the provisions of the Civil Procedure Code.

For the reasons I have given I am of opinion that the respondents' suit is not sustainable, and that this appeal must be accepted, the decree of the trial Court reversed and the suit dismissed. I would allow the appellant his costs throughout.

G.B *Appeal allowed.*

A. I. R 1927 Lahore 118

COLDSTREAM, J.

Gujjar Singh and *another*—Plaintiffs —Appellants.

v.

Kahan Singh and *others*—Defendants —Respondents.

Second Appeal No. 1459 of 1926, Decided on 17th November 1926, from a decree of the Dist. J., Gurdaspur, D/- 29th April 1926.

(a) *Limitation Act, S. 5—Omission to implead a person as respondent by carelessness is not sufficient ground.*

Omission to implead a person as respondent owing to negligence in drafting the appeal is no ground for extending the time for impleading him. [P.118, C. 2]

(b) *Custom—Punjab—Alienation for necessity —Purchase of woman for vendor's son amounting to purchase for concubinage is not a necessity.*

Where the purchase of a woman for the vendor's son amounts to purchasing a woman for concubinage, such a purchase cannot be considered to be one for necessity among Jat agriculturists. [P. 119, C. 1]

Ram Lal Malik—for Appellants.

N. C. Mehra—for Respondents.

Judgment.—Hakim Singh, a Jat, sold 40 kanals, 2 marlas of land to Kahan Singh and Waryama two brothers and Jowala Singh by a registered deed on 17th June 1918, for a stated consideration of Rs. 2,000. In June 1924, his sons Gujjar Singh and Gajjan Singh instituted the suit from which this appeal arises for a declaration that the alienation would not affect their reversionary rights. Jowala Singh having died, his widow Mt. Harnami was impleaded as his representative. The Subordinate Judge, Second Class, Gurdaspur, found that necessity had not been proved in respect of more than Rs. 800 of the consideration and gave a decree to the effect that the sale would only affect the plaintiffs' right to this extent.

On appeal the learned District Judge held that necessity was proved in respect of the full consideration stated and dismissed the suit on the 29th April 1926. Against this decree the plaintiffs preferred the present second appeal on the 25th May 1926. By a careless error Jowala Singh, the deceased, has been cited as respondent instead of his widow Mt. Harnami. Mr. Ram Lal Malik applies for permission to implead Mt. Harnami. Mr. N. C. Mehra for the respondents urges that as the appeal cannot proceed against Kahan Singh and Waryama alone it should be held to have abated as a whole and that there is no sufficient ground for extending the period of limitation in the case of Mt. Harnami. He asks accordingly for the dismissal of the appeal.

No reason for the omission to cite Mt. Harnami except negligence in the drafting of the appeal is offered by appellants' counsel. The case appears to me to be one of gross carelessness which cannot be reasonably put forward as sufficient cause for jeopardizing the rights confirmed to Mt. Harnami by the decree of 29th April 1926. I am not prepared to extend time in this case and I accordingly dismiss the appeal so far as it concerns Mt. Harnami.

From the entry in the revenue record it appears that the sale was to the three vendees in common in equal share and I do not see why it should not be entertained so far as it relates to the two shares of Kahan Singh and Waryama. There is no case here of an indivisible mortgage or of unascertained shares and the plaintiffs might, had they so pleased, have elected to leave one of the vendees undisturbed and sought to save their rights in the land sold to the other two alone.

The consideration of Rs. 2,000 consisted of the following items :

	Rs.	a.	p.
To be paid by the vendees to previous mortgagees: ...	800	0	0
Received before the Sub-Registrar	500	0	
A promissory note dated 17th June 1918, executed by Kahan Singh vendee	700	0	0

Mr. Ram Lal Malik states that his clients' appeal is with reference to an amount of Rs. 770 only and that his only ground is the learned District Judge was wrong in finding that the debt to defray which this amount was required was a just one. According to the defendants-respondents this sum was spent by Hakim Singh on the purchase of a woman for his son Gujjar Singh and the finding of the learned District Judge that Rs. 770 out of the consideration for the sale was so spent is final. The only question for decision now is whether a loan raised for this purpose was a just debt. The learned District Judge has disposed of the matter with the remark that as Gujjar Singh was unmarried this item was for necessity. From the evidence it appears that the woman was the wife by "Anand" formality, of the vendor Jawind Singh with whom she had lived for six months. It is not shown that she was married to Gujjar Singh. At the time of the suit her whereabouts were unknown. It, therefore, appears that the transaction was the sale of a woman for concubinage. Such traffic is certainly opposed to public policy and the transaction can surely not be regarded as an act of necessity for a Jat agriculturist. I hold, therefore, that to the extent of Rs. 770 the debt to defray which the consideration for the sale was required was proved by the alienees themselves to be not a just debt.

The result is that the appeal must be accepted; the order of the lower appellate Court is set aside so far as it relates to Kahan Singh's and Waryama's shares in the land sold and the plaintiffs-appellants are granted a declaration to the effect that the sale of the two shares to Kahan Singh and Waryama will not affect their reversionary rights except to the extent of Rs. 820 for which sum the share will be considered jointly mortgaged to Kahan Singh and Waryama.

G. B. *Appeal accepted.*

A. I. R. 1927 Lahore 119

BROADWAY AND COLDSTREAM, JJ.

Smail and *others*—Plaintiffs—Appellants.

v.

Bahab and *others* — Defendants—Respondents.

Second Appeal No. 2824 of 1922, Decided on 5th July 1926, from the decree of the Dist. J., Montgomery, at Lahore, D/- 11th August 1922.

Limitation Act, Art. 120—*Suit for declaration disentitling defendant from demanding partition—Application for partition gives fresh start—Entries in revenue records showing co-ownership do not affect.*

An application for partition is an act of invasion which gives a new cause of action for a suit for declaration that the defendant is not entitled to demand partition and entries in revenue records showing co-ownership of plaintiff and defendant do not affect limitation: 140 *P. R.* 1907 and 98 *P. R.* 1919, *Foll.*

[P 119 C 2]

Zafar-Ullah Khan for *Abdul Aziz* and *Anant Ram*— for Appellants.

Aziz Ahmad—for Respondents.

Broadway, J.—The only point for determination in this appeal is whether the suit brought by the plaintiffs is within limitation. The trial Court held that it was. The lower appellate Court came to the conclusion that it was not. It is not necessary to set out the facts of this case in any detail. The revenue records show that the land in suit in the "ownership" column is entered as belonging to the plaintiffs and the defendants but the possession is with the plaintiffs. This state of affairs has existed since 1872 or thereabouts. In 1897 an attempt was made by the plaintiffs to have the revenue records altered and their names entered not only as in sole possession but as sole owners. This application was rejected.

In 1921 one of the defendants applied for partition of the land in suit. The plaintiffs pleaded their title and were referred by the revenue authorities to the civil Court. In my judgment the suit is clearly within limitation. In *Hakim Singh* v. *Waryaman* (1) a similar question arose for decision and it was held that the application for partition was an act of invasion which gave a new cause of action. *Jahana* v. *Wali* (2) is

(1) [1907] 140 P. R. 1907.
(2) [1919] 98 P. R. 1919=53 I. C. 595.

an authority to the same effect. Mr. Aziz Ahmad for the respondent very frankly accepts the propositions enunciated in those authorities but has attempted to differentiate this case from those on the ground that in the reported cases the entries showed sole ownership whereas in the present case the entries related to co-ownership. This is a distinction no doubt, but I do not think it affects the question.

I would, therefore, accept this appeal and return the case to the Court of the District Judge, for disposal of the other questions raised in appeal. Costs in this Court will follow the event. The stamp on appeal will be refunded.

Coldstream, J.—I agree.

R.D. *Case remanded.*

A. I. R. 1927 Lahore 120

JAI LAL, J.

Nur Khan—Defendant—Appellant.

v.

Jiwan Dass—Plaintiff—Respondent.

Second Appeal No. 634 of 1926, Decided on 20th November 1926, from a decree of the Dist. J., Shahpur, at Sargodha, D/- 30th November 1925.

(a) *Practice—Suit for damages for malicious prosecution—Judgment in criminal case should not be discussed—If conclusions are based on evidence adduced in the damages suit itself judgment is not vitiated.*

In the judgment in a suit for damages for malicious prosecution it is not proper for the Judge to discuss the judgment in the criminal case, but if the conclusions arrived at by the Judge are not based on the findings of the Magistrate or on evidence recorded by him but he has come to independent conclusions on the evidence produced in the case on the issues framed, his judgment is not vitiated merely on this ground. [P 121 C 2, P 122 C 1]

(b) *Damages—Malicious prosecution — Suit for damages—Burden to prove malice and want of reasonable cause is on the plaintiff.*

The burden of proving want of reasonable and probable cause is on the plaintiff and the existence of malice should be independently proved and cannot be inferred merely from the absence of probable and reasonable cause. [P 122 C 1]

(c) *Damages—Malicious prosecution—Damages can be awarded separately for arrest and prosecution.*

In a suit for damages for malicious prosecution it is competent to award damages under two heads, viz., a malicious arrest and malicious prosecution. [P 122 C 1]

C. H. Carden Noad—for Appellant.

Muhammad Alam—for Respondent.

Judgment.—The appellant Nur Khan is a Head Constable of the Railway Police on duty in Sargodha and the respondent Jiwan Das is a Travelling Ticket Examiner of the North-Western Railway. On the 27th of July 1923, one Rallia Ram complained to the Station Master of Bhalwal of the theft of his mangoes despatched by him by Railway and suspected the Guard Teja Singh from whose possession some mangoes were recovered. The matter was reported to the higher Railway authorities and also to the Police at Sargodha, whereupon the appellant came and commenced the investigation of the case. During the investigation Teja Singh appears to have stated that the mangoes found with him belonged to Jiwan Dass and the Head Constable further discovered, as alleged by him that at the Ajnala Railway Station Jiwan Dass was seen sitting in the brake with Teja Singh. He, therefore, decided to send up Jiwan Dass, for trial for the theft of the mangoes. A telegram was sent by him to the Railway Authorities at Lahore requesting the surrender of Jiwan Dass and a reply was received that the latter had been instructed to return to the office with the equipment and after handing over charge to report himself at the thana. The Head Constable, however, without waiting for this being done, arrested Jiwan Dass, kept him in the lock-up till the next day when he was taken to the Magistrate's Court in handcuffs who released him on bail.

It might be mentioned here that before me the learned counsel for the appellant contended that the learned District Judge had made a mistake in arriving at the finding that it was Nur Khan who arrested Jiwan Dass. As a matter of fact Jiwan Das was arrested by a constable under the order of Nur Khan, Head Constable. This, in my opinion, makes no difference because the arrest was effected under the orders of the appellant. Moreover, in his pleas he accepted responsibility for the arrest because he stated in para. 3 of the written statements that the plaintiff was arrested, handcuffed, kept in custody and taken to the Court in handcuffs and was released on bail by the Magistrate the

next day, and also in his statement as a witness he deposed that the plaintiff was arrested because there was danger of his disappearance, explanation which is not without an important bearing on this case.

The plaintiff was prosecuted but was discharged by the Magistrate. He then instituted a suit against Nur Khan for recovery of Rs. 2,000 as damages for malicious prosecution. He has been granted a decree both by the trial Court and the District Judge for Rs. 800 and the defendant has presented this second appeal to this Court.

The learned District Judge has found that the arrest and prosecution of the plaintiff were the result of a personal grudge that the subordinate Railway Police Officer had against the plaintiff owing to his having reported against Nur Muhammad Constable for breach of Railway Regulation in allowing his relation to travel by the Railway without paying the usual fares. The District Judge in fact holds that the defendant had actually threatened the plaintiff that he would soon be punished for his conduct in troubling Nur Muhammad's relations and that as a result of this Jiwan Dass had made a report to his Departmental Officers that he apprehended trouble at the hands of the Railway Police at Sargodha. He has further found that the defendant supported the case against Jiwan Dass by evidence which was false and which he had concocted. The learned Judge was of opinion that the statement of Teja Singh that the mangoes belonged to the respondent being by a person who was himself accused for their theft by the owner should not have carried any weight with the Head Constable.

The learned counsel for the appellant has attacked the findings of the learned District Judge on three main grounds :— (1) that the burden of proving absence of reasonable and probable cause has been wrongly placed on the defendant ; (2) that the learned Judge has held that the mere proof of absence of reasonable and probable cause amounts to malice ; and (3) that the District Judge was very much influenced by the Magistrate's judgment.

As regards the first objection, though in the trial Court inter alia two following issues were framed :

(1) Was there any just or reasonable cause for the arrest or detention of the person of the plaintfff in the lock-up ?

(2) Whether defendant Nur Khan maliciously and without just and probable cause prosecuted the plaintiff ?

The learned District Judge has, as a matter of fact, proceeded on the second of these issues assuming that the burden of proof lay on the plaintiff. The first issue was wrongly framed and conflicts with the second one but an exmination of the judgment shows that he discussed the plaintiff's evidence and on that he came to the conclusion that the prosecution was without just and probable or reasonable cause and also that it was malicious.

On the second point also the contention of the learned counsel is not correct. All that the District Judge has held is that when it has been positively established that the prosecution was without just and probable cause very little evidence is sufficient to show that it was malicious ; still he arrived at a definite conclusion on the material on the record that the defendant was actuated by malice in arresting and prosecuting the plaintiff. The learned Judge has, no doubt, taken into consideration as one of the elements in determining the presence of malice the fact that the defendant had absolutely no reasonable cause for implicating Jiwan Dass which fact, in his opinion showed, that there wae some ulterior motive to implicate him, but the finding is not based on this consideration alone. On the other hand the Judge has definitely found that the subordinate Police Officers were annoyed with Jiwan Dass and that Nur Khan had threatened him with injury about a month before this incident and there is evidence on the record in support of this finding. I am unable to see that the learned counsel has any reasonable complaint about this part of the District Judge's judgment.

With regard to the third objection it is, no doubt, true that the District Judge has in places discussed the judgment of the Magistrate. This he should not have done but then his conclusion are not based on the findings of the Magistrate or on evidence recorded by him but he has come to independent conclusions on the evidence produced in this case on the issues framed. I am unable to hold

that this judgment is vitiated merely on this ground. There is thus considerable force in the contention of the learned counsel for the respondent that all the findings of the lower appellate Court are findings of fact and cannot be attacked in this second appeal. He has, in my opinion, violated no provisions of the law in arriving at his conclusions. In view of what I have stated above it is not necessary to notice the authorities cited by counsel for the appellant in support of this proposition that the burden of proving want of reasonable and probable cause is on the plaintiff and that the existence of malice should be independently proved and cannot be inferred merely from the absence of probable and reasonable cause. These propositions are well-recognized and I feel no hesitation in assenting to them.

On the question of damages the learned counsel for the appellant contended that the District Judge has awarded the plaintiff Rs. 250 on account of costs of his defence ; Rs. 250 for physical and mental injury on account of his actual arrest before the prosecution and Rs. 500 for wrongful and malicious prosecution. He did not contest the first item but objected to the remaining two on the ground that they overlapped each other and that no separate compensation could be given for malicious arrest as distinguished from malicious prosecution.

In my opinion there is no legal mistake in the method adopted by the Courts below in calculating the damages. Instead of giving one lump sum for injury to the feelings of the plaintiff, the Subordinate Judge has sub-divided it under two heads, in other words, in assessing the total compensation under this head which he fixed at Rs. 550 the learned Judge took into consideration the conduct of the defendant, firstly, in arresting the plaintiff under the circumstances already mentioned, keeping him in lock-up and taking him to the Court in handcuffs and, secondly, in actually sending him for trial to the Court knowing that the case against him was false. Admittedly no reasonable objection could be taken on second appeal if the learned Judge had given Rs. 550 as compensation for the injury caused to the plaintiff. It follows that no objection can be taken if the Judge gives reasons in detail for fixing the amount awarded. In my opinion in dividing the compensation under the sub-heads the Courts below have merely stated their reasons for assessing the damages at Rs. 550.

There is no force in this appeal and it is hereby dismissed with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 122

JAI LAL, J.

Firm Nand Lal-Lajpat Rai—Plaintiffs—Petitioners.

v.

Firm Ramji Das-Dwarka Das—Defendants—Respondents.

Civil Revision Petition No. 450 of 1926, Decided on 20th November 1926, from the decree of the Sr. Sub-J., Ludhiana, D/- 23rd November 1925.

Limitation Act, Art. 65—Settlement of liquidated damages by parties prior to breach—Limitation runs from breach and not settlement.

In a suit for damages for breach of a contract where parties have settled the amount of liquidated damages, prior to the date of the performance of the contract, limitation runs from the time originally fixed for its performance and not from the date of the settlement regarding the liquidated damages. [P 123 C 1]

Ram Lal-Malik—for Petitioners.

Shamair Chand—for Respondents.

Judgment.—On the 14th August 1921, the plaintiff entered into an agreement with the defendant to sell to him cotton seeds which were to be delivered in the month of Magh, Sambat, 1978 which corresponds to about the 12th January to the 12th February 1922. It appears that in the meantime the parties decided that the actual delivery of the cotton seeds would not take place and agreed to Rs. 121-14-0 as the damages due to the plaintiff from the defendant on that account. The plaintiff instituted a suit for the recovery of this amount along with others. So far as other items are concerned the suit had been dismissed on the merits, but the suit for Rs. 121-14-0 was decreed by the trial Court. The Senior Sub-Judge on appeal, however, dismissed the suit holding that the same was barred by time. He held that the limitation for the recovery of Rs. 121-14-0 began to run from the date of the settlement of the damages between

the parties and not from the date on which the delivery was originally agreed to be given. It is admitted that the suit would be within limitation from the latter date. In my opinion the view of the learned Senior Sub-Judge is erroneous. The suit is for the recovery of damages for breach of contract which would ordinarily be recoverable on the date of the breach i. e. the date on which the delivery was to be made. The settlement of the amount due from the defendant to the plaintiff was done merely in order to save the parties from the trouble of going into accounts later to calculate damages. This did not, however, amount to a novation of the contract, nor did the document produced by the plaintiff in support of his allegation that the amount of damages was settled at Rs. 121-14-0 give the plaintiff a fresh cause of action. It is a mere acknowledgment which cannot itself be made the basis of a suit. The cause of action is the breach by the defendant which happened on the date originally fixed for the delivery of goods. I hold that the plaintiff's suit was within time.

I accept this petition and decree the plaintiff's suit for Rs. 121-14-0 with costs throughout.

J.V. *Petition accepted.*

A. I. R. 1927 Lahore 123

COLDSTREAM, J.

Khillu Ram and *others*—Defendants—Petitioners.

v.

Jai Chand and *others*— Plaintiffs—Respondents.

Civil Revision Petition No. 178 of 1926, Decided on 22nd October 1926, from a decree of the 2nd Cl. Sub-J., Lahore, D/- 7th November 1925.

Arbitration—Power to appoint umpire.

Where the Court is empowered to appoint an umpire, in case the arbitrators fail to appoint, appointment of umpire, on the umpire appointed by arbitrators refusing to act, is not illegal.

[P. 123, C. 2]

Mukand Lal Puri for *B. H. B. Petman* and *Gopal Chand*—for Petitioners.

Fakir Chand—for Respondents.

Judgment.—On the 14th of November 1922, the plaintiffs-respondents instituted a suit against the defendants-petitioners for partition of a wall and the site thereof dividing the parties' houses. On the 29th June 1923, the parties agreed to refer their dispute to two arbitrators. It was also agreed that if the two arbitrators differed the matter would be referred to an umpire, and that if they failed to appoint an umpire with mutual consent an umpire would be appointed by the Court. The arbitrators differed and selected an umpire who refused to act.

Then one Lala Karam Chand was selected an umpire, but he too declined to adjudicate. Thereupon the Court appointed Bawa Baij Nath who, on the 16th July 1926, filed his award in which he held that the wall, which was fourteen inches wide and dilapidated, could and should be partitioned, each party taking seven inches. The award also provided for the re-building of the wall by the plaintiffs who were to defray two-thirds of the expenditure on the defendant's portion and to cause no damage to the house. Objections to the award were heard and disposed of and a decree in accordance with it was passed on the 7th November 1925.

The defendants have petitioned this Court to set aside the order of the Sub-Judge overruling the objections and decreeing the suit in the terms of the award, and to order the award to be remitted under para. 14 of the Second Schedule to the Civil P. C.

The only grounds urged by Mr. Mukand Lal Puri, who appears for the petitioners are: (1) that the Court acted without jurisdiction in appointing an umpire (Ground No. 1 of the petition); (2) that the award determined matters not referred to arbitration (Ground No. 4 (*b*) of the petition); and (3) that the material objection made to the award was not considered by the Court (Grounds Nos. 2 and 3 of the petition).

I do not find force in Mr. Mukand Lal Puri's argument that once the arbitrators had in agreement selected an umpire, the Court was functus officio in the matter and could not appoint another umpire when the umpire selected refused to act. The parties clearly empowered the Court to appoint an umpire if the arbitrators failed to appoint one. The appointment of a person who refused to be umpire was certainly a failure to appoint an umpire. The Courts therefore, acted with

perfect legality in appointing an umpire itself.

The second objection is one against the award itself on the ground that it provides for the demolition of the wall, whereas the matter referred to arbitration was merely the partition of the wall. Now, it is perfectly clear from the plaint and the pleas, the award of the two arbitrators and the previous litigation between the parties, a history of which has been given me by Mr. Mukand Lal Puri himself in support of his petition, that the only real dispute between the parties was this question of partitioning the wall in such a manner as to allow the plaintiffs to re-build the wall in order to repair or re-build their house. The ownership of the wall was already settled. The only purpose of the plaintiffs in suing was to be empowered to do what they wished with their property. The award was a settlement, in a most reasonable manner, of the dispute between the parties, and the decree was in accordance with the award. A revision on this ground is manifestly out of the question. The last ground is of no more consequence than the others.

It appears that after the arbitrators had been appointed, one of the defendants, Ralia Ram, died and his minor son was brought on to the record as his representative. The objection which is alleged to have been ignored by the Court is that neither the minor nor his guardian ad litem was examined by the umpire. The umpire was not bound to examine the guardian or the minor or anyone else. The defendants had a common counsel. It is not alleged that the minor or guardian wished or applied to be examined or has any interest adverse to that of the other defendants. No misconduct on the umpire's part is now suggested apart from the omission to question the minor or his guardian. This ground does not warrant interference in revision.

For these reasons the petition is dismissed with costs.

R.D. *Petition dismissed.*

A. I. R. 1927 Lahore 124

CAMPBELL, J.

Muhammad—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1469 of 1926, Decided on 10th December 1926, from an order of the Dist. Mag., Shahpur, D/- 23rd July 1926.

Punjab Restriction of Habitual Offenders Act (5 of 1918), Ss. 16 and 7—Rules under S. 16—Magistrate cannot confine a person between specified hours but can only to specified area.

The rules under S. 16 do not empower the Magistrate to confine a person to his house between certain specified hours. He can only be restricted to the area of the village or such larger area as the Court may fix. [P 124, C 2]

Tara Singh Narula—for Petitioner.

Sundar Das for *Government Advocate*—for Respondent.

Judgment.—Under S. 7 of Punjab Act 5 of 1918 the petitioner Mohammad, son of Raja, has been restricted for three years within the boundaries of the village Daulatpur Khilchi, where he resides. The Magistrate further ordered him to report himself daily to the Sub-Inspector Police thana Miani, at 5 p. m. because in the opinion of the Magistrate, Mohammad, being the son of one lambardar, could not be looked after properly by the other lambardar. Mohammad was further directed not to leave his house at night in the main abadi of the village Daulatpur between 8 p. m. and 5 a. m. This order was upheld on appeal by the learned District Magistrate and has been brought to this Court on revision.

According to S. 7 of Act 5 of 1918 the order of restriction must conform to the rules made by the Local Government under S. 16. Those rules do not empower the Magistrate to confine the petitioner to his house between the hours of 8. p. m. and 5 a. m. He can only be restricted to the area of the village or such larger area as the Court may fix.

Thana Miani appears from the learned District Magistrate's order in appeal to be 2½ miles away from the village and the direction for a daily report there is, in my opinion, onerous. I set aside this order and also the order confining the petitioner to his house at night. The order restricting the petitioner to the

village Daulatpur Khilchi for three years is maintained, and the daily report will be made to the lambardar of the village who is not the father of the petitioner.

R.D. *Petition partly accepted.*

A. I. R. 1927 Lahore 125

COLDSTREAM, J.

Kirpa Ram—Defendant—Appellant.

v.

Chand Bahadur — Plaintiff — Respondent.

Second Appeal No. 1719 of 1926, Decided on 17th November 1926, from a decree of the Addl. Dist. J., Amritsar, D/- 13th May 1926.

Practice—New plea—Appeal—Point not referred to in lower Court's judgment must be presumed to have been given up there.

Where the judgment of the lower appellate Court makes no reference to certain points, it must be assumed that the matters were not brought to the notice of that Court but were given up : *A. I. R.* 1923 *Lah.* 124, *Rel on.* [P 125 C 2]

Harbhajan Das—for Appellant.

Shamair Chand—for Respondent.

Judgment.—On the 27th February 1925, Kirpa Singh contracted to supply certain furniture to Chand Bahadur, who had himself contracted to supply it to the Amritsar Medical School. The articles were to be supplied by the 15th March, but an extension was given up to the 19th March. The defendant did not, however, supply the goods until the 20th April, and when he supplied them they were rejected by the Medical School authorities. On the 1st July 1925 Chand Bahadur instituted a suit from which this appeal arises, against Kirpa Singh, claiming Rs. 1,096-8-0 made up as follows :

	Rs.	a.	p.
Purchase of Benches not supplied	307	0	0
Spent on repairs on other furniture	159	8	0
Spent on polishing furniture	20	0	0
Money advanced ...	610	0	0
Total ...	1,096	8	0

The defendant pleaded that the benches had not been supplied because the plaintiff had failed himself to furnish the defendant as he had undertaken to do with iron legs for them. As regards the other articles the defendant pleaded that they had been supplied in time and had been of proper quality.

The first Court decreed a sum of Rs. 786-8-0 being Rs. 486 spent on purchase of benches and repairs and Rs. 300 damages for the payment of which the contract provided. This amount was reduced to Rs. 666-8-0 on appeal by the Additional District Judge who allowed Rs 466-8-0 on account of money actually spent and Rs. 100 only on account of damages. The defendant Kirpa Singh has filed this second appeal which has been argued before me by Mr. Harbhajan Das. The grounds urged by Mr. Harbhajan Das are, firstly, that the lower appellate Court has omitted to deal with two questions raised by the grounds of appeal preferred before it, namely, whether the goods on which Rs. 159-8-0 are said to have been spent were those supplied by the defendant and whether the plaintiff had or had not failed to supply the iron legs for the benches, secondly, that the contract was between the plaintiff and the defendant and the lower Courts were wrong in holding that the defendant was bound to supply the goods to the satisfaction of the Medical School, and thirdly, that the evidence shows that the goods supplied were passed by the plaintiff as acceptable.

As regards the first contention : I find that the judgment of the lower appellate Court makes no reference to the points referred to in Mr. Harbhajan Das's final contention. It must be assumed that the matters were not brought to the notice of the lower appellate Court but were given up : *Abdul Karim* v. *Thakar Ram Jaggu Ram* (1). I find, moreover, on perusing the evidence in the case that the first Court's findings upon them in favour of the plaintiff were justified. As regards the contention that the defendant had not contracted to supply the goods to the satisfaction of the Medical School authorities I agree with the findings of the lower Courts to the effect that the words in the contract Ex. P. 1 ("balance to be paid when goods are passed") were understood by the defendant to mean that the goods were to be passed as satisfactory not by the plaintiff but by the Medical School authorities.

(1) A. I. R. 1923 Lah. 124.

This is, in my opinion, clearly established by the evidence.

The defendant admitted that he did not supply the benches. I find it proved by Mr. Longman's evidence that the iron legs for the benches were duly furnished to the defendant. As regards the rest of the goods it is proved that they were supplied a month late and I find no justification for Mr. Harbhajan Das' arguments that they must have been accepted as satisfactory because the plaintiffs advanced Rs. 50 in part payment to the defendant on the 20th April. This disposes of all the grounds of appeal urged before me. The appeal is dismissed with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 126

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Mt. Jio—Defendant—Appellant.

v.

Mt. Rukuran and *another* — Plaintiffs and Defendant—Respondents.

First Appeal No. 1553 of 1922, Decided on 23rd November 1926, from the decree of the Sr. Sub-J., Delhi, D/- 27th April 1922.

(a) *Will—Construction — Where language is plain, testator's intention is immaterial.*

No doubt the intention of the testator is a very important element in the construction of a Will but at the same time when the language is clear and unambiguous, the question of finding out the intention of the testator does not arise and the will has to be construed according to its plain language. [P 127 C 1]

(b) *Hindu Law—Will in favour of two persons—They take as tenants-in-common — Hindu Law—Gift.*

When a deed of gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint owners.

The principle of joint tenancy is unknown to the Hindu Law except in connexion with the joint Hindu family : 33 *All.* 665 ; 26 *Bom.* 445 and 39 *P. R.* 1909, *Rel. on.* [P 127 C 2]

Sardha Ram and *Bishan Narain*—for Appellant.

Jugan Nath Aggarwal and *Lal Chand Malhotra*—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit brought by the plaintiffs for a declaration that the sale made by Mt. Jio, Defendant No. 1, in favour of Muhammad Umar, Defendant No. 2, with respect to one-half share of certain property was without necessity and ineffectual against their rights as reversioners. They admitted that Mt. Jio had rights of ownership in the other half of the property. Mt. Jio and Muhammad Umar, her transferee, pleaded that the sale was for necessity and, therefore, the plaintiffs had no right to challenge the alienation.

In order to understand the case properly we must go back to the year 1891 when a widow Mt. Sunder made a Will in respect of five shops and one house in favour of Mt. Jio, her daughter, and her son-in-law Ram Saran. Under that Will she provided that after her death her daughter (Mt. Jio) and her son-in-law (Ram Saran) should succeed to the entire property detailed in the Will and that they were to be owners of, and heirs to the property in every way. Mt. Jio executed two mortgage deeds dated respectively the 11th of May 1909 and the 18th of June 1909. They are in respect of two shops and the mortgagee under both these mortgage bonds is one Jainti Parshad. The first mortgage was for Rs. 300 and the second for Rs. 99. Both these documents contained recitals to the effect that money was required for the repairs of the shops included in the mortgages. In 1913 we come to a third mortgage in respect of those very two shops for a sum of Rs. 900 in favour of the same mortgagee, Jainti Parshad. This sum of Rs. 900 was partly in satisfaction of the two prior mortgage-deeds of the year 1909 and also "for the purpose of defraying food expenses and effecting repairs, etc., to the mortgaged property." The last mortgage was for possession like the two previous ones. It must be noted that at the time of these three mortgages the husband of Mt. Jio, Ram Saran, was alive. He died about fifteen months before the filing of the present suit, that is to say, sometime early in 1920. After his death, on the 18th of August 1920, Mt. Jio executed the two sale-deeds in favour of Defendant No. 2, Muhammad Umar, under which she transferred three shops and a half share in the house. The total consideration for these two sale-deeds is Rs. 8,000. In the sale-deed relating to the three shops there is a recital of the mortgage bond of 1913 in favour of Jainti Parshad and it is further mentioned that after satisfying the mortgage of Jainti Parshad, the purchaser,

Muhammad Umar, has been put in possession of the property as an absolute owner.

A plaint was filed on behalf of the plaintiffs which, curiously enough, does not bear any date. We find a document purporting to be an amended plaint printed at page 24 of the paper-book, also without a date. In this plaint the plaintiffs claimed as reversioners of Ram Saran, the late husband of Mt. Jio, and, as stated above, they said that the sale of the property in favour of Muhammad Umar was without any necessity and was, therefore, not binding upon them. The Court below has decreed the suit of the plaintiffs to the extent of only half of the shop, holding that under the terms of the Will of the year 1891 Mt. Jio was the full proprietor of half the property, i. e., half of the house and 2½ shops. The sale-deeds in favour of Muhammad Umar in respect of the three shops has been held to be invalid only to the extent of half the shop.

Mt. Jio has come up in appeal to this Court, and her contention is that under the terms of her mother's Will and, according to the intention of the testatrix, she was entitled to the whole of the property left by her mother Mt. Sunder, and that the name of her husband was more or less a surplusage. This contention is directly against the clear language of the will of 1891 and cannot be entertained for a moment. It is true that the intention of the testator is a very important element in the construction of a Will but at the same time when the language is clear and unambiguous, the question of finding out the intention of the testator does not arise the Will has to be construed according to its plain language.

It was further argued that there was a joint tenancy created under the terms of the Will of 1891 and that as a consequence on the death of Ram Saran, Mt. Jio became the full owner of the whole property by right of survivorship. This contention of the appellant is contrary to a large volume of case-law on the subject, vide *Kishori Dubain* v. *Mundra Dubain* (1); *Gopi* v. *Mt. Jaldhara* (2); *Ram Piari* v. *Krishna Piari* (3); *Bai Diwali* v. *Patel Bechardas* (4) and *Munna* v. *Umrao Singh* (5). These cases in substance lay down that when a deed of gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint owners. In fact the case of *Kishori Dubain* v. *Mundra Dubain* (1) clearly lays down that the principle of joint tenancy is unknown to the Hindu Law except in connexion with the joint Hindu family. This being so there is no force in the contention of the appellant that Mt. Jio on the death of her husband took the whole property by survivorship.

The learned counsel for the appellant tried to justify the sale of the extra half of the shop on the ground of necessity by arguing that the sale proceeds of half of the shop went towards the payment of the mortgages in favour of Jainti Parshad and for other subsequent repairs of the property. We have noticed, however, that the mortgages in favour of Jainti Parshad were executed during the lifetime of Ram Saran so that Mt. Jio did not at the time occupy the position of a Hindu widow. She was the full proprietor of half of the property and it was only after the death of the husband that she acquired the status of the Hindu widow qua the other half of the property left by her husband. If she borrowed money in order to repair her own shops during the lifetime of her husband, it cannot be argued on her behalf that after the death of her husband she was justified in selling part of the property which came into her possession as a Hindu widow, in order to pay off the mortgages executed by her for meeting the expenses of those repairs. There is no satisfactory evidence of any repairs having been executed after the death of her husband to the property which came into Mt. Jio's possession as a Hindu widow and in fact there are no recitals in the two sale-deeds in suit about any recent repairs having been made or contemplated. This being so, neither Mt. Jio nor the transferee from her has discharged the onus which heavily lay upon them of proving necessity for the sale of half of the shop over and above her own share.

(1) [1911] 33 All. 665=10 I.C. 565=8 A.L.J. 757.
(2) [1911] 33 All. 41=7 I. C. 697=7 A. L. J. 941.
(3) A.I.R. 1921 All, 50=43 All. 600.
(4) [1902] 26 Bom. 445=4 Bom. L.R. 102.
(5) [1909] 39 P.R. 1909=59 P.L.R. 1909=1 I.C. 720=55 P.W.R. 1909.

In the absence of any evidence that debts were incurred by her for any legal and valid necessity we hold that the judgment of the learned Subordinate Judge is correct and we dismiss this appeal with costs.

G.B. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 128

MARTINEAU AND FFORDE, JJ.

Fateh Shah—Plaintiff—Appellant.

v.

Bahat Shah and *others*—Defendants—Respondents.

First Appeal No. 2666 of 1920, Decided on 4th April 1925, from the decree of the Sr. Sub-J., Montgomery, D/- 30th August 1920.

* *Specific Relief Act, S. 42—Proviso—Proviso refers to plaintiff's position at the date of suit.*

The proviso to S. 42 that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of the plaintiff at the date of the suit. Therefore the plaintiff's right to maintain the suit for a declaratory decree is not affected by the fact that during the pendency of the suit right to possession also has accrued to the plaintiff: 12 *Mad.* 136 and 20 *C. L. J.* 107, *Foll.* [P. 128, C. 2]

Sagar Chand and *Parkash Chandra* for *Mahesh Das*—for Appellant.

M. M. Tufail and *Bal Kishen*—for Respondents.

Judgment.—The plaintiff sues for a declaration that a gift of ancestral land made by his father Bahab Shah in favour of the latter's daughters Sahib Bibi, Saidan Bibi, and Badshah Bibi shall not affect his reversionary rights. The parties are Sayads of Basti Kesar in the Montgomery district, and the lower Court has held that among Sayads such a gift is valid by custom, and has dismissed the suit. The plaintiff has appealed.

On behalf of the respondents two preliminary objections are taken: (1) that the appeal abates because no representative of Mt. Saidan Bibi, who died during the pendency of the appeal, has been brought on the record, and (2) that as the donor Bahab Shah also has died during the pendency of the appeal the suit for a declaratory decree cannot be maintained, and that the plaintiff ought to sue for possession of the land. The first objection has no force, as Mt. Nuran, the mother and legal representative of Mt. Saidan Bibi, has already been impleaded as the representative of Mt. Sahib Bibi, and there is no difference between her character as legal representative of one daughter and her character as legal representative of the other. The second objection has also no force, as it has been held in *Govinda* v. *Perumdevi* (1) which was a case exactly similar to the present one, that the proviso to S. 42 of the Specific Relief Act that

> no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so

refers to the position of the plaintiff at the date of the suit: see also *Ram Charan Mandal* v. *Biswanath Mandal* (2) in which the Madras ruling was followed by the Calcutta High Court. The plaintiff's right to maintain the suit for a declaratory decree is not affected by the death of Bahab Shah during the pendency of the appeal. We, accordingly, overrule the preliminary objections.

Coming to the merits of the case we find that a remand is necessary before the question of custom can be disposed of. The decision turns almost wholly on the entries in the riwaj-i-am of the Montgomery district and in the wajib-ul-arz of the village Basti Kesar, to which the learned Subordinate Judge has referred in his judgment, and we are surprised to find that although the learned Judge has mentioned Exs. Nos. D-4 and D-5 of the extracts from the riwaj-i-am, and has said in his judgment that he has placed a copy of the entry in the wajib-ul-arz on the record, those documents are, as a matter of fact, not on the record.

We send the case to the lower Court with the direction that certified copies of the entries in the riwaji-i-am and wajib-ul-arz referred to in that Court's judgment be placed on the record, and that plaintiff be given an opportunity of producing evidence to rebut those entries, if he wishes to do so, after which the record should be returned to this Court.

G.B. *Case remanded.*

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(1) [1889] 12 Mad. 136.
(2) [1915] 20 C. L. J. 107=26 I. C. 410.

A. I. R. 1927 Lahore 129 (1)

JAI LAL, J.

Biru Ram—Plaintiff—Petitioner.

v.

Miran Bikhsh and *others*—Defendants—Respondents.

Civil Revision Petition No. 198 of 1926, Decided on 12th November 1926, from the decree of the Small Cause Court J., Jullunder, D/- 20th January 1926.

Civil P. C., O. 1, R. 1—Member of joint Hindu family who is named as creditor in bond can sue alone—Other members even, if necessary, could be joined as defendants.

If a bond is in favour of one member alone of a joint Hindu family, he is competent to sue alone on the bond.

Assuming that all the members of a joint Hindu family are necessary parties to such a suit, the provision of law is complied with, even by making them as defendants in the case. [P 129 C 1]

L. C. Mehra—for Petitioner.

Jamna Das—for Respondents.

Judgment.—Biru Ram instituted a suit against Miran Bakhsh for recovery of principal and interest alleged to be due to him on a bond executed by the latter in his favour. The plea of the defendant was that the amount was due to a joint Hindu family of which Biru Ram was a member and also that he had repaid the amount. The Judge, Small Cause Court, ordered the plaintiff to implead the other members of the family. After this had been done he dismissed the suit on the ground that the other members of the family should have been impleaded as plaintiffs and not as defendants as was done by the original plaintiff and also that the re-payment of the loan had been proved by the defendant.

Assuming that, in the face of the fact that the bond was executed in favour of Biru Ram alone it was open to the defendant to plead that the amount was due to a joint Hindu family and that all the members of such family were necessary parties. I hold that the provisions of law were complied with by making them defendants in the case. That was a sufficient protection to the defendant if one was needed. The suit could not, therefore, be dismissed on this ground. But I hold that the bond being in favour of Biru Ram alone he was competent to sue alone to recover the amount alleged to be due on it. (The remaining potion of judgment is not material for this report.)

J.V. *Petition accepted.*

A. I. R. 1927 Lahore 129 (2)

SHADI LAL, C. J.

Gul Muhammad—Complainant—Petitioner.

v.

Pir Akbar Ali — Accused — Respondent.

Criminal Petition No. 1094 of 1926, Decided on 18th November 1926, from the order of the S. J., Ferozepur, D/- 16th June 1926.

Penal Code, S. 504—Provocation likely to cause the person provoked "to commit any other offence" is within the section.

A person also comes within the ambit of S. 504, I. P. C., if the provocation offered by him is of such a character as to cause the person provoked "to commit any other offence," and hence a complaint made under that section should not be dismissed in limine on the ground that the provocation offered was not likely to cause the breach of public peace. [P 130 C 1]

Moti Sagar and *Mukand Lal Puri*—for Petitioner.

Zafarullah Khan—for Respondent.

Judgment.—The question for determination is whether the trial Magistrate was justified in dismissing the complaint in limine on the ground that it did not satisfy the requirements of the offence described in S. 504, Indian Penal Code. The complaint was based upon a letter said to have been written by the accused and despatched by him to the complainant. The Magistrate finds that the letter in question contained "a long and involved series of attacks" on the complainant's character and public life, and that "these attacks are mostly malicious and of a nature intended to hurt the addressee." The learned Magistrate, however, holds that as the insult or abuse was conveyed in a letter and not delivered face to face and as the receiver of the letter had time to think the matter over, the provocation caused to him was not likely to cause a breach of the peace.

The question is a debatable one and cannot be satisfactorily determined in the absence of evidence bearing upon it. It has been held by the Bombay High

Court that the requirement of the law is satisfied if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. The public peace can be broken by angry words as well as by deeds: *King-Emperor* v. *Chunibhai Dahyabhai* (1). It is, however, unnecessary to discuss the matter any further, because, as pointed out by the learned counsel for the petitioner, a person comes within the ambit of the section, if the provocation offered by him is of such a character as to cause the person provoked "to commit any other offence." This aspect of the case appears to have been ignored by the trial Court.

I am accordingly of opinion that this is not a case in which the complaint should have been dismissed in limine on the ground that it disclosed no offence. I must, however, make it clear that nothing contained in this judgment should be taken as an expression of opinion on the merits and, that the only question which I have decided is that the case cannot be disposed of on a preliminary ground, but that it requires determination on the merits.

I accordingly accept the application and setting aside the order of dismissal remit the case for trial in accordance with law.

J.V. *Trial ordered.*

(1) [1902] 4 Bom. L.R. 78.

A. I. R. 1927 Lahore 130

COLDSTREAM, J.

Aso and *others*—Defendants—Appellants.

Bishan Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 699 of 1926, Decided on 12th October 1926, from the decree of the Dist.-J., Hoshiarpur, D/- 26th January 1926.

Landlord and tenant—Occupancy tenants enjoying rights of grazing their cattle and taking fuel—Reasonable area should be set apart.

Where occupancy tenants enjoy the rights of grazing in and taking fuel and fodder for their cattle from the village common land they are entitled to have a reasonable area set apart for the purpose: 119 *P. R.* 1889, *Rel. on.*

[P 130 C 2]

Sunder Das—for Appellants.

Fakir Chand—for Respondents.

Coldstream, J.—The suit out of which this appeal and the cross-objections arise was instituted by some occupancy tenants of land in Shahpur village in Una Tehsil of Hoshiarpur district against some of the proprietors of the land (with whom they joined as defendants certain mortgagees and tenants-at-will) on the allegation that the plaintiffs had until six months before date of suit exercised their rights of grazing in, and taking fuel and fodder for their cattle from, the village common land measuring 7217 kanals and that the proprietors had interfered with these rights. They asked for an injunction to restrain this interference and such other relief as the Court might think proper to grant.

The proprietors denied the plaintiffs' rights in the village land as a whole and contended that the rights described could be exercised only on the lands occupied by the plaintiffs and that the common land had been partitioned among the proprietors. It appears that the common land was as a fact partitioned between the proprietors in 1900 when an area of 283 kanals was demarcated or set aside for the exercise of the rights in dispute. The greater part (some 208 kanals) of this reserved area has, however, been submerged by flooding.

The parties were apparently in agreement to the effect that for the time being the area of 208 kanals was sufficient to satisfy the requirements of the plaintiffs. The trial Court holding that the latter were entitled to an area sufficient in which to graze their cattle and to cut fuel and fodder, gave a decree restraining the contesting defendants from preventing the exercise of this right from 208 kanals of land to be demarcated in execution proceedings.

The parties filed cross-appeals in the Court of the District Judge who dismissed the appeal of the landlords and accepted that of the defendants so far as to modify the decree which he worded as follows:

The plaintiffs are entitled to rights of pasturage for their agricultural cattle, of removal of grass for such cattle and of (taking) fuel for their ordinary use from that portion of the common land which is lying unenclosed and unreclaimed. The plaintiffs shall be entitled to exercise their rights subject to the rights of the proprietor of reclamation and enclosing any areas that may be necessary for them. The

defendants 1—14 (the contesting defendants) are hereby permanently restrained from preventing the plaintiffs from the exercise of the above rights.

This decree, it will be seen, avoided demarcation of any particular area. Against this decree the defendants proprietors have filed a second appeal to this Court contesting in the memorandum the rights of the plaintiffs to exercise rights in any area outside that of the demarcated reserved area of 283 kanals (of which only 75 remain unsubmerged). The plaintiffs have filed cross-objections disputing the proprietors' rights to reclaim and enclose the common land to an unlimited extent.

For the appellants Mr. Sundar Das states that he now admits the correctness of the view taken by both lower Courts of the legal rights of the parties, based as it is on the wajib-ul-arz the rulings *Nagina* v. *Baggu* (1), *Hira* v. *Nathu* (2) and *Bhola Nath* v. *Midnapore Zamindari Co.* (3), summarized in para. 220 of Rattigan's Digest of Customary Law. For the cross-objecting respondents Mr. Faqir Chand admits before me that the landlords cannot be restricted from enclosing land according to their wishes provided that an area for grazing sufficient for the real needs of the tenants in respect of grazing and feeding their cattle kept for agricultural purposes and the collection of fuel is left available. That is to say, counsel agree that the law is that the tenants are entitled to exercise these rights in the common land which is not enclosed and that the landlords can partition the land and enclose it so long as a sufficient area for the exercise of these rights remains. Further both counsel admit that for their present needs an area of 283 kanals is sufficient and Mr. Sundar Das says that his clients are prepared to allow the tenants for their purposes an area of 208 kanals in addition to the 75 kanals still unsubmerged out of the previously damarcated area. The only point of dispute remaining is the form of the decree. Mr. Sundar Das urges that it is essential to prevent further litigation that this area of 208 kanals should be demarcated as provided for by the trial Court's decree, while Mr. Faqir Chand supports the lower appellate Court's decision that such demarcation now will not settle the case, for more land may become submerged, the requirements of the tenants may increase, and the quality of the pasturage alter from time to time according to climate and the vagaries of the river. Mr. Faqir Chand further asks that the decree may be modified so as to make it clear that the proprietors are not at liberty to enclose or reclaim such an area that insufficient pasturage etc., will not remain for the tenants.

Having heard the arguments on both sides I find myself in agreement with the learned District Judge's view that a final demarcation of area is likely to be futile and that it would not tend to avoid litigation. I accordingly dismiss the appeal. On the other hand there appears to me to be force in Mr. Faqir Chand's demand that the decree ought to lay down in clear terms that the proprietors must leave a sufficient pasturage to the tenants. It is consistent with the statement as to tenant rights at page 411 in *Hira* v. *Nathu* (2) and is I think a proper relief in the circumstances. Accepting the cross-objections to this extent only I order that the decree of the lower appellate Court be amended by the insertion after the words "necessary for them" the words

> provided that the proprietors shall not be entitled to enclose or reclaim so much land that there will not remain to the plaintiffs in consequence of such enclosures, or reclamation an area sufficient for the pasturage of the cattle required for their agriculture and the collection of grass and fuel required for their ordinary use.

In the circumstances of this appeal I pass no order as to costs.

R.D. *Appeal dismissed.*

(1) [1881] 100 P. R. 1881.
(2) [1899] 119 P. R. 1889.
(3) [1904] 31 Cal. 503=31 I. A. 75=8 C. W. N. 425=8 Sar. 611 (P. C.).

A. I. R. 1927 Lahore 131

MARTINEAU, J.

Sajawal—Surety—Appellant.

v.

Firm Gobind Ram-Shankar Das and *another*—Decree-holders and Judgment-debtor—Respondents.

Miscellaneous First Appeal No. 1755 of 1926, Decided on 11th November 1926, from an order of the Sr. Sub-J., Multan, D/- 25th June 1926.

Civil P. C., S. 145—*Notice to surety by Court under the proviso to S.* 145, *along with the warrant for his arrest is not invalid—Civil P. C., O.* 21, *R.* 30.

Mere arrest of a surety does not, but detaining him in civil prison does constitute the execution of a money decree passed against his principal, and hence no objection can be taken where a Court issues against a surety a warrant of arrest at the same time that it issues a notice to him, under the proviso to S. 145, Civil P. C., to show cause why his bond should not be forfeited.

[P. 132, C. 1]

Sain Das—for Appellant.

Ram Chand Manchanda—for Respondents.

Judgment.—The appellant, Sajawal, stood surety for Ghulam Sarwar Khan against whom the respondents had a decree, and as Ghulam Sarwar Khan has not paid the decretal amount the decree-holder has proceeded against Sajawal, and the Senior Sub-Judge has ordered that the latter be detained in the civil prison for a period of 6 months.

It is urged for the appellant that no notice was given to him and that the order is, therefore, illegal. The order of the 4th May, however, shows clearly that notice was given to the appellant to show cause why his bond should not be forfeited. That was a sufficient compliance with proviso to S. 145, Civil P. C. Objection is taken to the procedure of the lower Court in issuing a warrant of arrest against the appellant at the same time that it issued the notice. But S. 145 merely requires a notice to be given to the surety before the decree is executed against him and this was done. The decree was executed against him not by his arrest, but by his detention in prison (see O. 21, R. 30, Civil P. C.,) and the order for his imprisonment was passed after the notice had been given to him and he had been given an opportunity of showing cause why the decree should not be executed against him.

There is no force in any of the grounds of appeal and the appeal is in fact purposeless seeing that the appellant has undergone nearly the whole of the term of imprisonment imposed by the lower Court.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 132

DALIP SINGH, J.

Yusaf Ali Hakimji—Plaintiff—Appellant.

v.

Mohammad Din & Sons—Defendants—Respondents.

Second Appeal No. 1793 of 1925, Decided on 13th November 1926, from the decree of the Dist. J., Rawalpindi, D/- 6th April 1925.

Evidence Act, S. 115—*Irregular mode of recording evidence can be validated by consent—Party consenting is estopped.*

In a civil case the consent of parties can validate the mode of recording evidence, even though irregular, and a party consenting to a particular mode is estopped from challenging that mode on the ground of illegality.

[P. 133, C. 1]

Har Gopal—for Appellant.

Aziz Ahmad—for Respondents.

Judgment.—The case was remanded under O. 41, R. 25, Civil P. C., to the District Judge for a decision on the following points :

1. When the stair-case and the platform in dispute wsre built, and,
2. Whether the property is or is not partible.

The case was, however, remanded to the lower Court by the District Judge. That lower Court recorded the evidence and gave a finding. On objection before him the learned District Judge held, in view of *Lahore Bank, Ltd.* v. *Lakhi Ram* (1) that the proceedings before the Sub-Judge were ultra vires and held an enquiry himself. Three witnesses were examined for the plaintiff and thereafter the plaintiff's counsel stated that the evidence taken by the Sub-Judge should be taken as evidence in the case. The defendant produced no evidence, but requested that the evidence before the Sub-Judge should be taken as evidence in the case. Upon that the District Judge passed the following order :

After recording evidence and hearing arguments on both sides I have arrived at the following findings :

1. That the stair-case and platform were both built in 1922 and that the stair-case was demolished by the order of the G. O. C. and a pucca stair-case was built in the same year.

(1) [1913] 242 P. L. R. 1913=215 P. W. R. 1913=19 I. C. 970=105 P. R. 1913.

2. That the property is not partible. Both parties agree on this point.

Before me it is contended by counsel for the appellant that the provisions of O. 41, R. 25, Civil P. C., which are mandatory, have not been complied with as the learned District Judge has given no reasons for his findings. It is also contended on the authority of *Lahore Bank, Ltd.* v. *Lakki Ram* (1) that the evidence recorded by the Sub-Judge should not have been taken into consideration at all. The latest ruling of this Court is contained in *Labh Singh* v. *Ram Lal* (2) and seems to be opposed to *Lahore Bank, Ltd.* v. *Lakhi Ram* (1). Be that as it may, it seems to me that in a civil case the consent of parties can validate the mode of recording evidence and that the appellant is estopped from raising this point. Counsel for the respondent has not contended that the order of the learned District Judge complies with the provisions of O. 41, R. 25, Civil P. C. Counsel for the appellant wished me to go into the evidence myself and decide the case under S. 103, Civil P. C. Counsel for the respondent, however, did not agree and counsel for the appellant did not, in view of this, press his point. I, therefore, remand the case back again to the learned District Judge to record his finding with reasons, therefor, on the question when the stair-case and platform in dispute were built. Costs of this application will abide the event.

R.D. *Case remanded.*

(2) A. I. R. 1925 Lah. 39=5 Lah. 252.

A. I. R. 1927 Lahore 133

SHADI LAL, C. J., AND BROADWAY, J.

Chandu Lal and *others*—Defendants—Appellants.

v.

Mukandi Lal and *others*—Piaintiffs—Respondents.

Letters Patent Appeal No. 71 of 1925, Decided on 14th January 1927.

Custom (Punjab)—Alienation by guardian—Mortgage by widow for herself and minor step-son—Subsequent mortgage by step-son of same property—Previous debt is not antecedent.

Where widow acting on her own behalf and on behalf of her minor step-son executed a mortgage and subsequently the step-son again mortgaged the same property in favour of the same mortgagee for the previous debt plus a certain additional sum.

Held: that the previous debt cannot be regarded as an antecedent debt. [P 133 C 2, P 134, C 1]

Sheo Narain—for Appellants.

Shamair Chand—for Respondents.

Broadway, J.—This is an appeal under S. 10 of the Letters Patent against the decision of Mr. Justice Campbell, dated the 2nd February 1925. The facts briefly are as follows: In 1906 one Mt. Dashodan, widow of Telu Mal, mortgaged certain shops to Chandu Lal etc., for a sum of Rs. 590 with interest. She professed to have acted on her own behalf and on behalf of her step-son Mata Ram as his guardian. On the 20th of August 1918 Mata Ram executed a mortgage of the said property in favour of the same mortgagees. The consideration for this mortgage is entered as the sum of Rs. 800 due under the mortgage of 1906 and a further loan of Rs. 100.

At or about the same time Mata Ram executed a document taking the shops on lease from the mortgagees. As the rent reserved under the lease was not paid, the mortgagees sued and obtained a decree for possession of the mortgaged property. The three minor sons of Mata Ram then instituted the suit out of which this appeal has arisen asking for a declaration that Chandu Lal and others were not entitled to take possession of the mortgaged property under the decree referred to above, inasmuch as the said property was joint and ancestral.

It was found that the sum of Rs. 100, said to have been paid before the Sub-Registrar had not been proved to be for necessity and the only question before the learned Judge in Chambers was whether the sum of Rs. 800 could be regarded as an antecedent debt. After a careful examination of the situation Mr. Justice Campbell came to the conclusion that it had not been proved that Mt. Dasodhan had been in fact the manager of her step-son's estate or the guardian of his person. Mt. Dasodhan was clearly not Mata Ram's guardian de jure and after giving due weight to the arguments addressed to us by Mr. Sheo Narain I am of opinion that the view taken by the learned Judge in Chambers is correct, that the mortgage of 1906 was not effected by a de-facto guardian of the minor Mata Ram. I also agree with the learned Judge in

Chambers in holding that the debt incurred by Mt. Dasodhan in 1906 cannot be regarded as an antecedent debt.

I, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

Appeal dismissed.

R.D.

A. I. R. 1927 Lahore 134

JAI LAL, J.

Firm Champa Lal-Madho Lal—Defendants—Petitioners.

v.

Banarsi Das—Plaintiff—Respondent.

Civil Revision No. 319 of 1926, Decided on 12th November 1926, from the order of the Addl. Dist. J., Ferozepur, D/- 1st December 1925.

(a) *Civil P. C. O. 3., R. 2—Power of attorney—Power to defend a suit includes power to appeal against an order refusing to set aside decree.*

Where the power authorizes the agent to take all necessary steps on behalf of the principal to defend a suit, the agent is also authorized to institute an appeal against the order refusing to set aside the ex-parte decree in the suit as it is a step necessary for the defence of the suit: 153 *P. L. R.* 1915 and *A. I. R.* 1926 *Lah.* 32, *Foll.* [P 134 C 2]

(b) *Civil P. C., S. 115—Refusal to entertain appeal on erroneous grounds—Revision lies.*

Refusal to entertain on erroneous grounds an appeal amounts to failure to exercise jurisdiction and is revisable. [P 135 C 1]

Mool Chand—for Petitioners.

M. L. Puri—for Respondent.

Judgment.—A suit was instituted against Champa Lal-Madho Lal, residents of Indore in the Court of the Subordinate Judge, Ferozepur. The defendants appointed one Kapur Chand as their attorney to defend the suit on their behalf. It appears that the suit was decreed ex parte. Kapur Chand applied on behalf of his principal to set aside the ex-parte decree, but the application was dismissed by the Subordinate Judge. Then a pleader under the instructions of Kapur Chand presented an appeal against the order of the Subordinate Judge refusing to set aside the ex-parte decree. This appeal had been dismissed by the District Judge on the ground that Kapur Chand was not competent to present an appeal from the order under the authority of his power of attorney. The defendants have presented this petition for revision.

It is contended on their behalf by Mr. Mool Chand that the view of the learned District Judge is wrong and that as a matter of fact the power of attorney filed by Kapur Chand in the Court of the Subordinate Judge authorized him to do everything which was necessary to defend the suit on behalf of his principals and impliedly included the power to present an appeal. Reliance is placed on a judgment of the Chief Court of the Punjab reported as *Dayal* v. *Hirde Ram* (1) and also on judgment of this Court reported as *Budhu Ram* v. *Kalu Ram* (2). In the former of these cases the learned Judge made the following remarks with reference to an objection taken for the respondents that the power of attorney in favour of the plaintiffs' agent did not authorize him to institute an appeal in the Chief Court.

I have read the power of attorney carefully and I am of opinion that, though it does not expressly mention the institution of the appeal in the Chief Court, there is no doubt that the plaintiffs authorize him to prosecute all the litigation arising out of the suit and thus impliedly conferred upon him the power to lodge and prosecute an appeal in this Court.

This judgment was followed in *Budhu Ram* v. *Kalu Ram* (2) where the learned Judge remarked that a power of attorney authorizing a pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the Chief Court. The power of attorney in this case expressly mentions that the principal authorized the agent to conduct all proceedings relating to the suit and ends with the remark that whatever the agent will do on behalf of the principal in that connexion would be binding on the principal. In my opinion this power of attorney authorized the agent to take all necessary steps on behalf of the principal to defend the suit and the institution of an appeal against the order refusing to set aside the ex-parte decree was a step necessary for the defence of the suit.

A preliminary objection is taken on behalf of the respondent that this Court is not competent under S. 115 of the Civil Procedure Code to interfere with the judgment of the District Judge if the

(1) [1915] 153 P. L. R. 1915=29 I. C. 895=80 P. W. R. 1915.

(2) A. I. R. 1926 Lah. 32=6 Lah. 461.

learned Judge did not refuse to exercise jurisdiction which was vested in him. In my opinion this Court is competent to interfere on revision in the present case, because the learned District Judge has refused to entertain the appeal on erroneous ground and has, therefore, failed to exercise jurisdiction vested in him.

I accept this petition, set aside the order of the District Judge and remand the case to him with directions to hear the appeal on the merits. The petitioner will have his costs in this Court against the respondent.

G.B. *Petition accepted.*

A. I. R. 1927 Lahore 135

DALIP SINGH, J.

Rupa—Defendant—Appellant.

v.

Mam Chand and *others* — Plaintiffs—Respondents.

Second Appeal No. 1108 of 1926, Decided on 1st November 1926, from a decree of the Dist. J., Hissar, D/- 15th January 1926.

Punjab Tenancy Act, S. 60 — Alienation of occupancy with one of the landlords' consent is binding on sons or grandsons apart from customary law.

Where one of the landlords consents to the alienation of occupancy tenancy, qua his share of the occupancy tenancy he made the transaction non-voidable; apart from the Customary Law his own son and grandson who succeed to him are bound by his act. [P 136 C 1]

Shamair Chand—for Appellant.

R. C. Soni—for Respondents.

Judgment.—The facts of this appeal are as follows:

One Hanwanta was an occupancy tenant of 64 bighas 5 biswas of land in Sirsa tahsil. The plaintiffs and the pro forma Defendants Nos. 2 to 4 are its proprietors. Hanwanta died in 1901 and his widow Mt. Rami gave consent to a mutation in favour of Hanwanta's daughter's son Rupa, Defendant No. 1. It was alleged in the mutation proceedings that Rupa had been adopted as a son by Hanwanta. In 1912 Mt. Rami died and Defendants Nos. 2 to 4 brought a suit for possession of the whole of the said land, alleging that Hanwanta had never adopted Rupa as his son. The present plaintiffs were pro forma defendants and pleaded that their share of the occupancy tenancy had fallen to the then plaintiffs on account of a private partition. The suit was decreed as to half the property, it being held that there had been no such partition. It seems that the real reason for the pleading in that case was the fact that Kura, the predecessor-in-interest of the present plaintiffs, had acquiesced or agreed to the mutation in favour of Rupa in 1901 or thereabouts. The present plaintiffs who are sons and grandsons of Kura, have now brought a suit for possession of the half share of the land alleging that Rupa was not the adopted son of Hanwanta.

The learned Sub-Judge dismissed the suit on various grounds holding that Kura had given his consent to the mutation, that Rupa was not the adopted son of Hanwanta and that, therefore, the plaintiffs were estopped from bringing the present claim. The learned District Judge held that Rupa was not the adopted son of Hanwantha but held that granting that the plaintiffs' ancestor acquiesced in the mutation, the acquiescence was under some misapprehension of facts and could not bind the plaintiffs because the property in dispute is ancestral qua Kura. He, therefore, decreed the suit.

Two points have been argued before me in appeal. Firstly, that the suit is barred by limitation. It seems to me that the case is covered by the Division Bench ruling reported as *Thakur Singh* v. *Bihari Lal* (1) and, therefore, the suit is not barred by limitation.

It has next been argued that the consent of Kura binds Kura and, therefore, binds the present plaintiffs. The point is not free from difficulty. The following rulings have been cited by the learned Counsel for the appellant; *Habib Khan* v. *Muhammad* (2), *Sohaj Ram* v. *Ram Lal* (3), *Chuhar* v. *Jas Kaur* (4) and *Shib Ram* v. *Shib Singh* (5). Counsel for the respondents has cited *Mitra Sen*

(1) [1917] 44 P.R. 1917=51 P.L.R. 1917=39 I.C. 163=1 P.W.R. 1917.
(2) [1912] 68 P.R. 1912=210 P.L.R. 1912=16 I.C. 463=194 P.W.R. 1912.
(3) [1914] 78 P.L.R. 1914=22 I.C. 542=69 P. W.R. 1914.
(4) [1917] 69 P.R. 1917=41 I.C. 927=103 P. W.R. 1917.
(5) [1908] 138 P.W.R. 1908=78 P.R. 1908.

Singh v. *Janki Kuar* (6) and *Beni Pershad Koeri* v. *Dudhnath Roy* (7) on the question that there was no estoppel even as regards Kura and has also cited *Sohawa Shah* v. *Sher Zaman Shah* (8), *Manohar Lal* v. *Nanak Chand* (9), *Muhammadi* v. *Gokal Chand* (10), *Harvans Singh* v. *Harnam Singh* (11) and *Jaswant Kaur* v. *Wasawa Singh* (12).

Now the question whether in a case of alienation of ancestral land by a proprietor the consent of one of the reversioners would bind his own descendants is not free from difficulty, but it has been held in *Habib Khan* v. *Muhammad* (2) and *Makhan Singh* v. *Kishan Singh* (13) that such an assent if made bona fide is binding on the reversioner's son. Be that as it may, it seems to me that the consent of Kura to the mutation in favour of Rupa may be presumed to be the consent of Kura to a fresh occupancy tenancy being created in favour of Rupa. The widow Mt. Rami can only be held to have alienated the property in favour of Rupa under S. 60 of the Punjab Tenancy Act. The alienation would be voidable at the instance of the landlord. If the landlord or one of the landlords consented to the alienation then it would seem to me that qua his share of the occupancy tenancy he made the transaction non-voidable. This being so and quite apart from the Customary Law it would follow that his own son and grandson who succeeded to him are bound by his act because they are his representatives within the meaning of S. 4 (7) of the Tenancy Act.

I, therefore, consider that the plaintiffs must be considered to be debarred from bringing the present suit and I accept the appeal, reverse the decree of the learned District Judge and restore the decree of the first Court dismissing the suit with costs throughout.

R.D. *Appeal accepted.*

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(6) A.I.R. 1924 P.C. 213=46 All. 728.
(7) [1900] 27 Cal. 155=26 I.A. 216=4 C.W.N. 274=7 Sar. 580 (P.C.).
(8) [1895] 49 P.R. 1895.
(9) [1919] 68 P.R. 1919=52 I.C. 503.
(10) [1903] 26 P.L.R. 1903.
(11) [1898] 84 P.R. 1898.
(12) A.I.R. 1923 Lah. 353=5 Lah. 212.
(13) A.I.R. 1924 Lah. 213.

A. I. R 1927 Lahore 136

CODLSTREAM, J.

Ghulam Haidar—Debtor—Applicant—Appellant.

v.

Durga Das and *others* — Creditors—Respondents.

Misc. First Appeal No. 1347 of 1926, Decided on 22nd October 1926, from an order of the Dist. J., Gurdaspur, D/- 29th March 1926.

Provincial Insolvency Act, S. 10—Unable to pay—Petitioner must be unable to pay when the petition is made, not that he would never be able to pay.

Under S. 10 a petitioner has to prove that he is unable to pay his debts. Therefore, a petition cannot be rejected on the ground that the petitioner's relations are rich and that he would one day succeed to them and be able to pay off his debts. [P. 136, C. 2]

M. A. Ghani—for Appellant.

Faqir Chand and *Maya Das*—for Respondents.

Judgment.—I dispose in this order of the two appeals Nos. 1347 and 1348 of 1926, by Ghulam Haidar and Ghulam Hussain, respectively.

The appellants, who are brothers, petitioned the District Judge of Gurdaspur under S. 13, Provincial Insolvency Act, to be declared insolvents. The applications were opposed by creditors. The learned District Judge dismissed both petitions mainly on the grounds that their father owned 500 kanals of land and that their uncle Miran Baksh was sonless and the petitioners would one day succeed to his property. It is obvious that these are not good grounds for rejecting insolvency petitions. Under S. 10 of the Act a petitioner has to prove he is unable to pay his debts, not that he will never be able to pay his debts. In the brief order appealed against the learned District Judge has, it is true, remarked that the petitioners could pay their debts if they wished, but apart from the fact that the petitioners' father and uncle have land there appears to be no evidence to justify this finding.

It appears that the learned District Judge did not think it necessary to call upon the creditors to rebut the evidence produced by the petitioners in view of his opinion that the assets of the petitioners' father and uncle justified the dismissal of the petitions. The evidence produced by the petitioners, if unrebut-

ted, goes to show that they cannot pay their debts and the creditors should be allowed an opportunity to rebut this evidence. On behalf of the creditors Mr. Faqir Chand states that he has no objection if the petitioners are allowed to add to the evidence they have already produced so long as an opportunity to rebut it is allowed to the creditors.

In the circumstances of the case I accept both appeals and setting aside the orders of the District Judge remand both cases to him for disposal according to law. If he finds after hearing all the evidence that is produced that the debtors have proved that they are unable to pay their debts and that they owe Rs. 500, the petitioners will be entitled to be declared insolvents. If he finds that the petitioners have not proved that they are unable to pey their debts and that their debts amount in each case to Rs. 500 he will dismiss the applications. Costs to be costs in the cause.

G.B. *Appeals allowed.*

A. I. R. 1927 Lahore 137

ADDISON, J.

Ram Dass—Plaintiff—Appellant.

v.

Lal Chand and *another*—Defendants—Respondents.

Second Appeal No. 1499 of 1926, Decided on 1st November 1926.

Negotiable Instruments Act, S. 118 *(a) and (g)—Pro-note obtained for unlawful consideration—Onus is on holder to prove that he is holder in due course and for consideration.*

The initial presumption is that a holder of a promissory note is a holder in due course, but when it is proved that there was no consideration for the original transaction and the instrument was obtained from the maker for an unlawful consideration, the burden shifts on to the holder in due course for full consideration: *A. I. R.* 1924 *Lah.* 462, *Dist.* [P 138 C 1]

D. C. Relli—for Appellant.

Shiv Dayal for *Lal Chand*—for Respondents.

Judgment.—Rattan Chand, Defendant 2, brought a criminal complaint under S. 406, Indian Penal Code, an offence which is not compoundable, against his sister's son, Jia Lal. On the 1st February 1925, they came to terms and the complainant put in an application in the Magistrate's Court that very day to withdraw from the prosecution. On that day also Lal Chand, Defendant No. 1, whose daughter is married to Jia Lal, executed a pronote for Rs. 700 in favour of Rattan Chand. On the 16th August 1925 Rattan Chand transferred the pro-note by endorsement in favour of Ram Dass plaintiff. Ram Dass sued Lal Chand and Rattan Chand on this pro-note for Rs. 728-8-0 principal and interest. Rattan Chand, Defendant 2, admitted the transfer of the pro-note to the plaintiff. Lal Chand, Defendant 1, admitted the execution of the pro-note but pleaded that it had been executed without consideration in order to stifle the criminal prosecution brought by Rattan Chand against his son-in-law Jia Lal, and further that this pro-note was only to be enforced, if the prosecution was withdrawn. Rattan Chand, however, when his application was sent to the District Magistrate, refused to withdraw, with the result that the case is still proceeding in the Court of the Tahsildar. It was further pleaded that the plaintiff was not a holder in due course and had paid nothing to Rattan Chand, Defendant 2.

The trial Court held that the pro-note was without consideration and was executed in order to stifle the prosecution of a non-compoundable offence. It also held that it was only intended to be paid if the prosecution was withdrawn. The trial Court further held that the transfer of the pro-note to the plaintiff was for consideration and that the plaintiff was a holder in due course. It granted a decree for Rs. 707 in favour of the plaintiff against Rattan Chand, Defendant 2, only and dismissed the suit as against Lal Chand, Defendant 1.

The District Judge held on appeal that the original pro-note in favour of Rattan Chand was without consideration and was executed in order to stifle the criminal prosecution under S. 406 Indian Penal Code of Jia Lal for a non-compoundable offence. It further came to the conclusion that it was doubtful whether the plaintiff was a holder in due course for consideration as the pro-note was without consideration in the beginning and the endorser knew that it had been executed to stifle a criminal prosecution. It also held that under S. 118 (g) of the Negotiable Instruments Act the

burden of proof lay on the plaintiff to prove both consideration and the fact that he did not know that the previous consideration was unlawful. The District Judge therefore, maintained the decree as passed by the trial Court.

In second appeal it was urged before me that under S. 118 of the Negotiable Instruments Act the presumption must be in favour of the plaintiff that he is a holder in due course. In the first instance the burden was undoubtedly on Defendant 1 to prove that the plaintiff was not a holder in due course, but it seems to me that it was sufficient to discharge that burden and to place the burden on the plaintiff when it was held proved that there was no consideration for the original transaction, which was entered into merely to stifle the prosecution for an offence which was non-compoundable. That means that the instrument was obtained from the maker for unlawful consideration. See 39 *P. R.* 1914. The case therefore clearly fell within S. 118 (g) of the Negotiable Instruments Act. In Chalmer's Negotiable Instruments in British India, 4th Edition, at page 231, it is said :

> In order to place the burden of proof on the holder, the defendant must first prove that the circumstances specified in S. 118 (g) exist. When these facts are proved the holder must prove that he became such in due course and this onus will include proof that value was given ; thus the case, where the facts specified in S. 118 (g) are proved, forms an exception to Clause (a) of the same section which states that 'value' may be presumed.

The plaintiff has not established that he had not sufficient cause to believe that there was a defect in the title of the endorser. In my opinion, therefore, the decision of the District Judge was correct.

This question is also discussed in detail in the 3rd Edition of Bhashyam and Adiga's Negotiable Instruments Act at pages 439–40. It is also laid down there that a holder in circumstances like the present has to prove not only that he gave consideration, but also that he gave it without having sufficient cause to believe that any defect existed in the title of the person from whom he took the instrument. It is true that the District Judge has only said that it was doubtful if the plaintiff was a bona fide holder in due course for consideration, but his next sentence shows that he held that the burden of proof on all points was on the plaintiff in the circumstances described, and that he had failed to discharge that burden.

I was referred by the appellant's counsel to *A. I. R.* 1924 *Lahore* 462. That case, however, is not in point. In it there was only a failure of consideration and there was no allegation that the instrument had been obtained by means of an offence or fraud or for unlawful consideration from the maker. In the present case it has been established that the consideration was unlawful while it has further been established that there was a failure of consideration. That distinguishes the present case from the one referred to.

This disposes of the appeal which is dismissed with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 138

HARRISON, J.

Durga Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1152, of 1926, Decided on 29th October 1926 from an order of the S. J., Jullundur D/- 28th June 1926.

Criminal P. C., Ss. 408 and 407—Trial partly as Second Class Magistrate—Decision by same Magistrate as First Class—Appeal lies to Sessions Judge and not to District Magistrate.

Where a Magistrate who begins as a Second Class Magistrate and completes the case as a First Class Magistrate, passes a higher sentence in the latter capacity, the course of appeal is to the Sessions Judge and not to the District Magistrate : 4 *L. B. R.* 239, *not Foll.* ; *A. I. R.* 1925 *Patna* 472, *Foll.* [P 139 C 1]

R. C. Soni—for Petitioner.

Judgment.—One Durga Das was tried by Bawa Sundar Singh and ultimately convicted and sentenced.

The facts in this case are that proceedings commenced in a chalan under S. 353, on the 28th November 1925, the Magistrate being Bawa Sundar Singh, exercising powers of a Second Class Magistrate. On the 10th December the evidence of eight prosecution witnesses was recorded and on the 15th January 1926, the Magistrate was gazetted to be a First Class Magistrate. On the 27th January two

more prosecution witnesses were recorded and a charge was framed. Eventually judgment was pronounced on the 10th May and the accused was convicted. He appealed to the Sessions Judge, Jullundur, who relying on *Emperor* v. *Nga Paw* (1), quoted at page 885 of Mitra's Criminal Procedure Code returned the appeal for presentation to the District Magistrate. This ruling is to be found in 8 *Criminal Law Journal* 48, *Emperor* v. *Nag Paw* (1) and the facts there were that on the day the judgment was pronounced the Magistrate received enhanced powers. There is a reported case of a Division Bench of the Patna High Court in which the facts were similar to those in this case, namely *Sheo Bhanjan Singh* v. *Emperor* (2), and in which it was held that the appeal lay to the Sessions Judge. The Magistrate had there been empowered some time before the hearing of the arguments.

In this case he was empowered before the prosecution evidence was completed or the charge was framed. In *Queen-Empress* v. *Persad* (3) an analogy is to be found, for it is there laid down that a Magistrate under these circumstances who begins as a Second Class Magistrate and completes the case as a First Class Magistrate is entitled to pass the higher sentence in the latter capacity and it is explained in this Full Bench judgment that, were this not so, the impossible position might arise of a de facto First Class Magistrate reporting a case for an adequate sentence, which sentence as a First Class Magistrate he could pass himself. I find, following *Sheo Bhanjan Singh* v. *Emperor* (2) that the course of appeal is to the Sessions Judge. I accept the application for revision and direct the Sessions Judge to proceed to dispose of the appeal in accordance with the law.

R.D. *Revision accepted.*

(1) [1907] 4 L. B. R. 239.
(2) A. I. R. 1925 Patna 472.
(3) [1885] 7 All. 414=(1885) A. W. N. 105.

* A. I. R. 1927 Lahore 139

BROADWAY, J.

Mathra Das—Convict—Petitioner.

v.

The Crown—Opposite Party.

Criminal Misc. No. 109 of 1926 and Criminal Revision No. 830 of 1926, Decided on 22nd December 1926.

* *Criminal P. C., Ss. 369 and 561-A—S. 561-A is not governed by S. 369—Criminal P. C., S. 561-A.*

Section 561-A is in no way limited or governed by S. 369 and High Court has power to reconsider the question of sentence when the ends of justice require it. [P 139 C 2, P 140 C 1]

Nand Lal—for Petitioner.

Abdul Rashid—for the Crown.

Order.—This is an application under S. 561-A, Criminal Procedure Code, filed on behalf of one Mathra Das who had been convicted of an offence under S. 408, I. P. C. and sentenced to two years' rigorous imprisonment and a fine Rs. 200 or in default six months further imprisonment.

The petition for revision against his conviction and sentence was heard by me and disposed of on the 30th September 1926. I came to the conclusion that the conviction should have been had under S. 408, Indian Penal Code, and altered the section accordingly. At the same time I maintained the sentence. Upon this Mathra Das preferred a petition under S. 561-A Criminal P. C. and Dr. Nand Lal appeared in support of it.

On reconsideration of the situation while declining to reopen the question of the petitioner's guilt, I issued notice on the question of sentence which I was willing to re-examine. At the hearing the Assistant Legal Remembrancer raised a preliminary objection to the effect that under S. 561-A Criminal Procedure Code, this Court had no power to interfere with the sentence. Reliance is placed on S 369 of the Criminal Procedure Code which is to the following effect:

> Save as otherwise provided by this Court or by any other law for the time being in force or in the case of a High Court established by Royal Charter by the Letter Patent of such High Court no Court when it had signed a judgment shall alter or review the same except to correct a clerical error.

This section was put in its present form by Act 18 of 1923. The same Act added to the Criminal P. C., S. 561-A, which is to the following effect:

> Nothing in this Code, shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to secure the ends of justice.

It has been urged that S. 561 A cannot override the specific provisions of S. 369. It seems to me, however, that the object of enacting S. 561-A was to enable this Court, when the ends of justice required to make such orders as might be neces-

sary and that it is in no way limited or governed by S. 369. As I read these two sections this Court has power to reconsider the question of sentence when the ends of justice require it. In the present case the Courts below have considered that the sentence of two years rigorous imprisonment and a fine of Rs. 200 was an appropriate sentence for the offence under S. 408, I. P. C. The offence no doubt was a serious one but after due consideration it seems to me that on the conviction now standing under S. 408, Indian Penal Code, the Courts below would not have passed the sentence allowable by the section.

I accordingly reduce the sentence to one of one year's rigorous imprisonment and a fine of Rs 100 or in default three months rigorous imprisonment. The fine if realized is to be paid to the N. W. Railway as compensation.

G.B. *Application allowed.*

A. I. R. 1927 Lahore 140

ADDISON, J.

Ishar Das—Plaintiff—Appellant.

v.

Municipal Committee, Notified Area of Garhdiwala — Defendant — Respondent.

Second Appeal No. 1619 of 1926, Decided on 1st November 1926, from the decree of the Dist. J., Hoshiarpur, D/- 9th March 1926.

(a) *Punjab Municipal Act, Ss. 242 and 61-B —Under S. 242 Local Government can impose only such taxes as are mentioned in S. 61-B.*

The powers conferred on the Local Government by S. 242. with regard to Notified Areas, are limited to the imposition of taxes described in S. 61-B and the sanction of the Governor-General in Council is an indespensable preliminary condition for their imposition.

[P 140, C 2]

(b) *Punjab Municipal Act, S. 62 (9)—Notification not necessary under the Act—Sub-S. (9) does not apply.*

A notification which is not necessary under the Act, shall not be conclusive evidence that the tax was imposed in accordance with the provisions of the Act. [P 141, C 1]

M. L. Puri—for Appellant.

J. N. Aggarwal—for Respondent.

Judgment.— By Notification No. 11419, dated the 28th April 1919, the Punjab Government imposed a tax on residences within the Notified Area of Garhdiwala in the Hoshiarpur district under the provisions of S. 242 (1) (a) of the Punjab Municipal Act. The plaintiff, who is a resident of the Notified Area, brought a suit for an injunction restraining the Notified Area from realizing the tax from him as it was illegal and he also claimed the release of a mare which had been attached in order to satisfy the demand of the Notified Area. The two Courts below have held that the plaintiff was not competent to question the legality of tax and dismissed his suit. Against these decisions this second appeal has been preferred.

Under S. 242 (1) (a) the Local Government has power to impose in any notified area any tax which could be imposed there by the Committee if the Notified Area were a Municipality, subject to a proviso. It has, however, been held by a Full Bench of this Court in *Notified Area Committee, Unao* v. *Amar Singh* (1) that 'the powers conferred on the' Local Government by S. 242 of the Punjab Municipal Act, with regard to Notified Areas, are limited to the imposition of taxes described in S. 61(B) of the Punjab Municipal Act. The sanction of the Governor-General in Council is an indispensable preliminary condition for the imposition of taxes described in S. 61 (A). The Act has been amended and S. 61 (A) now corresponds to S. 61 (3). It is admitted that the tax imposed by the notification referred to, falls within S. 61 (A) or S. 61 (3) of the Act and that the sanction of the Governor-General in Council was necessary and that this sanction was not obtained. Prima facie, therefore, the tax is illegal.

Further, under Section 242 (1) (f) of the Act the Local Government may extend to any notified area the provisions of any section of this Act subject to such restrictions and modifications, if any, as the Local Government may think fit. Now, by Notification No. 27909 dated the 11th November 1922, the Punjab Government extended S. 62 (1) to (4) to all notified areas in the Punjab. It did not, however, extend S. 62 (6) to (9). The lower appellate Court held that S. 62 (9) must have been extended by implication, but I am unable to agree to this contention. When certain sub-sections are explicitly extended, it must

(1) A. I. R. 1924 Lah. 361=4 Lah. 442 (F. B.).

be held that the other sub-sections were not intended to be extended. Sub-section (9) of S. 62, therefore, which is to the effect that a notification of the imposition of a tax under this Act shall be conclusive evidence that the tax has been imposed in accordance wfth the provisions of the Act cannot be held to have been extended to this notified area. On the contrary, it must be held that its application was excluded.

There is another consideration. S. 242 gives the Local Government power to impose in any Notified Area any tax which a Municipal Committee could have imposed. But nowhere in the Act is it said that a notification to this effect must issue. For example, the wording of S. 244 is noteworthy in this connexion. The Local Government seems to have power to impose the tax without a notification. How, therefore, can it be said that a notification, which does not seem to be necessary under the Act, shall be conclusive evidence that the tax was imposed in accordance with the provisions of the Act? The case is in fact on all fours with *Notified Area Committee* v. *Amar Singh* (1) and no question of S. 62 (9) comes in.

I must accept the appeal and grant the plaintiff an injunction restraining the Notified Area from collecting any tax from him under the notification in question and also ordering the Notified Area to release his attached mare. I understand that there is now a new notification imposing the tax afresh. The decree will not apply to it.

It is clear that the notified area is not to blame but the Punjab Government. In these circumstances I only allow the appellant his costs here and in the lower appellate Court. Parties will bear their own costs in the trial Court.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 141

HARRISON AND AGHA HAIDER, JJ.

Gobind Mal—Plaintiff—Appellant.

v.

Ram Chand and *another*—Defendants—Respondents.

First Appeal No. 1653 of 1922, Decided on 13th December 1926, from the decree of the 1st Cl. Sub-J., Ferozepore, D/- 31st March 1922.

(a) *Bengal Regulation* (17 *of* 1806), *S.* 8—*"Himself" is equivalent to "in person" as mentioned in Civil P. C., O.* 3, *R.* 1.

The word "himself" in S. 8, Bengal Regulation (17 of 1806) is merely another way of putting "in person" and under O. 3, R. 1, Civil P. C., an act which can be done in person can also be done by an attorney. [P 142 C 1]

(b) *Bengal Regulation* (17 *of* 1806), *S.* 8—*Power of attorney—Construction.*

Where the power of attorney provided: "They are authorized to make mutual settlement to effect compromise, to conduct case jointly and severally, to appoint any vakil to conduct the case, to nominate any arbitrator or Umpire for purposes of the decision of the case, to get witnesses summoned, to put questions to the parties and their witness to produce evidence of all sorts and to realize from Court money due to me after filing their receipt in Court. In short all the steps taken by them in this case shall be accepted, as done by me."

Held: that the power also included the power to file an application under S. 8. [P 142 C 1, 2]

(c) *Bengal Regulation* (17 *of* 1806), *Ss.* 8 *and* 7—*Notice is not invalid if the words "S.* 7" *are not used in it provided its contents are embodied in the notice.*

The mortgagee has the option either of giving the actual contents of S. 8 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. A notice is not invalid if the sacrosant words "S. 7" do not occur therein provided always that the contents of that section are embodied in the notice: 123 *P. R.* 1894; 34 P. *R.* 1895 and 57 *P. R.* 1914, *Rel. on.* [P 143 C 1]

(d) *Bengal Regulation* (17 *of* 1806), *S.* 7—*Notice—Mistake as to amount is immaterial.*

It is immaterial whether mistakes are made or not in the amount provided the claim is made quite clear and it is for the mortgagor to deposit or to tender the amount which he himself believes to be due on the foot of the mortgage: 91 *P. R.* 1913, *Foll.* [P 143 C 1]

Badri Das, Faqir Chand and *Vas Dev Kuneria*—for Appellant.

Moti Sagar and *Jagan Nath Bhandari*—for Respondents.

Harrison, J.—The plaintiff in this case being the minor son of an original mortgagee brought a suit through his mother for possession of the mortgaged property after foreclosure proceedings under Regulation 17 of 1806 had taken place. The suit was contested on various grounds but mainly on the allegations that the presentation of the original application was not regular and that the notice was not valid. The suit was dismissed, the finding being that the Mukhtar who presented the application was not duly authorized to do so in asmuch as the power of attorney was defective.

In the second place it was held that the notice was not valid as it made no reference to S. 7 of the Regulation and stated the wrong sum as due, i. e., it claimed interest in lieu of rent in addition to the principal. It was held that it was defective because of certain slight clerical errors in the body of the notice such as the 25th of October the actual date of execution of the mortgage being shown as the 26th of October which was the date of registration.

On appeal counsel contends that the suit should have succeeded in spite of any such defects and further contends that there were no real defects at all and nothing more than immaterial clerical errors. The first point is that of presentation. Although this point has not been taken in this form by the Senior Subordinate Judge Mr. Moti Sagar appearing for the respondents draws our attention to the wording of S. 8 of the Regulation. The words are :

> Apply for that purpose by a written petition to be presented by himself, (i. e., the mortgagee), or by one of the authorized vakils of the Court, etc.

The application in question was presented by a special Mukhtar on the strength of a special power of attorney executed by the guardian of the minor Mt. Viro. Mr. Moti Sagar contends that the word 'himself' is stricter than the word 'in person' as used in O. 3, R. 1 of the Code of Civil Procedure and draws an analogy from O. 33, R. 3, where the presentation of certain application can only be effected by a pauper himself or his duly authorized agent. In our opinion, the word 'himself' is merely another way of putting 'in person' and under O. 3, R. 1 of the Code of Civil Procedure an act which can be done in person can also be done by an attorney.

The second point is the validity of the power of attorney under which Ganga Ram was authorized to act. This, in our opinion, is a very much stronger point. The power of attorney runs as follows :

"Application for issue of a foreclosure notice." Then a recital of the names of the principal and the attorney and then the following :

> All Acts and deeds performed by them shall be acceptable to me as if done by me. They are authorized to make mutual settlement to effect compromise, to conduct case jointly and severally, to appoint any Vakil or Bar-at-Law or certified Mukhtar to conduct the case, to nominate any arbitrator or Umpire for purposes of the decision of the case, to get witnesses summoned, to put questions to the parties and their witness to produce evidence of all sorts and to realize from Court money due to me after filing their receipt in Court. In short all the steps taken by them in this case shall be accepted, as done by me.

It has been held by the trial Court that this does not authorize the Mukhtar to present the application itself but only to conduct the case in its subsequent stages. Great stress is laid by counsel for the respondents on the passage which forms the central portion of this paragraph and which describes in detail certain acts. It is true that this passage does not include the presentation of an application and there is certainly all the difference in the world between the presentation and the subsequent proceedings and, were it possible to exclude the opening words of the concluding sentence in this paragraph we think there would be great force in what he says. The paragraph, however, must be read as a whole and we believe the meaning of it to be that the lady Mt. Viro intended to authorize these two men jointly and severally to do all acts necessary in the matter of the presentation of the application and the following up the same, that where certain acts were described in detail they were merely instances of what could be done and that some such words as "in particular" should be read as inserted between the first and the second sentences in order to bring out this fact more clearly. In other words, we do not hold that this enumeration of acts is exhaustive and excludes everything which is not therein contained, but rather that it is merely illustrative of what these attorneys may do. We realize that the matters are further complicated by the place in the paragraph in which the words "jointly and severally" occur, and that the meaning would have been very much claarer had these occured at the beginning, for it is contended, and with some force that the power of attorney does not authorize, in so many words, each of the attorneys to do each or any of these acts himself. Holding, that this is the meaning which the paragraph, as a whole, conveys we find that the attorneys acted with due authority.

The next point is the actual wordin of the notice and it is contended tha this also is defective. The words "S. 7

are not used and the word "radium" or 'redempoion' is not used. Various authorities have been quoted, more especially *Mul Raj* v. *Harsa Singh* (1); *Wasawa Singh* v. *Rura* (2); *Ram Chand* v. *Sandal Khan* (3) and *Bulanda* v. *Fateh Din* (4). Excluding *Ram Chand* v. *Sandal* (3) a judgment by a single Judge which deals only, in our opinion, with the particular facts of that particular case, we find that the general gist of these rulings is that the mortgagee has the option either of giving the actual contents of S. 8 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. We do not find it anywhere laid down that a notice is invalid if the 'sacrosanct words "S. 7" do not occur therein provided always that the contents of that section are embodied in the notice. The final objection is as to the amount, and on the authority of *Bhagirth* v. *Nath Mal* (5), it is contended that this is wrong. Whether right or wrong this defect, in our opinion, is cured by the view taken in *Barkat Rai* v. *Ali* (6). It is immaterial whether mistakes are made or not provided the claim is made quite clear and it is for the mortgagor to deposit or to tender the amount which he himself believes to be due on the foot of the mortgage. It is true that there is a distinction in this case in that not only is there some question as to the amount, but it is a fact admitted by both sides that the claim of future interest during the whole of the year of grace in advance is wholly unjustified. Even so we think that *Barkat Rai* v. *Ali* (6), governs the position for this claim was made quite clear. The sum was not added without due notice to the mortgagor, and it was for him to repudiate it if he wished to do so. We find, thererore, that in spite of the technical omissions the notice is good and valid. We accept the appeal and give the plaintiff a decree for foreclosure with costs.

G.B. *Appeal accepted.*

(1) [1894] 123 P. R. 1894.
(2) [1895] 24 P. R. 1895.
(3) [1903] 21 P. R. 1903=83 P. L. R. 1903.
(4) [1914] 57 P.R. 1914=25 I. C. 504=256 P. L. R. 1914.
(5) [1907] 105 P. R. 1907.
(6) [1913] 91 P. R. 1913=341 P. L. R. 1913=21 I. C. 643=223 P. W. R. 1913.

A. I. R. 1927 Lahore 143

BROADWAY AND ZAFAR ALI, JJ.

Chawa—Defendant—Appellant.

v.

Ahmad and *another*—Plaintiffs—Respondents.

First Appeal No. 513 of 1922, Decided on 8th November 1926, from the decree of the Senior Sub-J., Montgomery, D/- 16th November 1921.

(a) *Riwaj-i-am—Entries in, are presumed to be correct.*

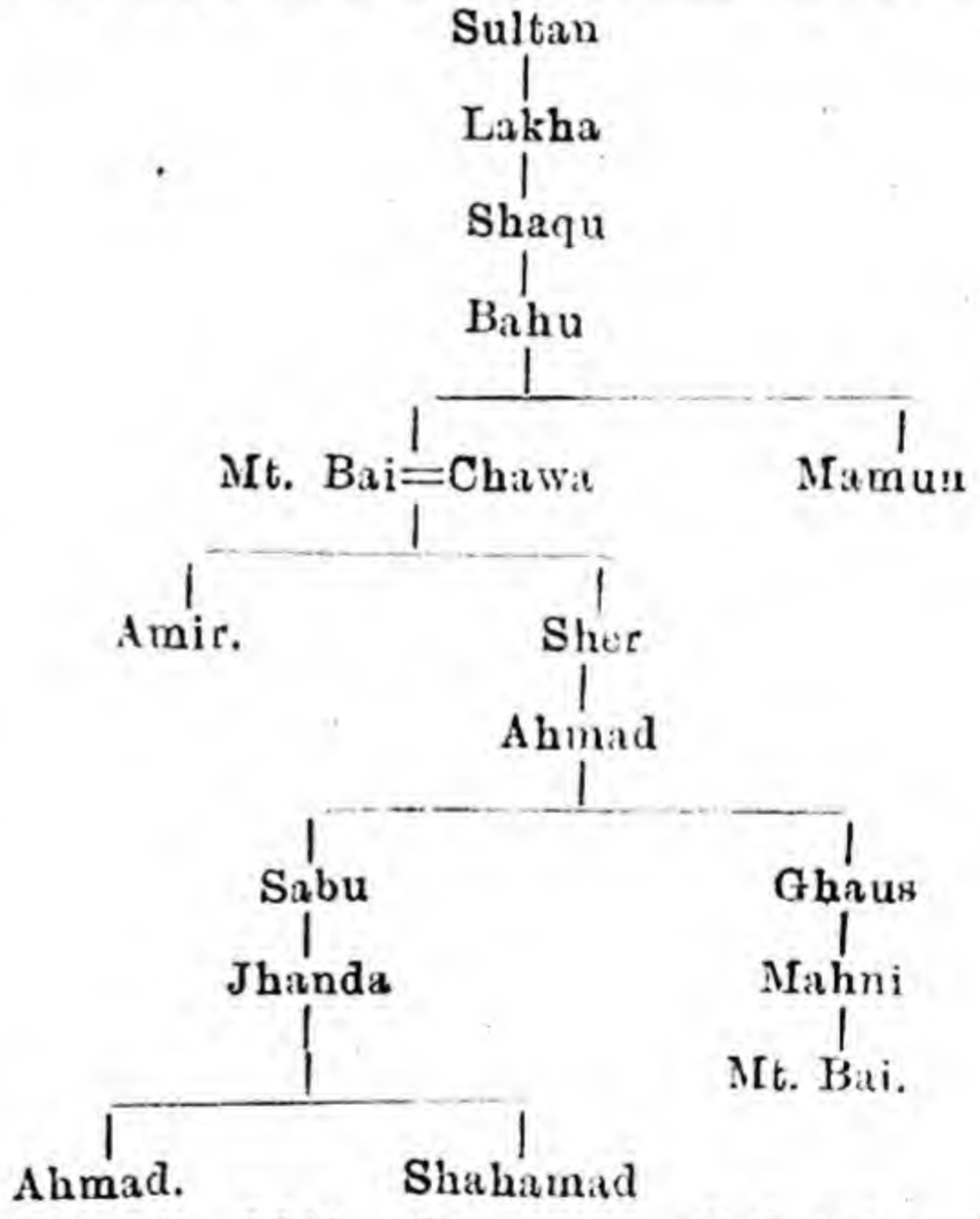
A presumption of correctness arises in regard to entries in the Riwaj-i-am, and in the absence of evidence to rebut, they should be given effect to. [P. 144, C. 2]

(b) *Custom (Punjab)—Gift to daughter.*

There is no custom prevailing amongst Kharals of Gogera Tahsil, District Montgomery allowing a gift of ancestral property oral or written, to a daughter or a resident son-in-law. [P. 144, C. 2]

Zafrulla Khan—for Appellant.
B. D. Kureshi—for Respondents.

Judgment.—The following pedigree-table will be of assistance in this case :



On the 11th January 1916 Mahni, a Gogera Kharal of Mauza Gogera, executed a deed of gift which was duly registered in favour of Chawa, his sister's son as well as son-in-law. Mahni and his widow having died the plaintiffs Ahmad and Shahamad instituted a suit on the 8th July 1920 for possession of the land belonging to Mahni which had passed to Chawa under the deed of gift. They alleged that the land in suit was ancestral and that the parties being

governed by custom Mahni had no power to make a gift of it. Further, that according to custom, Mahni had no power to appoint a khana damad or resident son-in-law ; nor had he the power to appoint his sister's son as his heir. Finally it was urged that, as a matter of fact, Manhi had not made Chawa his khana damad.

The suit was contested by Chawa who pleaded that he had been appointed khana damad by Mahni and that Mahni had power to make the appointment. He also pleaded that in any event the suit was bad in the presence of Mahni's daughter and her sons. The trial Court settled the following issues :

1. Are the parties bound by the agricultural custom in matters of alienation and are the powers of alienation of a sonless proprietor unlimited ?

2. Was the defendant made a khana damad by Mahni deceased ?

3. Is there a custom to make a khana damad in the Kharal tribe ?

4. If the defendant was appointed a khana damad, have the plaintiffs a right to contest the alienation in question in the presence of the defendant and sons of the daughter of the deceased.

5. Was the gift for consideration ; and if so what is its effect on the rights of the plaintiffs ?

And after considering the evidence, documentary and oral, led by the parties, came to the conclusion that Chawa had been appointed khana damad by Mahni, but that Mahni had no power by the custom prevailing among Kharals of Gogera to make the appointment or to make the gift in question. It accordingly decreed the plaintiffs' suit with the result that Chawa has now come up to this Court in appeal.

It has been urged on behalf of the appellant by Mr. Zafrulla Khan that the decision arrived at by the lower Court is erroneous and that on the evidence on the record it is perfectly clear that the inhabitants of Gogera where the parties lived are not restricted by custom in the alienation of property whether ancestral or self-acquired. He has taken us through the entire evidence and has commented on the same. The plaintiffs produced an extract, Ex. P-10, from the Riwaj-i-am relating to the Kharals of the Gogera tahsil of Montgomery district. This Riwaj-i-am was prepared in 1872 and this document, Ex. P 10, clearly shows that the Kharals of this tahsil are governed by custom and have not the power to make a gift of their ancestral property, oral or in writing, to their daughters or sons-in-law living as khana damads. This statement of the custom is supported by definite instances.

Mr. Zafrulla Khan admitted that his client has been unable to produce a single instance opposed to this entry in the Riwaj-i-am. As has been held by the Judicial Committee a presumption of correctness arises in regard to entries in the Riwaj-i-am such as these. No evidence having been produced to rebut this presumption it would seem that this entry should be given effect to. Mr. Zafrulla Khan has, however, laid great stress on the document Ex. D 2 (page 13 of the paper-book). This document is also an extract from the revenue record and relates to the foundation of and acquisition of ownership in this village. It has been urged that this document shows that daughters of sonless proprietors actually acted as conduit pipes through whom succession to lands had flowed to their male issues. Stress was laid on a paragraph at page 15 and it was pointed out that one Chuhar having died sonless leaving him surviving his daughter Mt. Azim Khatun, married to Sher, a Gogera Kharal, Chuhar's lands passed to Sher's descendants. This document, however, does not show who Chuhar was and it is quite possible, if not probable, that Chuhar himself was not a Kharal. The mere fact that his daughter succeeded to his property does not, therefore, establish the contention raised by Mr. Zafrulla Khan and I do not think this document, Ex. D-2, in any way rebuts the presumption of correctness attaching to Ex. P-10. Mr. Zafrulla Khan referred to *Ganpat Rai* v. *Kesho Ram* (1), in which there are certain observations relating to the Riwaj-i-am of the Montgomery district. This Riwaj-i-am was prepared by Mr. Purser and it has been pointed out by their Lordships in the authority cited that Mr. Purser himself noted that the entries in the Riwaj-i am of this district are not to be entirely trusted.

I have referred to the Revised Land Revenue Settlement report in question and gather that the remarks made in *Ganpat Rai* v. *Kesho Ram* (1) are based on para. 10, page 207 of the said report. It is true that Mr. Purser comments adversely on the manner in which the

(1) [1909] 34 P. R. 1909=1 I. C. 691.

Riwaj-i-ams were prepared in this district (Montgomery) and says that they "ought to be received with much caution," but also says that

they are of undoubted value if so received and the precedents and exceptions entered in them will be always useful.

In the present case the Riwaj-i-am of this village is supported by instances, and after exercising all possible caution, in the consideration of this statement of the custom in question, I am unable to discover any real reason to refuse to accept it as a correct record of the said custom.

A presumption of correctness attaching to the Riwaj-i-am and in the absence of any evidence in rebuttal of this presumption I feel bound to give effect to it. In the circumstances I dismiss this appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 145

SHADI LAL, C. J.

Ishar Dass and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Case No. 1322 of 1926, Decided on 26th November 1926, reported by the S. J., Mianwali, on 25th August 1926.

(a) *Criminat trial—Resort to criminal Courts should be discouraged when a civil remedy is available.*

It is a very sound principle that parties should not be encouraged to resort to criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court. [P 146, C 1]

(b) *Penal Code, S. 426—Property believed to be one's own—Removal of obstruction therefrom not tantamount to mischief.*

No offence under S. 426, I. P. C., is committed when a person only removes an obstruction from a well which he believes to be his own, by removing a few bricks from the wall. [P 146, C 1]

Facts.—Sardar Devindar Singh, a First Class Magistrate, has sentenced Ishar Dass, Surya Ram, Loka Ram and Rup Chand applicants to a fine of Rs. 10, each under S. 426, Indian Penal Code, and has further ordered that this fine should be paid to the complainants as compensation for the expenses incurred in conducting the case. Hence the application for revision.

The facts as found by the Magistrate are:—"There is a certain well named Chah Kotwalla in Abadi Deh of village Harnoli, and belongs to the complainants, who are co-sharers in the well.

On the eastern side of Ahata Chah of this well there is an open space eleven karams wide extending up to a small lane which is six karams in width and across which there is a baithak of the accused. The open space had been in possession of no particular party and was commonly used by both. Situated as it is between the Chah and baithak either of the parties are anxious to take its exclusive possession. And so the complainants taking an opportunity prepared a wall on the western side of the above referred lane to avoid all sorts of interference from the side of the accused. The complainants erected the wall in a short interval themselves and without the assistance of any mason, etc. probably to avoid trouble from the accused. They naturally, on learning this fact resented it, desired to demolish the wall, and actually did remove some bricks from its top. The complainants then resisted it and brought the complaint.

For the prosecution six other witnesses besides the five complainants have been examined who prove that the wall was undoubtedly erected by the complainants and that the accused caused mischief in trying to dismantle the same.

The accused, however, also in their turn allege that the wall was prepared by them and not by the complainants and they have produced five defence witnesses to corroborate their statements.

The evidence, however, is more convincing on the side of the complainants and the fact that there is no door in the wall opening into the lane, clearly established that it could never be made by the accused. Thus it is proved that the complainants prepared the wall which the accused wanted to remove. The proper course for the latter was to have the question of ownership, etc., of the space decided by some competent civil Court and not to have taken the law in their own hands. Thus under the circumstances and trivial nature of the offence, I order each of the accused to pay a fine of Rs. 10 or in default to suffer simple imprisonment for one week under S. 426, Indian Penal Code."

The case is submitted to the High Court for revision of sentence under S. 438, Criminal P. C., for the reason that even on the facts found by the Magistrate no offence under S. 426, Indian Penal Code, had been committed as the accused only removed an obstruction from the property which they believed to be their own and that by removing a few bricks from the wall they did not cause any wrongful loss to the complainants: vide *High Court Proceedings, 31st May* 1881 (1) and *In re Aniel Grove* (2). It is a very sound principle that parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court. It is, therefore, recommended that the sentence be quashed and fine refunded. The fine has been paid.

Order.—The dispute between the parties relates to the ownership of a plot of land and should be decided by a civil Court. I agree with the learned Sessions Judge that the guilt of the accused has not been established. Accordingly I accept the recommendation made by him, and setting aside the convictions and the sentences, I direct that the fines, if paid, be refunded to the accused.

J.V. *Convictions set aside.*

(1) 1 Weir 488.
(2) 1 Weir 488.

A. I. R. 1927 Lahore 146

JAI LAL, J.

Narain Singh and *others* — Defendants—Petitioners.

v.

Kali Ram—Plaintiff—Respondent,

Civil Revision Petition No. 328 of 1926, Decided on 12th November 1926, from a decree of the Senior Sub-J,, D/- 13th March 1926.

Punjab General Clauses Act, S. 2 (26)—Standing trees are immovable property and so exempt from being attached and sold in execution of money decree against the deceased proprietor even though planted by him—Custom—Trees.

Standing trees are included in the definition of immovable property within Cl. 26 of S. 2 and therefore are exempt from attachment and sale in execution of a money decree obtained against a deceased proprietor even though planted by him unless they are charged with the decretal amount: *A. I. R.* 1925 *Lah.* 29, *Dist.* [P 146 C 2]

Shamair Chand—for Petitioners.

Devi Dayal Kapur—for Respondent.

Judgment.—In the execution of a money-decree against the estate of one Gunni Ram certain trees standing on his ancestral land were attached. Objection was raised by the legal representatives of Gunni Ram to the attachment of the trees on the ground that they were immovable property and as they were planted by Gunni Ram on the ancestral land, they also became ancestral immovable proporty, and that, therefore, their attachment and sale was prohibited by virtue of *Jagdip Singh* v. *Narain Singh* (1). This judgment prohibits the attachment and sale of ancestral immovable property, in execution of a money-decree obtained against a deceased proprietor when such property has descended to his male heirs unless it is charged with the decretal amount. The learned Senior Sub-Judge has held that the trees did not fall within the definition of 'land' as contained in the Punjab Alienation of Land Act, and, following *Achhru Mal* v. *Maula Bakhsh* (2). has held that they are attachable.

With this view of the learned Judge I do not agree. What is prohibited is the attachment and sale of immovable property and not merely of 'land' and the question is arguable whether for the purpose of this case there is any difference between the definition of land and immovable property. Be that as it may, I am satisfied that having regard to the definition of 'immovable property' contained in Cl. 26 of S. 2 of the Punjab General Clauses Act the standing trees are included in the definition of suchp roperty. *Ahchru Mal* v. *Maula Bakhsh* (2) has no bearing on the present case because that case concerned the definition of land as contained in the Punjab Alienation of Land Act. The trees in question fall within the prohibition contained in *Jagdip Singh* v. *Narain Singh* (1) because though they were planted by the deceased Gunni Ram this was done on land which is admittedly ancestral and, therefore, became a part thereof and for the present purpose are governed by the

(1) [1912] 160 P. W. R. 1912=15 I. C. 866=4 P. R. 1913=173 P. L. R. 1912.
(2) A. I. R. 1925 Lah. 29=5 Lah. 385.

same rule as the land on which they stand. As admittedly the land was not attachable it follows that the trees also were not attachable. I accept this petition, set aside the order of the Senior Sub-Judge and remand the case to the executing Court with direction to proceed with execution in accordance with law. The respondent will pay the costs of the petitioners throughout.

R.D. *Case remanded.*

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* A. I. R. 1927 Lahore 147

ADDISON, J.

Nihala Ram and *another* — Plaintiffs—Appellants.

v.

Punnun Ram and *others* — Defendants—Respondents.

Second Appeal No. 1367 of 1926, Decided on 22nd October 1926, from a decree of the Dist. J., Dera Ghazi Khan, D/- 8th January 1926.

* *Pre-emption—Relinquishment by reversioner for consideration of right to sue to set aside alienation by widow is not sale for pre-emption.*

An alienation by a Hindu widow is not void but only voidable at the instance of the reversioner. Reversioners do not succeed to the property alienated by a widow but have to sue for such property and establish their right to it. Therefore, a relinquishment for consideration by the reversioner to the vendee of the widow of his right to sue to set aside the sale does not amount to a sale for purposes of pre-emption; 42 *P. R.* 1917; 20 *O. C.* 249 and 21 *Cal.* 496 (*P C.*), *Rel. on.* [P 147 C 2, P 148 C 1]

M. L. Puri—for Appellants.

J. N. Agyarwal—for Respondents.

Judgment.—Paera Ram died leaving two sons, Walu Ram and Parshotam Ram, and two daughters. His sons succeeded to his estate and they were succeeded by their widows, Mt. Popati Bai and Thakari Bai. The two widows made a joint mortgage of the land inherited by them in 1886. Mt. Popati Bai then died in 1897 and the surviving widow Mt. Thakari Bai sold the mortgaged land in 1898 to the mortgagees. Mt. Thakari Bai died in 1913. The two daughters of Paera Ram had issue, one of them having three sons, Asa Ram, Nihal Chand and Wasu Ram while the other has a grandson Pokhar Das. Asa Ram and Nihal Chand, two sons of one of the sisters, sued for possession of their share of the land alienated by the widow and obtained a decree for possession of one-third on payment of a specified sum. Wasu Ram, the brother of Asa Ram and Nihal Chand then sued for possession of his $\frac{1}{6}$th share and also obtained a decree on payment of a particular sum. Pokhar Das, however, the grandson of the other sister, never sued. He transferred whatever rights he had in half of the property in favour of Dharu Ram, son of Asa Ram, who was one of the plaintiffs in the first suit. Therefore, Dharu Ram executed a deed of relinquishment in favour of the vendees on the 4th February 1924, the consideration being Rs. 370. His uncles Nihal Chand and Wasu Ram then sued for pre-emption of this transfer, which was described as a sale on payment of Rs. 370.

The trial Court decreed the suit but on appeal the learned District Judge held that there was no sale which could be pre-empted and he accordingly dismissed the suit.

The only question in this second appeal is what was the nature of the transaction referred to. Widows in Hindu Law succeed to a limited estate and have dominion over the property which comes to them though this is circumscribed by certain limitations for the protection of the reversioners. An alienation by a Hindu widow is not void but only voidable at the instance of the reversioners, provided that there was no legal necessity. Reversioners do not succeed to the property alienated by a widow but have to sue for such property and establish their right to it. A reversioner has thus the right to avoid an alienation made by a widow but he may never exercise it and cannot be compelled to do so.

In the present case Pokhar Das surrendered or relinquished his right to sue in favour of Dharu Ram and Dharu Ram relinquished his right to sue in favour of the mortgagees vendees. All that Pokhar Das or Dharu Ram was possessed of was this right to sue and in my opinion the relinquishment of that right was not a sale. It would not amount to the transfer of property owned. But for a certain consideration each relinquished his right to sue. It makes no difference that some of the reversioners had sued and had been successful in their suits, Pokhar Das had still to sue, and could

not be compelled to sue. He or Dharu Ram had thus never become owner of any part of the property and did not sell any part of the property.

It was held in *Shams-ud-din* v. *Ghulam Hassan* (1) that where a reversioner had obtained a decree subject to payment of a certain sum in a case like the present and sold that decree the transfer did not amount to a sale for the purposes of pre-emption. In the present case a decree even had not been obtained and it does not follow necessarily that a decree would have been obtained, had a suit been filed, while the alienation by the widow remained absolute until challenged. In these circumstances it is not necessary to discuss this question at great length. The deed itself is quite clear and amounts to this : that Dharu Ram relinquished his rights in Pokhar Das's right of succession in favour of the widows' vendees, the consideration being Rs. 370. It cannot be said that this is a sale. *Raj Bahadur* v. *Jagrup Pande* (2) is nearly on all fours with the present case. It was held there that where all that a vendor alienated was a right to recover possession of property to which he had a claim that did not give rise to a right of pre-emption. *Abdul Wahid Khan* v. *Shalukha Bibi* (3) is also an analogous case. It was held that a transaction very similar to the present was the sale of a share in a law suit.

I have no hesitation in agreeing with the view of the lower appellate Court and dismiss this appeal with costs.

G.B. *Appeal dismissed.*

(1) [1917] 42 P. R. 1917=38 I. C. 658=51 P. W. R. 1917.
(2) [1917] 20 O. C. 249=42 I. C. 37=4 O.L.J. 540.
(3) [1894] 21 Cal. 496=21 I. A. 26 (P. C.).

A. I. R. 1927 Lahore 148

JAI LAL, J.

Sohna Mal—Plaintiff—Appellant.

v.

Budh Mal and *another*—Defendants—Respondents.

Second Appeal No. 1182 of 1926, Decided on 25th October 1926, from a decree of the Dist. J., Gujranwala, D/- the 15th March 1926.

Practice—Appeal—Burden of proof shifted in appeal—Remand should be ordered.

Where burden of proof is shifted from one party to the other in appeal, the person to whom the burden is shifted is entitled to a remand to enable him to produce further evidence. [P 149, C 1]

C. H. Oertel and *G. S. Salarya*—for Appellant.

Mehr Chand for *Badri Nath* and *Ram Das Seth*—for Respondents.

Judgment.— The plaintiff-appellant instituted a suit against the defendants for the recovery of principal and interest due on a balance of Rs. 800 acknowledged by the defendants in the plaintiff's book on the 26th November 1924. The defendants admitted having signed the entry, but denied receipt of consideration. The trial Court framed the following issue :

Is the entry without consideration ?—O. P. on defendants,

and after recording the evidence of the parties decreed the suit with costs.

The learned District Judge on appeal by the defendants came to the conclusion that under the circumstances the onus was on the plaintiff to prove that he had really paid the sum of Rs. 800 mentioned in the entry. He considered the evidence produced by the plaintiff and held that it was not sufficient to discharge the burden and dismissed the suit. The grounds on which the learned Judge held that the burden of proof was on the plaintiff to prove consideration were that in his opinion the document did not contain an admission or recital of the payment of consideration and that immediately after its execution the defendants reported to the police that the plaintiff had obtained it from them fraudulently and then filed a complaint in the Court of the Magistrate making the same allegations.

Though I am not prepared to agree with the learned District Judge that the document did not contain an admission of the receipt of consideration, still I am of opinion that his conclusion is correct, that under the circumstances the burden of proof shifted to the plaintiff to prove payment of consideration to the defendants. The principal complaint of the plaintiff-appellant before me is that as the learned District Judge had shifted the burden of proof on the plaintiff he should have remanded the case to the trial Court to enable the

plaintiff to prove the consideration of the document in suit. It was asserted that the evidence produced by the plaintiff was merely in rebuttal of the evidence given by the defendants and that he did produce the whole of his evidence because he felt satisfied that the defendants on whom the burden of proof lay had not discharged the same. I think there is force in this contention. On the burden of proof having been shifted from the defendants to the plaintiff the latter was entitled to a remand to enable him to produce his evidence.

I accept this appeal, set aside the decree of the learned District Judge and remand the case to the trial Court for recording the evidence of both parties on the assumption that the burden of proving payment of consideration in respect of the document in suit is on the plaintiff. The Court-fee paid on the memorandum of appeal in this Court will be refunded and the other costs will abide the result,

G.B. *Case remanded.*

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* A. I. R. 1927 Lahore 149

AGHA HAIDAR, J.

Bachan and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 438 of 1926, Decided on 31st October 1926, from an order of the 1st Cl. Mag. Amritsar, D/- 30th March 1926.

(a) *Criminal P. C., S. 103—Search list—Witness to, not examined—Search does not become illegal—If list cannot be proved its contents can be proved.*

The fact that the inhabitants of the locality whose signatures appear on the list prepared by the police at the time of the search had not been examined in the case would not render the search itself illegal : 23 *M. L. J.* 445, *Rel. on.*

If the list cannot be proved, the contents of the list can be proved by other evidence : 34 *Mad.* 349, *Rel. on.* [P 151 C 1]

(b) *Penal Code, S. 397—Deadly weapon—Dang or lathi is not.*

A lathi or dang is not a deadly weapon within S. 397. [P 151 C 1]

* (c) *Penal Code, Ss. 34 and 397—S. 34 does not apply to S. 397—Penal Code, S. 397.*

Section 34 does not apply to S. 397, so that if one in a party of dacoits carries a deadly weapon it cannot be said that it would increase the gravity of the offence in the case of his associates who were not similarly armed : *A. I. R.* 1923 *Lah.* 104, *Foll.* ; 16 *P. R.* 1901 and 15 *P. R.* 1901, *not Foll.* [P 151 C 2]

(d) *Criminal trial—First information—Informant professing to know a particular accused not mentioning his name—Case against such accused becomes doubtful.*

The fact that though the informant in his first report tried his very best to describe the alleged accused, yet he did not mention a particular accused, although in his evidence before the Court he says that he knew him before, makes the case of that accused at least doubtful. [P 150 C 2]

Brij Lal—for Appellants.

Jagan Nath Bhandari—for the Crown.

Judgment.—Early in the morning of the 14th October 1925, Nawab Khoja, a resident of the village Thathi in the Police Circle of Police Station Gharinda lodged a complaint to the effect that ten or twelve persons came to his house towards midnight out of whom three had guns, three had spears, and the rest had dangs. At the time of occurrence he happened to be sleeping in his shop close to his residential quarters. He was disturbed by these men in his sleep and some violence was used by the dacoits towards him. His son Allah Bakhsh received a dang blow and was more seriously injured and during the trial it was noticed that he was limping. The house of Nawab Khoja was entered and the inmates of the house including Nawab's wife, were terrorised with guns and other deadly weapons and were eventually made to surrender their valuables in the shape of ornaments and other things. The evidence for the prosecution goes on to say that, among the accused persons, at least one man named Gogi, who is absconding, went up to the roof of the house and from there by firing in the air continued to scare away those villagers who approached the house in order to render help to Nawab and his family. It is further in evidence that the dacoits pointed firearms at their victims in order to make them yield their valuables. Having thus robbed Nawab the dacoits decamped under cover of night. There was a lamp burning in the house of Nawab Khoja, and in order to facilitate their nefarious work, we may take it that, the lamp was allowed to remain burning, with the result that the inmates of Nawab's house were able to see faces and other features of some of the dacoits and could identify them.

The Police took up investigation and one Ganga Singh, a No. X badmash, gave the first clue to Harnam Singh, Sufedposh, with the result that the police pursued their enquires in the quarter indicated by Ganga Singh and Harnam Singh Sufedposh. As a result of the enquiries the police caught the five appellants in various villages in the adjoining district of Lahore. The houses of the accused were searched but nothing incriminating was found by the police. Later on, however, the five accused persons pointed out to the police the exact places where they had concealed their share of the booty. The result was that jewelry was found buried and concealed in the houses of Hakam Singh, Mit Singh, Saudagar Singh and Mohan Singh. Bachan Singh mentioned one Bhagat Singh, goldsmith of the village Jaman, as a man who had a portion of the stolen jewelry in his possession. A search of the houses of the various accused was made not only in the presence of the lambardar and Sufedposh of the village Thathi, but also of some of the residents of the village in question. The Additional District Magistrate, who tried the case, came to the conclusion that the identification in the case of the five appellants was sufficient and that furthermore a very large portion of the stolen property was found out in the manner as described above. The Magistrate convicted and sentenced each of the five appellants to rigorous imprisonment for seven years including three months solitary confinement and a fine of Rs. 500 or in default to undergo further rigorous imprisoment for one year.

As stated above, Gogi, who is alleged to have been one of the dacoits, has been absconding and so nothing need be said about him except what has already been mentioned, that he was the man who was firing in the air from the top of the house.

The case was argued at considerable length by the counsel appearing on behalf of the appellants. It is said in the first instance that the identification proceedings were not properly conducted, with the result that the prosecution witnesses who had identified the accused persons might have have had an opportunity to see the various accused beforehand and, therefore, had no difficulty in identifying them before the Magistrate of the Court. The learned Magistrate has appended a very helpful chart in his judgment which gives the names of those witnesses who identified the several accused. The identification proceedings seem to havo been perfectly above board and it cannot be said that they were in any way vitiated by any irregularity. In the case of Bachan Singh only the difficulty is created by the fact that though in his first Report Nawab Khoja tried his very best to describe the alleged dacoits, yet he did not mention Bachan Singh, although in his evidence before the Court he says that he knew him before. This makes the case of Bachan Singh at least doubtful. If he was present in the daccity, and if, as claimed by Nawab himself, he was known to Nawab, there is not the least doubt that Nawab would have certainly mentioned his name in the first Information Report.

As to the property which has been recovered at the instance of Bachan Singh it should be noted that the property was actually found in the possession of Bhagat Singh, goldsmith. This Bhagat Singh, goldsmith, produced a bahi in order to show that the entry of the various articles of jewelry produced by him was to be found in it. The bahi does not contain the name or signature of Bachan Singh. It does not give any date and it is also silent as to the alleged purpose for which the jewelry may have been given to him. All this makes the entry a very suspicious document and, having regard to the omission of Bachan Singh's name from the first report in spite of the fact that Nawab Khoja swore that he knew him and the unsatisfactory nature of Bhagat Singh's evidence, as well as the bahi produced by him, the case of Bachan Singh is not free from do bt. It cannot, therefore, be said that the evidence against him is of such a convincing nature as to prove his guilt beyond any possibility of doubt. I, therefore, accept the appeal of Bachan Singh, set aside his conviction and sentence and direct that he may be released forthwith.

The case of other four appellants, i. e. Hakam Singh, Mohan Singh, Mit Singh and Saudagar Singh, however, is entirely different. As already stated their identification has been fully established and

no serious flaw can be pointed out in the identification proceedings. The property was recovered in the houses of these four appellants and they pointed out the same. It was argued by Mr. Hakumat Rai, who appeared on behalf of Mohan Singh and Hakam Singh, appellants, that at time of the search in the native villages of his clients respectable persons of the locality were not called to witness the search. As a matter of fact, apart from the lambardar and Sufedposh of Mauza Thathi, the lambardars of the villages where the accused lived were present and signed the list. In any event, if the list cannot be proved, the contents of the list can be proved by other evidence vide *Solai Naik* v. *Emperor* (1). This has been done in the present case. The fact that the inhabitants of the locality whose signatures appear on the list prepared by the police at the time of the search had not been examined in the case would not render the search itself illegal. The principle enunciated in *Sri Sri Nadaduru Rajaguru Satagopala Charlu* v. *Satrughna Behara* (2) applies.

The result is that the convictions of Hakam Singh, Mohan Singh, Mit Singh and Saudagar Singh are maintained. It remains, however, to be seen what punishment should be awarded to the four unsuccessful appellants. The minimum punishment under S. 397 of the Indian Penal Code is seven years rigorous imprisonment. Now with the exception of Gogi, who is alleged to have been armed with a gun, the remaining four of the accused persons have not been shown to have been armed either with spears or with guns. We may take it that they had only dangs in their possession.

Now a very learned and experienced Judge of the Allahabad High Court had laid down that lathi is a 'lethal' weapon which in plain English means a 'deadly' weapon, mentioned in S. 397 of the Indian Penal Code. I take it that dang is the same thing as lathi. But in the case of *Lad Khan* v. *Emperor* (3) it was held that lathi is not a deadly weapon. Therefore, it follows that, with the exception of Gogi, there is no evidence that the four appellants were armed with anything else except lathis or dangs. S. 34 of the Indian Penal Code does not apply to S. 397, so that if one in a party of dacoits carries a deadly weapon it cannot be said that it would increase the gravity of the offence in the case of his associates who were not similarly armed. There has been a conflict of authorities on this point. Some learned Judges invoked in aid the provisions of S. 34, Indian Penal Code, while interpreting the provisions of S. 397 and came to the conclusion that the fact that one in a party was armed with a deadly weapon aggravated the offence of all. This was the law laid down in *Queen-Empress* v. *Mahabir Tiwari* (4). This view, however, was abandoned in *Emperor* v. *Nageshwar* (5) and the history of the case-law on this point in the Lahore High Court had been parallel to that of the Allahabad Court. The Chief Court of the Punjab, the predecessor of our present High Court, in two reported cases at least (i) *Crown* v. *Mohra* (6) and (ii) *Chatar Singh* v. *Emperor* (7) had adopted the view expressed in *Queen-Emress* v. *Mahabir Tiwari* (4). But I find that recently in the case of *Dangar Khan* v. *Emperor* (8) this Court has accepted the law as laid down in the case reported as *Emperor* v. *Nageshwar* (5); see also *Queen-Empress* v. *Santa* (9).

The result is that in the absence of specific evidence that these four appellants were armed with anything more dangerous than a mere lathi or a dang the offence does not render each and every one of them guilty of the offence under S. 397, but under S. 395 of the Indian Penal Code, under which the Court has got the discretion to order rigorous imprisonment for a term which may extend to ten years. I, therefore, reduce the sentence passed upon these four appellants to five years' rigorous imprisonment under S. 395 and thus modify the order and the sentence passed by the Additional District Magistrate, Amritsar. I do not see any point in inflicting a fine of Rs. 500 upon each of the

(1) [1911] 34 Mad. 349=21 M. L. J. 281= 8 I. C. 178=8 M. L. T. 451 (F. B.).
(2) [1912] 23 M. L. J. 445=17 I. C. 75=(1912) M. W. N. 1111.
(3) [1912] 11 P. L. R. 1911=13 I. C. 998=19 P. W. R. Cr. 1912.
(4) [1899] 21 All. 263=(1899) A. W. N. 76.
(5) [1906] 28 All. 404=(1906) A. W. N. 61.
(6) [1901] 16 P. R. 1901 Cr.
(7) [1901] 15 P. R. 1901 Cr.
(8) A. I. R. 1923 Lah. 104.
(9) [1899] A. W. N. 186.

appellants. Nawab Khoja has been able to recover the great bulk of the property of which he had been robbed by the dacoits and the Magistrate, having regard to this circumstance has refrained from passing an order compensating him for any loss. If the sentence of a fine of Rs. 500 were to be maintained the unfortunate families of the four appellants would suffer great hardship. I, therefore, order that no fine should be exacted from the appellants. The sentence of solitary confinement stands. To the extent of these modifications the appeals of the remaining appellants are allowed in parts. As to the rest, I dismiss the appeals of Hakam Singh, Mohan Singh, Saudagar Singh and Mit Singh.

G.B. *Appeal partly allowed.*

A. I. R. 1927 Lahore 152

ADDISON, J.

Mt. Piar Bai—Objector—Appellant.

v.

Firm Tulsi Das-Tarlochan Mal—Respondent.

Misc. Appeal No. 1704 of 1926, Decided on 6th January 1927, from the order of the Dist. J., Jhang at Sargodha, D/- 17th April 1926.

(a) *Hindu Law—Joint family—Son adjudged insolvent—Father willing away his properties to his wife and dying—Will is invalid and property vests in Receiver —Son succeeding to them by survivorship.*

Where immediately after the son was adjudged an insolvent, his father who formed a Hindu joint family with him willed away his properties to his wife and soon after died.

Held: that the will was invalid and as the insolvent took his father's estate by survivorship the same vested in the Receiver. [P. 152, C. 2]

(b) *Provincial Insolvency Act* (1923), *S.* 28—*Insolvent's power to sell his son's share for just debts vests in Receiver.*

The insolvent's power to sell his son's share for paying his just and proper debts vests in the Official Receiver: *A.I.R.* 1926 *Mad.* 994; *A.I.R.* 1926 *Lah.* 41 and *A. I. R.* 1926 *Lah.* 264, *Foll.* [P. 152, C. 2, P. 153, C. 1]

Sohan Lal for *Nand Lal*—for Appellant.

J. N. Aggarwal—for Respondents.

Addison, J.—Kala Ram was adjudicated an insolvent on the 9th December 1924. Ten days later on the 19th December 1924 his father Devi Das made a will of his properties in favour of his own wife, Mt. Piar Bai, and in case of her death in favour of the insolvent's minor son Lajpat Rai. Eleven days later the testator Devi Das died and the Receiver in the insolvency took possession of his estate on the ground that it come to the insolvent by survivorship. Devi Das' widow of Mt. Piar Bai, asked for its release on the basis of the will. The creditors denied the will, asserted that it was executed to defraud them and further pleaded that the father and son continued to be joint Hindu family until the insolvent's father died. The insolvency Court has held that the will was made, but that the father and his insolvent son continued joint and that thus the will was invalid as the insolvent succeeded to his father by survivorship. The insolvency Court further held that the fact that the insolvent consented to the will did not matter as at that time he was an insolvent whose estate had vested in the Receiver. The insolvency Court refused to decide the question of the wife's right of maintenance and residence as that would have been going beyond the objection. Against this decision this appeal has been admitted.

It was first contended that the insolvency Court was wrong in holding that there was a joint Hindu family, but the learned counsel who appeared for the appellant was unable to show how the decision arrived at was wrong. On the evidence it is clear that the deceased father and his insolvent son were members of a joint Hindu family and continued as such until the death of Devi Das.

That being the case, the will was invalid and the insolvent took his father's estate by survivorship.

It was next argued that the insolvent's son's half share did not vest in the Receiver and should not be allowed to be sold. There is ample authority against this contention, the latest of which is the Madras Full Bench decision. *Seetharama Chettiar* v. *Official Receiver* (1). There are also two decisions of this Court, namely, *Khem Chand* v. *Narain Das* (2) and *Sat Narain* v. *Sri Kishan* (3) and I hold that the insolvent's power to sell his son's share for paying his just

(1) A. I. R. 1926 Mad. 994=49 Mad. 849.
(2) A. I. R. 1926 Lah. 41=6 Lah. 493.
(3) A. I. R. 1926 Lah. 264=7 Lah. 376.

and proper debts vests in the Official Receiver.

The third point argued was that the widow was entitled to residence and maintenance. The question has not, so far, been decided by the insolvency Court and does not arise in this appeal.

For the reasons given I dismiss the appeal with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 153

ADDISON, J.

Badri Das—Decree-holder—Appellant.

v.

B. Bevan Petman—Judgment-debtor—Respondent.

Misc. First Appeal No. 1404 of 1926, Decided on 27th October 1926, from the order of the Sr. Sub.-J., Simla, D/- 20th March 1926.

Civil P. C., O. 21, Rr. 11 (2) j, 21—Executing Court cannot refuse to attach and sell library and office furniture of judgment-debtor—Civil P. C., S. 151.

The decree-holder has the right to execute his decree in the manner he desires, and it would be only in exceptional cases that the executing Court would interfere with that right. Court has no reason to refuse to allow the decree-holder to attach and sell the library and office furniture of his judgment-debtor who happens to be a pleader. [P 153 C 2]

Man Singh—for Appellant.

Judgment.—The decree-holder obtained at Ambala a decree for some Rs. 8,000 against a barrister practising in Simla. The decree was transferred to the Simla Court for execution. The first application for execution was put in on the 9th April 1925. It was dismissed on the 14th August 1925 on the ground that the decree had been attached. The second application for execution was presented on the 3rd September 1925. It was for attachment of the judgment-debtor's property of all kinds. Time was granted to the judgment-debtor on the 6th November 1925 and further time for a settlement was granted to him on the 4th December 1925. The decree-holder later stated before the executing Court that all he wished to attach was the office furniture and library including the law books, of the judgment-debtor. This he valued at more than the decretal amount. The judgment-debtor put in a list of his immovable property, which admittedly is heavily encumbered, and a considerable part of which is situated in a Native State. He was then ordered to show the amount of encumbrances on his immovable property but he did not do so. Finally, on the 20th March 1926, the executing Court refused to attach the office furniture and library of the judgment-debtor under its inherent powers conferred by S. 151 of the Civil P. C. and dismissed the application for execution. Against this decision the decree-holder has appealed to this Court.

The judgment-debtor has not appeared before me. It is obvious that the order of the executing Court cannot be upheld. It was held by the learned Chief Justice in *Hargobind Kishen Chand* v. *Hakim Singh & Co.* (1), that

> the law confers upon the decree-holder the right to decide whether he should execute his decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of his property, or by both, and that while the Court has discretion (which should be executed in a judicial manner) to refuse execution against the person and property simultaneously, it has no authority to refuse execution against the person of the jugment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor.

In the same judgment LeRossignol, J., held that

> the decree-holder should be encouraged to proceed against both the property and the person simultaneously and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule.

It follows from the principles enunciated in the above ruling that the decree-holder has the right to execute his decree in the manner he desires and that it would be only in exceptional cases that the executing Court would interfere with that. In the present case there was no reason why the decree-holder should not have been allowed to attach the furniture and library of the judgment-debtor. The latter was asked to show the extent to which his immovable property was encumbered and he has not done so. Admittedly it is heavily encumbered, while some of it is in a Native State and cannot be proceeded against in the executing Court. As other property of the judgment-debtor was available, the Court had no right to compel the decree-holder to embark upon lengthy execution proceed-

(1) A. I. R. 1926 Lah. 110=6 Lah. 548

ings in bringing the encumbered immovable property to sale. The judgment-debtor has been shown every concession and considerable time has been given him in which to settle the decree. During this time it was also possible for him to arrange to sell his immovable property. In the circumstances I accept the appeal ex parte and order the executing Court to attach the furniture and library in question and to proceed with the execution of the decree in accordance with law. The appellant will have his costs here.

G.B. *Appeal allowed.*

A. I. R. 1927 Lahore 154

CAMPBELL, J.

Mela Ram and *others*—Defendants—Appellants.

v.

Malik Ram and *others*—Plaintiffs — Respondents.

Second Appeal 2538 of 1925, Decided on 23rd February 1926, from the decree of the Dist. J., Shahpur, D/- 11th May 1925.

Custom—Punjab—Adoption by custom among non-agriculturist Hindus not in Dattaka form—Family of adoptee is not altered.

When an adoption is not according to the Dattaka form but according to the established custom prevailing among non-agriculturist Hindus of the Punjab, the family of the adoptee is not altered and no relationship with the adoptive father's collateral relations is established : 113 *P. L. R.* 1908, *Foll.* [P 155, C 1]

Badri Das—for Appellants.

Nanak Chand—for Respondents.

Judgment.—The suit concerned the property of one Bhagwan Das who had two daughters, Mt. Goman Devi and Mt. Gur Devi. Mt. Goman Devi had a a son Ghasita Mal and Mt. Gur Devi also had sons. After the death of Bhagwan Das the property was taken by Ghasita Mal and after his death was sold by his mother Mt. Goman Devi and her husband. The suit is by Mt. Gur Devi and her sons for possession of half of the property. The Courts below have concurred in decreeing the claim and in dismissing a second claim for a declaration in regard to the other half of the property with which I am not concerned.

The findings on which the decree has been granted are that Ghasita Mal was the adopted son of Bhagwan Das and that his heirs were to be sought for in his new family and not in his natural family for which reason his rightful heirs were Mt. Gur Devi's sons, from this point of view his sister's sons. A decree for half the property only has been granted because at the outset of the suit the plaintiffs admitted that Mt. Goman Devi was entitled to half.

On second appeal the first point urged is that on the findings of the lower appellate Court there was no valid adoption because there was no formal giving and taking. Reliance is placed on *Rattan Devi* v. *Muno* (1) but what was held there was that in the Punjab, in the case of the adoption of a sister's son, the law requires from the adoptor a manifestation of his unequivocal intention to clothe adoptee with the legal status of a son, and that such a manifestation of the adoptor's intention can be made either by a formal document combined with the proper treatment or by a formal giving and taking. In the present instance there was a formal document in the shape of a Will dated some years before Bhagwan Das's death in which Ghasita Mal was described as having been adopted five years previously and there was evidence by the witnesses for both parties that Bhagwan Das had adopted Ghasita Mal and had treated him as his son. The learned District Judge observed that he was not satisfied with the evidence produced by the plaintiffs to show that ceremonies of adoption had taken place. He held on the other evidence that Ghasita Mal had been adopted by Bhagwan Das. This, in my opinion, is a finding of fact which cannot be attacked in second appeal.

The second contention has more force and is that, although in the Punjab a Hindu may adopt his daughter's son, the adoption does not have the effect of transferring the adoptee bodily from his natural family to that of his adoptive father. The parties to the case are Khatris, and it was admitted early in the proceedings and held in a previous remand order against which no appeal was preferred that they are governed by Hindu Law as it prevails in the Punjab. Under strict Hindu Law a Dattaka adoption has the effect of transferring the

(1) [1918] 117 P. R. 1918=48 I. C. 776.

adopted boy from his natural family to that of his adoptive father, but there can be no adoption in Dattaka form of a daughter's son. There is no evidence in the present case that the adoption in question had the effect of transferring the adopted person from one family to another, and it was held in *Baij Nath* v. *Shamboo Nath* (2) that when an adoption is not according to the Dattaka form but according to the established custom prevailing among non-agriculturist Hindus of the Punjab, the family of the adoptee is not altered and no relationship with the adoptive father's collateral relations is established.

Hence Mt. Gur Devi did not become Ghasita Mal's sister and under Hindu Law his mother was a preferential heir to his mother's sister or to his mother's sister's son. Thus the plaintiffs had no right to succeed as his heirs.

I accept the appeal, set aside the decree of the lower Court and dismiss the suit with costs throughout.

G.B. *Appeal allowed.*

(2) [1908] 53 P. W. R. 1908=113 P. L. R. 1908.

A. I. R. 1927 Lahore 155

ADDISON, J.

Muhammad Hussain—Defendant—Appellant.

v.

Mt. Begam Jan — Plaintiff — Respondent.

Second Appeal No. 1692 of 1925, Decided on 12th February 1926, from a decree of the Dist. J., Jullundur, D/- 9th May 1925.

Mahomedan Law—Divorce—Suit for divorce by wife on the ground of her being falsely charged of adultery by husband is maintainable.

A Mahomedan wife is entitled to bring a suit and obtain a decree for dissolution of marriage on the ground that her husband had falsely charged her with adultery : 41 *All.* 278, *Foll.*

[P 155 C 2 ; P 156 C 1]

Niaz Muhammad—for Appellant.

Badri Das—for Respondent.

Judgment.—Plaintiff, Mt. Begam Jan, sued for the dissolution of her marriage with Muhammad Hussain on the ground that her husband had charged her with adultery. The Court of first instance dismissed the suit on the ground that the doctrine of laan is not applicable to British India, but on appeal the learned District Judge held on the authority of para. 76, page 118 of Wilson's Anglo Muhammadan Law, 3rd Edition, that such a charge was sufficient to allow him to decree the dissolution of the marriage. Against his decision this second appeal has been filed.

Para. 76 of Wilson's Anglo Muhammadan Law is as follows :

> The fact of a husband having (whether truly or falsely) charged his wife with adultery will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute and independently of the result of any such proceedings.

It is pointed out below in this paragraph that where the law respecting laan is enforced in its entirety a man who has imputed infidelity to his wife, without being able to bring four law-worthy eye-witnesses to the very fact, may be called upon either to withdraw the imputation, in which case he incurs the Koranic punishment for slander, viz., 80 stripes, or to confirm it by oath, in which case the wife must be called upon either to admit the truth of the imputation or to deny it on oath. If she admits her guilt she renders herself liable to capital punishment ; on her denying it and setting her oath against that of her husband, the Kazi must believe her and must grant a divorce. It is obvious that the above procedure cannot be carried out, but that does not mean that the wife may not still claim a dissolution of marriage in the Courts. In para. 240, page 188, of Mulla's Muhammadan Law, 7th Edition, it is laid down that if a husband charges his wife with adultery the wife may claim a divorce by a suit, but laan ipso facto does not operate as a divorce. According to Tyabji's Principles of Muhammadan Law the old procedure would more or less have to be followed. According to Ameer Ali's Muhammadan Law, Volume II, 4th Edition, page 596, a woman is entitled to claim a divorce in the Courts when a false accusation is preferred against her which the husband is unable to establish. This is not very different from what has been laid down by Wilson and Mulla. Finally in *Zafar Husain* v. *Ummat-ur-rahman* (1) it was held that a Muhammadan wife is entitled to bring a suit and obtain a decree for dissolution of marriage on the ground

(1) [1919] 41 All. 278=49 I.C. 256=17 A.L.J. 78.

that her husband had falsely charged her with adultery.

The facts in the case before me are that the husband brought a criminal complaint under S. 497, Indian Penal Code, against one Pir Muhammad charging him with having committed adultery with his wife. His complaint was dismissed. He still sticks to his charge against his wife in his pleas, in which he stated that his complaint was true. No attempt, however, was made to prove that it was true. The District Judge has not found that the imputation was false as he considered this unnecessary on the authority of Wilson's and Mulla's Anglo-Muhammadan Law. He could not have come to a finding as there was no evidence on the point. It seems to me that this is unimportant. It was in issue as to what was the effect of the defendant accusing his wife of adultery with Pir Muhammad and it was possible for the defendant to have produced evidence that it was true. His criminal complaint had already failed. I agree with the learned District Judge, that in these circumstances it was sufficient to decree the dissolution of the marriage on the ground that the husband charged his wife with adultery and still adhered to this charge in the suit.

I accordingly dismiss the appeal with costs.

G.B. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 156

ZAFAR ALI, J.

Mt. Aishan—Defendant—Appellant.

v.

Abdulla and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1252 of 1926, Decided on 11th December 1926, from the decree of the Dist. J., Jullundur, D/- 6th February 1926.

* (*a*) *Civil P. C., O.* 23, *R.* 3—*Reference to arbitration does not preclude parties from compromising.*

Even after a reference to arbitration is made in a pending suit the parties are not precluded from settling the dispute amicably by mutual agreement, and it is not therefore necessary to cancel the reference before accepting the compromise. [P 157, C 1]

(*b*) *Registration Act, S.* 17—*Compromise embodied in a decree of revenue Court does not require registration.*

Where a compromise between the parties to a suit in a revenue Court is embodied in the decree of that Court it does not require registration: *A. I. R.* 1926 *Lah.* 586, *Dist.* [P 157, C 1]

Abdul Aziz—for Appellant.

Badr-ud-din Qureshi—for Respondents.

Judgment.—The parties in this case are Arains and the property in dispute is agricultural land. The last male proprietor left no male progeny and so his landed estate devolved upon his widow Mt. Joi. On her death, which occurred in 1894, the estate was mutated in the names of her two daughters Faji and Lado, because none of the reversioners of her husband came forward to claim succession. Muhammadi was shown in the revenue records as the mortgagee in possession of a portion of the land. In 1896 the two ladies filed a suit against Muhammadi in a civil Court to recover possession of the land from him, but it was sent for trial to revenue Court presumably on the assumption that the relation between the parties was that of landlord and tenant, and the suit was one for ejectment In the revenue Court the parties agreed to refer the dispute to the arbitration of one Gammun Khan and an order of reference was made on their application. But either through the intervention of Gammun Khan or otherwise the ladies and Muhammadi came to terms and filed a razinama in Court attested by Gammun Khan. The terms of this razinama which were embodied in the decree of the Court, briefly were that the ladies would enjoy possession of the land so long as they would live, that on the death of one the survivor would be entitled to succeed to her share; and that, on the death of the survivor Muhammadi would succeed to the whole of the land. Faji died first, and on the death of Mt. Lado the land was mutated in the name of Mt. Aishan, daughter of Mt. Taji. Alleging that he was in possession of the land Muhammadi sued for a declaration that according to the compromise decree the rightful successor was he and not Mt. Aishan. The trial Court dismissed the suit, finding, inter alia, that the compromise was not binding on Mt. Aishan and could not deprive her of her right of succession. On appeal the learned District Judge came to the contrary conclusion and decreed the suit

Mt Aishan, defendant, has come up to this Court in second appeal and it is contended on her behalf (1) that the decree of the revenue Court based on the compromise was a nullity as no decree could be passed without first cancelling the reference to arbitration; (2) that the revenue Court was not competent to settle the dispute as to future succession and that the decision of that question was ultra vires; (3) that the compromise was not admissible in evidence for want of registration; and (4) that Mt. Aishan was not bound by the said compromise because Mt. Lado and Faji had only a limited interest in the estate and were not competent to alienate it.

There is no force in these contentions. Nos. 1 and 3 may be disposed of together. Even after the reference to arbitration the parties were not precluded from settling the dispute amicably by mutual agreement, and it was not, therefore, necessary to cancel the reference before accepting the compromise. And there is nothing to show that the compromise required registration as the value of the subject-matter of the compromise is not stated anywhere. Moreover, as it was embodied in the decree, it did not require registration and the ruling referred to by the counsel for the appellant, i. e., *Ghulam Muhammad* v. *Jaggo* (1), is not in point because in that case the compromise was presented to a revenue officer and not to a revenue Court.

As regards No. 2, it is clear that the revenue Court did not settle any dispute as to future succession. The agreement was lawful and the Court was, therefore, bound under O. 23, R. 3, Civil P. C., to record it and to pass a decree in accordance therewith so far as related to the suit. It cannot be said that the agreement or any part of it did not relate to the suit. The suit was for ejectment and the defendant agreed to give up possession in consideration for obtaining proprietary rights in the land after plaintiff's death. The ladies were competent to alienate the land in this way because they were absolute owners thereof having inherited it from a female and not from a male proprietor.

The appeal, therefore, fails and I dismiss it.

G.B. *Appeal dismissed.*

(1) A. I. R. 1926 Lah. 586.

A. I. R. 1927 Lahore 157

SHADI LAL, C. J.

(*Firm*) *Bhagat Sham Singh-Megh Raj* —Plaintiffs—Petitioners.

v.

Nur Khan and *another*—Defendants—Respondents.

Civil Revision Petition No. 104 of 1926, Decided on 9th December 1926, from an order of the 2nd Class Sub-J., Jhelum, D/- 6th August 1925.

Civil P. C., O. 5, R. 10—Proviso added by Lahore High Court—Order directing plaintiff to deposit process-fee and postal charges for serving summons—Deposit of process-fee—Failure to pay postal charges—Dismissal for default under O. 9, R. 2, is not justified—Civil P. C., O. 9, R. 2.

The proviso, which has been added to O. 5, R. 10, by the High Court of Lahore in order to provide for the service of summons by registered post leaves it to the option of the plaintiff to have the summons served in the ordinary way or by registered post, and the Court cannot compel him to deposit the process-fee for the service of the summons in the ordinary way and also to pay postal charges of service, by registered post and, therefore, dismissal of suit under O. 9, R. 2, on failure to pay postal charges when process-fee is paid is not justified. [P 158, C 1]

Ram Chand Manchanda—for Petitioners.

Nand Lal—for Respondents.

Judgment.—The application arises out of an action brought by the plaintiff for the recovery of a certain sum of money on the basis of a promissory note. The suit was originally instituted in the Court of the Subordinate Judge at Chakwal, but was subsequensly transferred to the Court of the Subordinate Judge at Jhelum. It appears that the summonses had not been served upon the defendants and that on the 13th June 1925, the Court ordered the plaintiff to deposit process-fee for the service of summonses in the ordinary mode and also to pay postal charges for defraying the cost of serving summonses by registered post. The plaintiff duly deposited the process-fee, but failed to pay the postal charges with the result that the Subordinate Judge, relying upon O. 9, R. 2, Civil P. C., passed an order on the 13th July 1925, that the suit be dismissed. On the 3rd August the plaintiff made an application for setting aside the dismissal and stated that, while he had deposited the process fee, he could not pay the postal charge

on account of the arrest of the agent in a criminal case. This application was rejected on the 6th August.

Now, O. 9, R. 2, authorizes the Court to dismiss a suit, if the plaintiff fails to deposit postal charges required for the service of summonses on the defendant. But the proviso, which has been added to O. 5, R. 10, Civil P. C., by this Court in order to provide for the service of summons by registered post is in these terms :

Provided that in any case, if the plaintiff so wishes the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule ; and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this order.

It will be observed that the proviso leaves it to the option of the plaintiff to have the summons served in the ordinary way or by registered post, and the Court cannot compel him to deposit the process-fee for the service of the summons in the ordinary way and also to pay postal charges for service by registered post. The order of the 13th June 1925, requiring him to have the service effected in both the modes was not warranted by law, and the Court was not justified in dismissing the suit when he had already deposited the process-fee.

I accordingly accept the application for revision, and setting aside the order of dismissal, remit the case to the Subordinate Judge and direct him to proceed in accordance with law. I leave the parties to bear their own costs in this Court.

R.D. *Case remitted.*

A. I. R. 1927 Lahore 158

SHADI LAL, C. J., AND AGHA HAIDAR, J.

(*Bhai*) *Aya Ram-Tola Ram*—Plaintiffs—Appellants.

v.

Bhajan Ram and *others*—Defendants—Respondents.

First Appeal No. 1513 of 1922, Decided on 16th November 1926, from the decree of the Dist. J., Dehra Ismail Khan, D/- 11th March 1922.

Usurious Loans Act (1918), *S. 3—Unconscionable contract of loan—Court can re-open the contract and allow a fair amount with reasonable interest—Interest at 12 per cent. and in default compound interest is not unconscionable.*

Where a contract of loan is made which appears to be unconscionable, the Court has the power to refuse to enforce it in its entirety, and may open the transaction and direct the payment of such sum of money as may be fairly due with a reasonable rate of interest. It is neither possible nor desirable to enunciate a fixed rule as to what is reasonable rate of interest, but interest at 12 per cent. per annum cannot be called excessive, such as to attract the equitable jurisdiction of the Courts. A covenant to pay interest at 12 per cent. at the end of the year and in the event of default to pay compound interest is however often embodied in transactions of loans and cannot be regarded as either unusual or unreasonable so as to attract the provisions of S. 3 ; 23 *C. W. N.* 233 (*P. C.*). *Ref.*

[P. 158, C. 2 & P. 159, C. 1]

Judgment.—This appeal arises out of an action brought by the firm of Aya Ram-Tola Ram against the defendants Bhajan Ram and others who were members of a joint Hindu family. The claim was for the recovery of a certain sum of money on the basis of an account between the parties. The correctness of the account has been admitted by the defendants, and the dispute is narrowed down to the question whether they are entitled to any relief in respect of the stipulation for the payment of interest.

There is ample evidence on the record, and indeed it is conceded, that the defendants promised to pay interest on the loan at the rate of 12 per cent. per annum, but it is urged that the rate of interest was excessive and should be reduced. Now, S. 3 of the Usurious Loans Act (10 of 1918), which has been invoked on their behalf, empowers the Court to give relief to the debtor, if the case satisfies the following two conditions :

(1) That the interest is excessive; and

(2) that the transaction was, as between the parties thereto, substantially unfair.

The principle on which the statute is based is well known. Where a contract of loan is made which appears to be unconscionable, the Court has the power to refuse to enforce it in its entirety, and may open the transaction and direct the payment of such sum of money as may be fairly due with a reasonable rate of interest. The jurisdiction conferred by the Act is, however, confined to the cases in which both the conditions mentioned above are fulfilled.

In order to bring their case within the ambit of the statute, the defendants contend that the stipulated rate of interest was unusual and should, therefore, be held to be excessive. It is neither possible nor desirable to enunciate a fixed rule as to what is reasonable rate of interest, but a stipulation for the payment of interest at 12 per cent. per annum is ordinarily found in transactions of loans, and the rate cannot be called excessive, such as to attract the equitable jurisdiction of the Courts.

It is true that the contract requires the debtors to pay interest at the end of the year, and that in the event of default they are liable to pay compound interest at the same rate. A covenant of this description is, however, often embodied in transactions of loans and cannot be regarded as either unusual or unreasonable. It does no harm to a borrower who fulfils his promise by paying simple interest on the due date, and it comes into operation only if he breaks the contract. It is manifest that if he could not impeach the propriety of the transaction at the time when it was entered into, he cannot subsequently improve his position by his failure to perform the obligation undertaken by him. As observed by their Lordships of the Privy Council in *Bilta Mal* v. *Ahad Shah* (1):

> There is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract. Bankers are, in fact, in this country in the habit, in the ordinary course of their business of capitalizing the interest accruing on overdrawn current accounts every 6 months, as long as a debit balance against the customer remains due.

For the aforesaid reasons, we are of opinion that the first condition prescribed by S. 3 of the Usurious Loans Act has not been satisfied, and that the Court had no jurisdiction to interfere with the contract entered into by the parties. We, accordingly, allow the appeal and decree the claim with costs throughout.

G.B. *Appeal allowed.*

(1) [1918] 23 C. W. N. 233=35 M. L. J. 614=48 I. C. 1=16 A. L. J. 905 (P. C.).

A. I. R. 1927 Lahore 159

COLDSTREAM, J.

Nazir Hussain — Defendant — Appellant.

v.

Nathu—Plaintiff—Respondent.

Misc. Second Appeal No. 1097 of 1926, Decided on 11th October 1926, from an order of the Dist. J., Sialkot, D/- 10th February 1926.

Civil P. C., O. 23, R. 1—Whether a fresh suit can or cannot be instituted before payment of costs, turns solely on the tenor of Court's order—Such order should specifically state the time limit for the payment of costs.

Where the payment of costs before institution or within a particular period is not definitely directed by the Court granting leave to a person to withdraw from a suit and to bring a fresh suit,

Held: that the fresh suit was not bad ab initio, but could be entertained if costs were paid before the suit came on for trial: 31 *Cal.* 965; 14 *C. L. J.* 105 and 19 *C. L. J.* 529, *Rel. on.* [P. 160, C. 1]

It is important that Courts when giving permission to withdraw with liberty to bring a fresh suit should pass an order limiting the time within which costs are to be paid and should direct that on failure to pay within that time, the original suit is dismissed with costs. [P. 160, C. 2]

Zafarulla Khan—for Appellant.

Muhammad Monir—for Respondent.

Judgment.—The plaintiff-respondent brought a suit against the defendant-appellant. On the 11th June 1925, the Court passed an order allowing him to withdraw the suit "and to bring a fresh suit provided he pays Rs. 20 costs to the defendant." Without paying any costs the plaintiff instituted the fresh suit 5 days later. No objection was taken by the defendant until the case came on for hearing of evidence, on which date an objection was accepted by the Court which dismissed the suit with costs. The plaintiff appealed and on 10th February 1926, the learned District Judge of Sialkot, accepting the appeal remanded the case for re-decision on the merits under O. 41, R. 23 of the Civil P. C., the plaintiff to pay the costs in the first hearing.

Against this order of the District Judge, the defendant has instituted the present appeal in which the only point for decision is whether in the circumstances the second suit ought to be allowed to proceed. Mr. Zafarullah who argues the

appeal relies on the rulings of the Madras High Court published as *Robert Fischer* v. *Nagappa Mudaly* (1), *Subal Chandra* v. *Mosaraf Ali* (2) and *Goolapudi Seshayya* v. *Nadendla Subbiah* (3). The first of these decided in 1909 deals with a case in which permission to withdraw had been granted on condition that costs were paid within a certain date and decided that as costs had not been paid within the period fixed the suit was barred. In 1917 this rule was followed by the Calcutta Court in *Subal Chandra* v. *Mosaraf Ali* (2) in a case in which the wording of the order granting permission to bring a fresh suit was found to mean clearly that the payment of costs was to be a condition precedent to the filing of a fresh suit. In *Seshayya* v. *Subbiah* (3), decided in 1924, a Single Bench of the Madras Court has apparently held that where an order of payment of costs was passed under the provisions of R. 1 (2) (b) of O. 23 of the Civil P. C., no fresh suit can be entertained until the costs have been paid whether the order fixed a date for payment or so worded its order as to leave it doubtful whether payment of costs was to be a condition precedent to the institution of the suit or not. It is to be noted that in the case dealt with by that judgment the fresh suit had been wholly tried and decreed without payment of the costs ordered.

The Calcutta Court has, however, distinguished between cases where the order of costs clearly made the payment of costs a condition precedent to the institution of a fresh suit or fixed a period for payment and cases where payment of costs before institution or within a period was not definitely directed. The earliest of its rulings cited for the respondent *Abdul Aziz Molla* v. *Ebrahim Molla* (4) dealt with a case in which the circumstances appear to have been very similar, as regards the point under discussion, to those of the present case and the Court there held that the fresh suit was not bad ab initio, but could be entertained if costs were paid before the suit came on for trial. (In the present case the objection that costs were not paid was not raised until before evidence was heard and it was then pleaded for the plaintiff that he was ready to pay costs then.) The ruling was followed by Division Benches of the same Court in *Gopi Lal* v. *Naggu Lal* (5) and *Sadhu Charan Tewari* v. *Baikuntha Nath Madak* (6). In *Subal Chandra* v. *Mosaraf Ali* (2) the Calcutta Court pointed out that the question whether a fresh suit can or cannot be instituted before costs ordered under O. 23, R. 1 are paid turns solely upon the construction of the order passed under that rule. It held that in that case it construed the order to mean that payment of costs was a condition precedent to the institution of a fresh suit. In spite of its previous rulings the Madras Court apparently expressed in *Dasarthy Naidu* v. *Palala Kumaramull* (7) their approval of the line adopted by the Calcutta Court in such cases.

I think that the learned District Judge was right in following the Calcutta ruling and in construing as he did the order passed in this case under O. 23, R. 1, Civil P. C., and I dismiss this appeal with costs accordingly.

As pointed out by the Calcutta and Patna Courts in *Sadhu Charan Tewari* v. *Baikuntha Nath Madak* (6) and *Kuldip Singh* v. *Kuldip Chowdhuri* (8) respectively much difficulty is given to the Courts by the incompleteness of orders passed under O. 23, R. 1. It is important that Courts when giving permission to withdraw with liberty to bring a fresh suit should pass an order limiting the time within which costs are to be paid and should direct that on failure to pay within that time the original suit is dismissed with costs.

J.V. *Appeal dismissed.*

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(1) [1910] 33 Mad. 258=6 I. C, 288=7 M. L. T. 226.
(2) [1917] 38 I. C. 476.
(3) A. I. R. 1924 Mad. 877.
(4) [1904] 31 Cal. 965.
(5) [1911] 14 C. L. J. 105=10 I. C. 6=15 C. W. N. 998.
(6) [1914] 19 C. L. J. 529=23 I. C. 210.
(7) [1918] 7 M. L. W. 557=45 I. C. 969=(1918) M. W. N. 427.
(8) [1918] 3 Pat. L. J. 63=44 I. C. 79=4 Pat. L. W. 134.

A. I. R. 1927 Lahore 161

CAMPBELL, J.

Maya Das and *another*—Petitioners.

v.

Municipal Committee, Chiniot—Respondent.

Criminal Revision No. 1417 of 1926, Decided on 10th December 1926, on report by the S. J., Lyallpore, on 13th September 1926.

(a) *Punjab Municipal Act* (1911), *S.* 81—*Order under.*

An order made by a Magistrate under S. 81 in a case to which that section has no application can be set aside in revision by High Court. [P 161 C 1,2]

(b) *Punjab Municipal Act* (1911), *Ss.* 81 *and* 83—*Amount of toll or tax can be farmed out under S.* 83—*Amount due by farmer is not recoverable by procedure under S.* 81 *but by a law-suit.*

It is open to a Municipal Committee to farm out the collection of any octroi, toll or terminal tax for a period not exceeding one year. However the amount due by the farmer is not amount due under the Act. It is an amount due under a simple lease or contract and only recoverable by law-suit and not by the procedure laid down in S. 81. [P 161 C 2]

Jiwan Lal Kapur—for Petitioners.

Muhammad Alam—for Respondent.

Grounds.—The Municipal Committee, Chiniot, District Jhang, has provided a stand for the tumtums within the Municipal limits. Every tumtum owner has to pay a certain sum by way of rent or toll, obviously for the use of the aforesaid stand. The collection of this toll or rent was leased by the Municipal Committee to Bhagwan Das and Maya Das, petitioners, for the years 1923-24 in lieu of Rs. 904 payable in three equal instalments. An agreement by the lessees was duly executed which is on Sheet No. 24 of the Municipal Record No. 141.

It appears that only Rs. 226 have been paid by the lessees and Rs. 678 are alleged to be still due by them. The Municipal Committee passed a resolution on the 11th May 1926, resolving that the Secretary should apply to the District Magistrate, under S. 81 of the Punjab Municipal Act, 3 of 1911, for recovery of the arrears due by the lessees Maya Das and Bhagwan Das. In pursuance of this resolution the Secretary gave the necessary application. Sheikh Fazal Ilahi, Magistrate, First Class, Jhang, ordered issue of a warrant for realization of the amount on 17th May 1926, and some moveable property of the lessees has been attached.

This revision has been filed by the lessees and it has been contended on their behalf that the provisions of S. 81 of the Punjab Municipal Act 3 of 1911 were inapplicable to the facts of the present case. The Government Pleader on behalf of the Municipal Committee has strenuously opposed the petition.

The learned Government Pleader raised a preliminary point to the effect that no revision lay in view of the provisions of S. 439 (5), Criminal P. C., because under S. 84 of the Punjab Municipal Act, 3 of 1911, an appeal against the assessment or levy of any tax under the Act lay to the Deputy Commissioner or to such other officer as might be empowered by the Local Government in that behalf. This is obviously an untenable position. In the first instance it has been only enacted in S. 439 (5), Criminal P. C., that when under that Code an appeal lay and no appeal was brought, no proceedings by way of revision should be entertained at the instance of the party who could have appealed. Now, in the present case no appeal lay under the provisions of the Criminal P. C. Again, the farming out of the toll or the rent due to the Municipal Committee is not a tax. I overrule this contention.

On the merits I am of opinion that the action of the Magistrate was ultra vires. Under S. 83 of the Punjab Municipal Act, 3 of 1911, it is open to a Municipal Committee to farm out the collection of any octroi, toll or terminal tax for a period not exceeding one year. However, the amount due by the farmer is not amount due under the Act. It is an amount due under a simple lease or contract and only recoverable by law suit. The case reported in *Abdul Azeez Sahib* v. *Cuddapah Municipality* (1) is in point and the High Court is competent to set aside the order of the Magistrate [vide *Din Mhammad* v. *Municipal Committee, Amritsar* (2)].

For the above reasons I submit the records to the High Court with the recommendation that the order passed by the Magistrate on 17th May 1926, should be set aside under S. 439, Criminal P. C.

(1) [1903] 26 Mad. 475.
(2) [1903] 23 P.R. 1903 Cr.=130 P.L.R. 1903.

Order.—The view taken by the learned Sessions Judge is correct. I accept the petition and set aside the order of the Magistrate, dated 17th May 1926.

Petition accepted.

R.D.

A. I. R. 1927 Lahore 162

JAI LAL, J.

Mehr Din—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1102 of 1926, Decided on 15th December 1926, from the order of the 1st Cl. Mag. Lahore, D/- 9th October 1926.

(a) *Arms Act, Ss. 4 and 19—Primary Purpose and not use for which an implement is used is the test—Axe or knife does not become "arm" within S. 4 by merely using it for offending or defending on particular occasions.*

It is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of "arms" in S. 4. Implements of ordinary domestic use such as an axe or knife cannot fall within the definition of arms by the mere fact that they have been used as weapons of offence or defence on particular occasions. [P 163 C 1]

(b) *Penal Code, S. 353—"In consequence of" in S. 353 includes motive for assault.*

The expression "in consequence of" as used in S. 353 includes the motive which actuated the assault as well as the cause of such assault. [P 163 C 2]

(c) *Penal Code, S. 353—Assault.*

Assaults on public servants cannot be lightly treated. [P 163 C 2]

Prakash Chandra—for Appellant.

M. Sleem—for the Crown.

Judgment.—The appellant, Mehr Din, has been convicted by Mr. Phailbus, a Magistrate of the First Class, exercising enhanced powers under S. 30, Criminal P. C.. for offences under S. 19 of the Indian Arms Act and S. 353, Indian Penal Code, and has been sentenced to three years' rigorous imprisonment for the former and two years' rigorous imprisonment for the latter offence. He has further been ordered to execute a bond under S. 106, Criminal P. C., in the sum of Rs. 1,000 with one surety to keep the peace for the period of three years after the expiry of his sentence. The undisputed facts of the case are as follows :

Mehr Din approached Mr. Ogilvie, Deputy Commissioner of Lahore, several times with an oral prayer to be put in possession of some takia and was always informed that the matter was one for the civil Courts to decide and that the Deputy Commissioner could do nothing. He then presented an application in writing in the month of May 1926 to Mr. Ogilvie containing the same prayer but received a similar reply. On the 13th September 1926, at about 10 in the morning, when Mr. Ogilvie, accompanied by Mr. Crighton, Assistant Commissioner, and Bir Bal, his chauffeur, was about to enter the compound of his Court-house he noticed the appellant standing in the road blocking his way with an axe in his hand. Mr. Ogilvie was in his motor-car at the time and noticing that the accused assumed a threatening attitude swerved the car round and went on. Mehr Din, however, chased the car and, therefore, Mr. Ogilvie stopped it and the three occupants got out of it. Bir Bal seized the arm in which the accused held the axe while Mr. Crighton seized the other arm and Mr. Ogilvie twisted the axe out of his hand after a violent attempt on the part of Mehr Din to free himself. It also appears that during this struggle the appellant tried to put his left hand into the bosom of his shirt but was unable to do so. He was then handed over to the police and on a search being made a knife was found concealed in his tehmat. The appellant when examined by the Magistrate stated that he merely raised the hatchet to stop the car. He explained his conduct by stating as follows :

I could not get justice from the Court. I had asked the Deputy Commissioner to get me possession of the takia. He told me to put in an application. I put in an application and he has not heard my petition for five months. My Pir told me to either lie down under the car or stop it with a hatchet. The hatchet is my dastpanah. I stopped the car with my hatchet and he made me over to the Police.

After his arrest the appellant was sent to the Mental Hospital, Lahore, and kept under the observation of Captain T. H. Thomas, Superintendent of the Hospital. The opinion of this gentleman is that the appellant is on the border line of sanity and insanity, but that he knew that what he did was wrong and that his action was liable to punishment. The Doctor has given his

reasons for his opinion in his evidence given in Court.

On this appeal it is contended on behalf of the appellant that no offence under the Indian Arms Act has been committed by the appellant. This contention is supported by the learned Government Advocate. The learned Magistrate has held that hatchets and knives such as were found in possession of the appellant are found nearly in every household and that as they were carried by the accused not for a domestic purpose but for the purposes of offence or defence, therefore, they fell within the category of 'arms.' The expression "arms" is defined in S. 4 of the Indian Arms Act as follows :

'Arms' includes fire-arms, bayonets, swords, daggers, spears, spear-heads, and bows and arrows, also cannon and parts of arms, and machinery for manufacturing arms,

This definition is neither exhaustive nor of much use for the purposes of this case. I take it that the view of the Magistrate is that the axe and the knife found in possession of the appellant did not per se fall within the definition of of 'arms' but that they become 'arms' by virtue of the use which the appellant made of them. This in my opinion, is not a correct criterion for deciding the question involved. It is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of 'arms' and applying this test I have no hesitation in holding that the axe and the knife which have been found to be implements of ordinary domestic use cannot fall within the definition of arms by the mere fact that they have been used as weapons of offence or defence. If the reasoning of the learned Magistrate be accepted as correct an ordinary lathi may, by virtue of the use to which it is put, come within the definition of an arm. I hold, therefore, that the appellant could not be convicted for an offence under S. 19 (f) of the Indian Arms Act which makes punishable the possession or control of arms in contravention of the provisions of the Act.

With regard to the conviction under S. 353, Indian Penal Code, it is contended that Mr. Ogilvie, when he was assaulted was not discharging his duties as a public servant, but S. 353 covers the case of an assault committed on a public servant in consequence of anything done or attempted to be done by such person in the lawful discharge of his duties as such public servant. In the case before me Mr. Ogilvie was approached with a certain prayer by the appellant in his capacity as a public servant and as such he expressed his inability to accede to the prayer. It is admitted by the appellant that it was owing to Mr. Ogilvie not having heard his petition for five months and in order to make him do so that he stopped the car with his hatchet in the manner already described under the instructions of his Pir. It is quite clear that the act of the appellant was in consequence of Mr. Ogilvie's action in not granting his prayer. In my opinion, the expression " in consequence of " as used in S. 353, Indian Penal Code, includes the motive which actuated the assault. I hold, therefore, that the appellant has been rightly convicted under S. 353.

I, however, agree with the learned Government Advocate that the appellant's conduct does not deserve a severe punishment having regard to the evidence of Captain Thomas and the statement of the accused from which it would appear that originally it was not his intention to cause any injury to Mr. Ogilvie. Technically he was guilty of an assault but his object was merely to draw the attention of Mr. Ogilvie to his petition by his extrordinary conduct and thus to induce him to grant his application. At the same time assaults on public servants cannot be lightly treated and having regard to all the circumstances of the case I consider that a sentence of one year's rigorous imprisonment will meet the ends of justice. Counsel for the appellant then contended that an order under S. 106, Criminal P. C. could not be passed in the case and that in any case it was unnecessarily severe. With both these contentions I am unable to agree.

I accept this appeal, set aside the conviction and sentence under the Indian Arms Act and maintaining the conviction under S. 353, Indian Penal Code, I reduce the sentence to one year's rigorous imprisonment. The order under S. 106, Criminal P. C., is maintained.

R.D. *Sentence reduced.*

A. I. R. 1927 Lahore 164

JAI LAL, J.

Jawala Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Petition No. 157 of 1926, Decided on 18th December 1926, for transfer of a case.

Criminal P. C., S. 526—Transfer—Grounds for.

The mere fact that a District Magistrate has come to the conclusion that there is a prima facie case against the accused is no ground for transfer of the case from the district unless it can be shown that he is influencing its result directly or indirectly. [P 164, C 2]

Moti Sagar—for Petitioner.

Dev Raj Sawhney—for the Crown.

Order.—This is an application under S. 526 of the Criminal P. C., for transfer of a criminal case under Ss. 420 and 161 of the Indian Penal Code pending against the petitioner Jawala Singh in the Court of Lala Ram Nath Luthera, a Magistrate of the First Class in the Lyallpur district. The prayer is to transfer the case from Lyallpur to some other district on the ground that the District Magistrate of Lyallpur has already taken action against the petitioner which shows that he is prejudiced against him and that he is taking such an extraordinary interest in the case that the trying Magistrate will not be able to arrive at an independent conclusion, and, therefore, that the petitioner will not get a fair and impartial trial in the Lyallpur district.

It appears that Jawala Singh, who is a Sufaidposh and has officiated as a Zaildar, was a witness for the Court in a murder case, but the accused were acquitted by the Sessions Judge. It was considered by those in charge of the prosecution that the petitioner's evidence was partial to the accused and that this was due to his having been bribed. The District Magistrate had an enquiry made through the Tahsildar who reported in favour of the petitioner. A further enquiry was made through an Inspector of Police who considered that a case under Ss. 420 and 161 of the Indian Penal Code had been established against Jawala Singh. As a result of this report the petitioner's license under the Arms Act was confiscated and his name was removed by the District Magistrate from the list of assessors of the district. It further appears that the Deputy Commissioner has not only declined to recommend the petitioner for appointment as a Zaildar owing to a vacancy having occurred but has recommended his suspension as an Inamkhor and Lambardar.

After the criminal prosecution against the petitioner had been started the Deputy Commissioner sent a note to Lala Ram Nath, Magistrate, asking him to report to him when the accused was charged or discharged. This was on the 3rd July 1926 The enquiry was made in writing and the letter was placed on the record by the Magistrate. This note, according to the affidavit of Lala Des Raj, Pleader, was on the record on the 2nd September. It was found that the note had been removed. The Magistrate in his explanation admits that he received a note from the District Magistrate, but states that he returned it to him. The District Magistrate states that he has not been able to trace the note and that

presumably it is included in the papers of suspension of Jawala Singh from his inamkhori which papers have been sent to the Court of the Commissioner, Multan.

It will thus be observed that all that the petitioner has been able to establish is that the District Magistrate is satisfied that there is a prima facie case against him which must be enquired into by the criminal Court. The note that he sent to the trying Magistrate merely asked him to inform him when the accused is charged or discharged. This did not give any indication to the Mag strate that the District Magistrate desired the accused to be charged. All that the Magistrate noted on the request by the District Magistrate was that he would be informed. This also does not show that the trying Magistrate was in any way prejudiced against the petitioner. The mere fact that the District Magistrate had come to the conclusion that there was a prima facie case against the accused is no ground for transfer of the case from the district unless it can be shown that he is influencing its result directly or indirectly, and this has not been established. In my opinion, therefore, there is no ground for transfer of the case from the District of Lyallpur and I dismiss this petition.

R.D. *Petition dismissed.*

A. I. R. 1927 Lahore 165

BROADWAY, J.

Kanshi Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1623 of 1926, Decided on 1st February 1927, from the order of the S. J., Hoshiarpur, D/- 6th October 1926.

Penal Code, S. 338 — Contributory negligence must be considered in determining sentence.

While contributory negligence would not be a defence entitling the petitioner to an acquittal it might be a factor for consideration in determining the sentence. [P 165 C 2]

In the case of a person driving a motor car the car should always be kept in a state of control sufficient to enable the driver to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to the driver. [P 165 C 2]

Abdul Aziz—for Petitioner.

D. Ram Lal—for the Crown.

Brodway, J.—Kanshi Ram, motor-driver, is the petitioner in this and the connected petition for revision which arises out of two separate trials in which the learned Magistrate and the learned Sessions Judge have thought fit to write one judgment, a procedure which in the present case has, to a large extent, prejudiced Kanshi Ram.

The trials related to two different offences alleged to have been committed by Kanshi Ram on two different dates under S. 338 of the Indian Penal Code. In one he was charged with having driven a motor-car rashly and negligently on the 15th of May 1926, his rash and negligent driving resulting in grievous hurt being caused to one Gajjan.

In the other case he was charged with having driven his car rashly and negligently on the 11th of June 1926, his rash and negligent driving resulting in grievous hurt being caused to a little girl named Mt. Ananti, aged 12 years. The sentence imposed in each case was one year's rigorous imprisonment and a fine of Rs. 150, the imprisonment to run concurrently.

The learned counsel for the petitioner has accepted the findings arrived at by the Courts below and has confined himself to the question of sentence and in this connexion has referred me to the case of *Kamdar Ali Serang* v. *Emperor* (1) where it was remarked that

> in considering the question of degree, the question of contributory negligence has also to be taken into account not as a defence to the indictment but for the purposes of determining causation and fixing a measure of the liability of the accused.

In cases of this nature it seems to me that while contributory negligence would not be a defence entitling the petitioner to an acquittal it might be a factor for consideration in determining the sentence.

Taking the case of Gajjan first it seems to me clear that the sentence upon him would not have been passed but for the fact that the Magistrate and the Sessions Judge thought fit to deal with the two cases together. It is in evidence that as the petitioner's car approached Gajjan and his companions, the petitioner sounded his horn which gave warning to Gajjan's companions and caused them to get out of the way. It has not been shown that the petitioner was aware of Gajjan's deafness, and as remarked in VI M. H. C. Appendix XXXI "a driver must necessarily assume an ordinary state of faculties." At the same time it seems to me that in the case of a person driving a motor-car the car should always be kept in a state of control sufficient to enable the driver to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to the driver. In this case I think a punishment of fine would have met the situation and I therefore set aside the sentence of imprisonment in the case relating to Gajjan but retain the fine.

The second case is, to my mind, of a more serious nature. It appears that there were two or three girls playing in the middle of the road when the petitioner approached in the car. According to the petitioner, he was not responsible for the injury to Mt. Ananti and his plea throughout has been that he never knocked her down. It has been found that he was responsible for the injury to the girl and I think that his conduct deserves more serious punishment. It seems to me that the petitioner must have been driving very recklessly to have caused the accident to Mt. Ananti without being able to pull up till he had gone

(1) [1911] 15 C.W.N. 835=11 I.C. 130=14 Cr. L.J. 656.

a distance of 700 karams. I would therefore dismiss the petition in this case.

The result is that the petitioner's sentence in the case relating to the injuries caused to Mt. Ananti is maintained in its entirety while the sentence of imprisonment passed in the case relating to the injuries caused to Gajjan is set aside, the fine only being maintained.

G.B. *Petition partly allowed.*

A. I. R. 1927 Lahore 166

COLDSTREAM, J.

Badri Das—Plaintiff—Appellant.

v.

Sundar Das and *others*—Defendants—Respondents.

Second Appeal No. 465 of 1926, Decided on 27th October 1926, from a decree of the Dist. J., Jullundar, D/- 10th December 1925.

Transfer of Property Act, S. 6—Property bequeathed to H and after her death her son to get it—Son gets property as vested remainder and can transmit it—Will—Construction.

Where a will provided as follows: "C my grandson has no right to the property concerned in the will. He is in possession of valuable property in Jullundur, but to his mother Mt. H are given a house and a shop that she having remained in possession of them during her life, after her they are to go to C."

Held: that C acquired by virtue of the will a vested estate in the property along with his mother, whose estate was in possession while his was in remainder. Such an estate is transmissible and presumably transferable: 45 *Cal.* 590 (*P. C.*); *A. I. R.* 1923 *P. C.* 189 and *A. I. R.* 1925 *Lah.* 341, *Dist.* 33 *All.* 558 and 38 *Cal.* 468 (*P. C.*), *Rel on.* [P 166 C 1 & 2, P 168 C 1]

Faqir Chand—for Appellant.

Badri Das—for Respondents.

Judgment.—In August 1891, one Mehr Chand who had two wives made a Will dividing his property between his heirs by both wives. By one wife Mt. Kahan Devi he had two ons, one of whom Harkishan Das was married to Mt. Hukam Devi. Harkishan Das had a son Chhaju Mal, who had been adopted into his mother's family. As regards the property bequeathed to Chhajju Mal, Mehr Chand's Will ran as follows:

For Chhaju Mal my grandson I have secured his maternal grandfather's property by suit because he was his adopted son. Therefore, he has no right to the property concerned in the Will. He is in possession of valuable property in Jullundur, but to his mother Mt. Hukam Devi are given a house and a shop that she having remained in possession of them during her life after her they are to go to Chhaju Mal.

The shop here mentioned is the property is dispute in this case.

On the 10th August 1895, Chhajju Mal made a Will bequeathing all his proprietary rights to his wife Maya Devi and his mother Hukam Devi including his rights in the property in dispute.

After Chhaju Mal's death Mt. Maya Devi having died Mt. Hukam Devi on the 16th November, 1921, sold the property to strangers.

On the 1st December 1923, Badri Das, the grandson of Mehr Chand by Mt. Ganga Devi, instituted the suit from which this appeal arises against Mt. Hukam Devi and her alienees for a declaration that the alienation by Mt. Hukam Devi would not affect his reversionary rights after Mt. Hukam Devi's death.

The suit was contested on many grounds by the alienees who refused to acknowledge Mehr Chand's and Chhajju Mal's Wills and pleaded that the alienation in dispute was effected for consideration and necessity. It was also pleaded that the plaintiff had no locus standi in the presence of Chhajju Mal's daughter and daughter's son and was estopped by his previous conduct, The trying Court found that consideration for the sale had passed but that necessity for it was not proved, that plaintiff had locus standi to sue and was not estopped, that Chhajju Mal had no power to alienate the property to his mother, and that the latter had merely a life-interest in the property and acquired no valid title by Chhajju Mal's empowering her to alienate in the presence of the reversioners. He decreed the suit. The alienees appealed and the District Judge of Jullundur finding that Chhajju Mal had acquired an absolute title on the death of Mehr Chand under the latter's Will and that his conveyance was legally valid, has accepted the appeal and dismissed the suit.

Against this judgment Badri Das has filed the present second appeal. The questions to be decided are what was the nature of the interest acquired by Chhajju Mal by virtue of the Will made by Mehr Chand and was this interest one which Chhajju Mal was competent in law to transfer. The making of the Will

by Mehr Chand and Chhajju Mal and the contents of the Wills are no longer in dispute. It is admitted that the parties follow the Hindu Law.

The material words in Mehr Chand's Will are as follows in the vernacular :

Chhajju Mal navira ko jaidad nankia wakia Jullundur mein ne mukadamma kar ke le di hui hai. Woh unka mutabana pisar ho chuka tha. Lihaza usko is jaidad mari men koi hak nahin. Woh Jullundur ki jaidad maliyat kasir par kabiz hai, lekin uski walida kao ek makan wah dokan dia jata hai keh woh ba haiyat ikhud qabiz rahkar badash Chhajju Mal ko mile.

Mr. Faqir Chand contends that the intention evident from these words is that Chhajju Mal was not to have any right in the property, which was to be given wholly to his mother with the ordinary reversion under Hindu Law to him after her demise. This reversionary right he argues, is no more than a hope of succession and gives him no title whatever in the property until it vests in him after his mother's death. Such a spes successionis is not a concrete right capable of transfer but is one opposed to the principle recognized in S. 6 of the Transfer of Property Act. He cites the Privy Council rulings *Amrit Narayan Singh* v. *Gaya Singh* (1) and *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2) and the Division Bench judgment of this Court *Gurbhaj* v. *Lachman* (3).

In reply Mr. Badri Das urges that the Will clearly bequeaths the property to Chhajju Mal and his mother, the latter's interest operating merely to postpone possession and enjoyment by Chhajju Mal. Such an interest he contends is transmissible. He refers first to Mehr Chand's Will itself in support of his contention as to its intention. The passage describing the bequests from which quotation has been made above ends with the words " *Illa jo hissas tajviz kardiye gai hain woh aj se mal wah wirsa un warsan ka tassawwar hoga*" (but the shares arranged shall be considered from today as the property and inheritance of those heirs). Then follows a detailed description of the property assigned to each legatee, the name of the legatee being written before the list of the property bequeathed to him. The property in dispute is described under the heading " Chhajju Mal and his mother."

As regards the contention that Chhajju Mal's right was a mere expectancy not to be assigned or transmitted he urges that this is not the case of a reversionary interest arising under the Hindu Law out of relationship and the rulings cited for the appellant are irrelevant. The right acquired by Chhajju Mal he argues was that of a testamentary residuary, vesting in him as a concrete right immediately on the death of the testator and capable of alienation as an existing title and not a mere expectancy forbidden by the legal principle recognized in S. 6 of the Transfer of Property Act. He relies on the authority of *Manmatha Nath Biswas* v. *Rohilli Moni Dasi* (4) *Bilaso* v. *Munni Lal* (5) and *Bhagabuti Barmanya* v. *Kali Charan Singh* (6) and cites Jarman on Wills, Vol. II, p. 1352.

The contention of Mr. Badri Das appears to me to have force. What Mehr Chand said in his Will was not that Chhajju Mal would have no right to any of his property and, therefore, he gave some of it to the latter's mother only, but that, although Chhajju Mal was not in equity entitled to succeed to his property nevertheless he gave some to him, but in such a way as to postpone Chhajju Mal's enjoyment of it during his mother's lifetime. The rulings cited for the appellant do not relate to cases of testamentary succession when a right of inheritance has been created by Will. In *Amrit Narayan Singh* v. *Gaya Singh* (1) the Lords of the Privy Council were dealing with the case of reversionary rights under the Hindu Law in an estate held by a widow in succession to her husband and in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2) laid down that a contract by a Hindu to sell immovable property to which it was possible that he might possibly as a reversioner succeed was void as being opposed to the principle embodied in S. 6 of the Transfer of Property Act. In *Gurbhaj* v. *Lachhman* (3) this Court relied upon the principle established by the Privy Council that the right of a reversioner under Hindu Law to succeed to an estate in

(1) [1918] 45 Cal. 590=44 I. C. 408=45 I. A. 85 (P. C.)
(2) A. I. R. 1923 P. C. 189=50 Cal. 929=50 I. A. 239.
(3) A. I. R. 1925 Lah. 341=6 Lah. 87.
(4) [1905] 27 All. 406=2 A. L. J. 84=(1905) A. W. N. 6.
(5) [1911] 33 All. 558=11 I. C. 516= 8 A.L.J. 577.
(6) [1911] 38 Cal. 468=10 I. C. 641=38 I. A. 541 (P, C.)

possession of a widow representing her husband was inalienable. But, here we have no widow's estate. Hukam Devi during whose life Chhajju Mal's enjoyment of the estate was postponed was not in possession qua a Hindu widow succeeding to her husband's estate as the surviving half of her husband. She was a legatee along with Chhajju Mal whose interest was not restricted to any contingency but created as a particular estate which vested in him at the instant of the death of the testator. It was Hukam Devi's tenure that was limited to the period of life, Chhajju Mal's title was absolute. The principle that a testamentary reversioner whose rights are not restricted to a contingency has an existing right vesting in him on the death of the testator which has been applied in Indian Cases for example by the Privy Council ruling in *Bhagabuti Burmanya* v. *Kali Charan Singh* (6) is statutorily enforced in respect of Hindu Wills in Madras and Bombay by S. 119 of the Indian Succession Act, 1925.

It is not apparent from the Will that the intention was that Chhajju Mal's right in the legacy was not to vest in him on the testator's death. I must, therefore, hold that Chhajju Mal acquired by virtue of Mehr Chand's Will a vested estate in the property along with his mother, whose estate was in possession while his was in remainder. Such an estate is transmissible [see *Billaso* v. *Munni Lal* (5)] and presumably transferable. It follows that this appeal fails and I dismiss it with costs accordingly.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 168

CAMPBELL, J.

Kirpal Singh—Petitioner.

v.

Mt. Santi—Respondent.

Criminal Revision Petition No. 1494 of 1926, Decided on 8th January 1927. against an order of the S. J,. Ferozepore, D/- 23rd July 1926.

Criminal P. C., S. 488 (3)—*Husband having another wife is not a just ground for refusal to live with him.*

The ground that the husband has another wife and children by her is not just for refusal to live with him within S. 488 sub-Cl. (3).

[P 169 C 1]

Jai Gopal Sethi—for Petitioner.

Man Singh—for Respondent.

Judgment—This is a petition by Kirpal Singh for revision of an order passed against him under S. 488 of the Criminal P. C. The woman in question was Mt. Santi, and she alleged that she was the karewa wife of the petitioner by virtue of a custom prevalent in the Ferozepore district according to which when a bridegroom dies between the ceremony of marriage and the ceremony of muklawa, his brother can re-place him in the muklawa, and thus become the woman's husband. Whether this condition had been fulfilled in the present case was a matter of controversy and both sides led oral evidence.

The Magistrate decided in favour of Mt. Santi on the strength of a copy put into Court of a statement alleged to have been made by the petitioner as an accused person in 1917, when he was being tried for murder. The person who made this statement, is recorded as having been asked whether he had two wives, and to have replied that he had one wife by marriage and another, his brother's widow, by karewa. If the statement was made by Kirpal Singh, the petitioner, there is no evidence given to connect the brother's widow referred to with the petitioner Mt. Santi, and the statement was never put to Kirpal Singh by the Magistrate in order that he might say, firstly, whether he was the person who made it, and, secondly, whether he had referred to the petitioner or to some other woman. In the circumstances, the copy of this statement was of no value as a piece of evidence, and whether Mt. Santi is or was the wife of Kirpal Singh is a matter which has been left in a state of considerable doubt.

If there was a marriage, Mt. Santi has stated that she was turned out by Kirpal Singh 8 or 9 years ago and since then has been living in her mother's house. The only action in that interval which she says was taken by her was that, on some occasion not specified she brought a panchayat to Kirpal Singh, who refused to accede to their request that he should maintain Mt. Santi. On being questioned whether she would now go to Kirpal Singh's house, Mt. Santi stated definitely that she would not under any circumstances even if Kirpal Singh gave

her a separate house. Her reason was that Kirpal Singh had another wife and children by her.

In my opinion, the statement of Mt. Santi did not disclose just grounds for refusal to live with Kirpal Singh, and under the circumstance should not have been made. I accept the petition and set aside the order.

This order wlll dispose of the connected case reported by the District Magistrate in which he recommends that the maintenance be increased. This report was made on a petition for revision by Mt. Santi, which is dismissed.

R.D. *Order set aside.*

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* A. I. R. 1927 Lahore 169

JAI LAL, J.

Fateh Khan—Defendant—Petitioner.

v.

Daim and *others*—Plaintiffs and Defendant—Respondents.

Civil Misc. Petition No. 491 of 1926, Decided on 30th November 1926, for stay of execution pending the decision of Civil Appeal No. 1817 of 1926.

* *Civil P. C., O. 41, R. 5 (3)—Decree for pre-emption—Appeal by vendee—Vendee's possession should not be disturbed till final decision of the appeal.*

In cases relating to immovable property where the decree is under appeal, the disturbance of *status quo ante* does result in substantial loss to the party in possession. This, however, is not a universal rule and all the surrounding circumstances have to be borne in mind.

In a suit for pre-emption the defendant vendee is in possession of the property under a perfectly valid title obtained for consideration from the original owner. Such possession should not be disturbed till the plaintiff has finally established his title and the vendee has exhausted all his remedies for retaining such possession.

[P 170 C 1]

Badri Das—for Petitioner.

Nanak Chand—for Respondent.

Order.—The proceedings arise out of a suit for pre-emption which was decreed. The vendee-defendant has filed a first appeal in this Court which has been admitted by his Lordship the Chief Justice for hearing to a Division Bench. The appellant has now applied that pending the disposal of the appeal the execution of the decree be stayed, as otherwise he would suffer great injury. He alleges that his crops are standing on the land and he would suffer irreparable loss if possession is given to the decree-holder. In support of his application the learned counsel cites. *Gokal Chand* v. *Samual Das* (1). Counsel for the respondents, on the other hand, strenuously opposes the application and relies upon *Dhera Mal* v. *Haidar Shah* (2) and *Ranjendra Singh* v. *Umrao Singh* (3). In the case cited by the counsel for the petitioner it was held that there is a recognized practice of this Court on an appeal having been preferred to stay execution of decrees relating to immovable property. In the cases cited on behalf of the respondents it was held that there was no such uniform practice but that each case has to be decided on its own merits and that no execution of the decree can be stayed unless the conditions laid down in O. 41, R. 5 (3) of the Civil Procedure Code have been satisfied. That rule provides that an appeal shall not operate as a stay of proceedings in execution except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate Court may for sufficient cause, order stay of execution of such decree and further that no order for stay of execution shall be made unless the Court is satisfied, inter alia, that substantial loss may result to the party applying for stay of execution unless the order is made. R. 6 (2) of the same order, however, provides that where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. It is, therefore, to be observed that so far as the sales of immovable property are concerned, they must be stayed irrespective of proof of substantial loss mentioned in the previous rule.

There is, however, no express provision of the law relating to stay of execution when the decree relates to possession of immovable property. The matter in

(1) [1920] 1 Lah. 348=2 I.J.J 32=79 P.L.R 1920=55 I.C. 933=12 P.W.R. 1920.
(2) A.I.R. 1921 Lah. 24=2 Lah. 61.
(3) [1921] 61 I.C. 827.

such cases has, it appears, to be decided with reference to the provisions of R. 5 (3). At the same time ordinarily in cases relating to immoveable property here the decree is under appeal the disturbance of *status quo ante* does result in substantial loss to the party in possession. This, however, is not a universal rule and all the surrounding circumstances have to be borne in mind.

In a suit for pre-emption the defendant vendee is in possession of the property under a perfectly valid title obtained for consideration from the original owner. Such possession should not in my opinion be disturbed till the plaintiff has finally established his title and the vendee has exhausted all his remedies for retaining such possession. In the case before me the vendee alleges that his crops are standing on the land in suit and agrees that the respondents be allowed to take back the money deposited by him in Court pending the decision of the appeal so that there may be no loss of interest and undertakes not to raise any objection on the score of their not having complied with the terms of the decree on that account. This offer by the petitioner will obviate any difficulty that may otherwise arise on the ground that the plaintiffs pre-emptors have not complied with the decree of the Court by depositing the amount in Court or by withdrawing the same.

Having regard to all the circumstances I think that this is a fit case in which an order for stay of execution should be made and I order accordingly subject to the condition that the petitioner will within a month from today give security to the satisfaction of the executing Court that he will obey and satisfy any decree that may be passed by this Court on appeal. The decree-holders may, if they choose, take back the money deposited by them in Court. There will be no order as to the costs of this petition.

G.B. *Execution stayed.*

A. I. R. 1927 Lahore 170

SHADI LAL, C. J.

Hira Mal—Plaintiff—Petitioner.

v.

Abdul Aziz and *another*—Defendants—Respondents.

Civil Revision Petition No. 672 of 1926, Decided on 7th December 1926, from the order of the 3rd Class Sub-J., Hoshiarpore, D/- 10th July 1925.

Civil P. C., O. 9, R. 2—Failure of plaintiff to furnish correct addresses of defendants or to accompany process-server does not justify dismissal under R. 2.

Dismissal of a suit for failure of the plaintiff to furnish the correct addresses of the defendants or to accompany the process-server to have the summonses served upon the defendants, is not justified under R. 2 of O. 9. [P 170, C 2]

Devi Dayal—for Petitioner.

Judgment.—On the 29th June 1925 the Subordinate Judge dismissed the plaintiff's suit under O. 9, R. 2, on the ground that he had neither furnished the correct addresses of the defendants, nor gone with the process-server to have the summonses served on them. On the 9th of July the plaintiff made an application for setting aside the dismissal, and stated that his failure to accompany the process-server was due to a misunderstanding. The Court, thereupon, passed an order on the 10th July rejecting the application summarily without giving the plaintiff as opportunity to substantiate his allegation.

Now, O, 9, R. 2, provides that where on the day fixed for the appearance of the defendant it is found that the summons has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed. This rule is inapplicable to the present case, for it is not alleged that the plaintiff was ever required to pay the Court-fee or postal charges to defray the cost of serving summonses on the defendants.

Accordingly, I accept the application for revision and setting aside the order of the lower Court, direct it to proceed with the suit in accordance with law. This order shall not affect Abdul Aziz, the suit having been dismissed as against him.

R.D. *Order set aside.*

A. I. R. 1927 Lahore 171

COLDSTREAM, J.

Faqir Mohammad and *another*—Defendants—Appellants.

v.

Ramzan and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2636 of 1925, Decided on 23rd December 1926, from an order of the Dist. J., Mianwali D/- 8th May 1925.

(a) Evidence Act, S. 115—Admissions in a deed estop a party in the absence of a strong proof to the contrary.

The admission by a mortgagor in a mortgage deed that the property comprised in the deed belongs to him, in the absence of a strong proof on his side that such property was not really his when he mortgaged it, concludes the matter against him. [P 171, C 2]

(b) Limitation Act, Art. 144—Suit for possession of property alleged to belong to a defendant adversely held by a co-defendant — Suit was governed by Art. 144—Persons alleging loss of title must prove adverse possession—Burden of proof.

Where a suit for possession of the mortgaged property by the mortgagee resolves itself, so far as limitation was concerned, into an assertion on the one side, that the mortgagor was the owner of the property and, on the other, the pleas on the part of co-defendants to the suit, alleging title to the mortgaged property by adverse possession, that the property never belonged to the mortgagor but that if title was found to be originally with the mortgagor it had been lost by adverse possession of the co-defendants.

Held: that Art. 144 was applicable to the case and that the onus of proving a prescriptive title against the mortgagor was rightly placed on the co-defendants, alleging such title. [P 172, C 1]

Har Gopal for *Sahib Ram Laul*—for Appellants.

M. S. Bhagat—for Respondents.

Judgment.— On 13th March 1912 one Ibrahim mortgaged a shop to Ramzan for Rs. 200 out of which a sum of Rs. 160 was to be paid to a prior mortgagee, Beli Ram, from whom Ramzan was to take possession after Beli Ram's tenure under his mortgage expired, which was to happen in two years. On the 6th July 1919, Ibrahim borrowed Rs. 20 on the security of the same shop from Beli Ram. Ramzan sued against Beli Ram for redemption of the mortgage in the latter's favour, but failed because the Courts found him unable to prove the mortgage by Ibrahim to Beli Ram. Ramzan then instituted the suit out of which this appeal arises for possession by virtue of the mortgages dated the 13th March 1919, and 6th July 1919. Beli Ram having died his son Pashori Lal was joined as his representative. Faqir Mohammad and Mehar Mohammad were also joined as they claimed to be owners of the mortgaged house in succession to Nur Ahmed, half brother of Ibrahim.

Ibrahim admitted the transactions of March and July 1919, but pleaded that the mortgages were without consideration and that he was not owner of the mortgaged property and was not entitled to mortgage them. Beli Ram's son Pashori Lal and Ram Labhya (the son of another previous mortgagee) pleaded that the property had been mortgaged to them by Nur Mohammad, while Faqir Mohammad and Mehr Mohammad, Nur Mohammad's sons, claimed that they were the owners, asserting that Ibrahim was not the son of Ghazi from whom as Ghazi's son, Ibrahim claimed to have inherited it. A plea was also raised under O. 2, R. 2 of the Civil P. C., and it was further pleaded that the suit was barred by limitation as Ibrahim had not been in possession of the property within the last twelve years.

The first Court dismissed the plea under O. 2, R. 2 of the Civil P. C. and held that the shop, the mortgaged property, belonged to Ibrahim, who was Ghazi's son, that it had been validly mortgaged by him to Ramzan and that the suit was not barred by limitation. It decreed possession on payment of Rs. 160 to Ibrahim. Faqir Mohammad and Mehr Mohammad appealed to the District Judge of Mianwali who agreed with the findings of the first Court and dismissed the appeal.

Against this dismissal Faqir Mohammad and Mehr Mohammad have preferred the present second appeal, which has been argued before me by Mr. Hargopal. Mr. Hargopal's first contention is that the finding on the question of title is not based upon any evidence. I find, however, that this finding is amply supported by the presumptions raised by the evidence on the record. So far as Ibrahim was concerned his admission in the mortgage-deed, in the absence of strong proof on his side that the house was not really his when he mortgaged it, concluded the matter

against him. The finding as to title I consider final. The whole circumstances justify the learned District Judge's conclusion that the defence is an effort by Ibrahim in collusion with the sons of Nur Mohammad who was his half brother to cheat Ramzan. The only other argument advanced by Mr. Hargopal is that the onus of proving that the suit was barred by limitation ought not to have been put on the defendant and that the plaintiff ought to have been called upon to prove that Ibrahim had been in possession of the property within twelve years of the suit. On turning to the first Court's record I find that the issue on the point of limitation was in the following curious form:

Is the suit of the plaintiff time-barred by reason of the fact that Ibrahim has never been in possession of the shop within twelve years and was the title of Ibrahim lost by this fact and could, therefore, not mortgage it?

Neither counsel has, however, referred to the actual form of the issue but they have argued the point as if the issue had been simply

Have the defendants proved adverse possession of any party for twelve years against Ibrahim so as to extinguish Ibrahim's title?

It appears also in spite of certain remarks by the learned District Judge about possession and dispossession, that the parties understood the issue to be as here stated and that the defendants' endeavour throughout the proceedings was to prove adverse possession on the part of Nur Mohammad.

In my opinion the onus of proving a prescriptive title against Ibrahim was rightly placed on the defendants. The plaint did not allege that Ibrahim had been dispossessed. The suit resolved itself, so far as limitation was concerned, into an assertion on the side that Ibrahim was owner and, on the other, the pleas that the shop was never Ibrahim's but that if title was found to be originally with Ibrahim it had been lost by adverse possession of another party. The article of the Limitation Act applicable was Art. 144. It was for the persons alleging loss of title to prove the adverse possession and I agree with the lower Court's finding of fact that such adverse possession has not been proved. Mr. Hargopal has admitted in argument that if Ibrahim's title was proved and the onus was rightly placed, his appeal must fail. I find that Ramzan proved that the property belonged to Ibrahim when he mortgaged it and that there is no proof of possession by any person such as would, under the law, extinguish this title I accordingly dismiss this appeal with costs.

J.V. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 172

SHADI LAL, C. J., AND BROADWAY, J.

Nidhan Singh —Plaintiff—Appellant.

v.

E. D. Sasoon and *Co.*— Defendants—Respondents.

Letters Patent Appeal No. 251 of 1925, Decided on 27th January 1927, from the decree of Zafar Ali, J., D/- 24th July 1925, in Civil Appeal No. 932 of 1925.

* *Limitation Act, Art.* 91 — *Suit to set aside a decree incorporating an award* — *Art.* 91 *applies.*

An award is an instrument within the meaning of Art. 91 and the plaintiff cannot impeach the decree incorporating the award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. [P 172, C 2]

Deo Raj Sawhney—for Appellant.

J. M. Mackay—for Respondent.

Shadi Lal, C. J.—This was a suit to set aside an award and the decree based thereon on the ground of fraud. The award was made on the 26th March 1918, and the decree which followed upon it was passed on the 5th June 1918. The suit was, however, not instituted until the 1st of June 1921.

The learned Judge from whose judgment this appeal under Cl. 10 of the Letters Patent has been preferred, holds that the suit was barred by time, and after hearing arguments on behalf of the appellant I concur in the conclusion reached by him.

It is to be observed that an award is an instrument within the meaning of Art. 91 of Schedule 1 to the Indian Limitation Act, and the plaintiff cannot impeach the decree incorporating the award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. It is undeniable that the suit to set aside the award is barred by time, but

Mr. Sawhney for the appellant contends that the case is governed by Art. 95, which provides a period of three years for an action to set aside a decree obtained by fraud, and the terminus a quo is the date on which the fraud becomes known to the plaintiff. It is, however, clear that the plaintiff became aware of the fraud on, or before the 28th May 1918. There can, therefore, be no doubt that the suit is barred by limitation even if Art. 95 be held to be applicable to it.

For the aforesaid reasons I confirm the judgment of the single Judge and dismiss the appeal with costs.

Broadway, J.—I concur.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 173

JAI LAL, J.

Amar Nath—Accused—Petitioner.

v.

Emperor—Respondent.

Criminal Revision Petition No. 1519 of 1926, Decided on 13th December 1926, from the order of the S. J., Multan, D/- 31st August 1926.

Criminal P. C., S. 476—Prosecution under, on evidence of witnesses whose evidence is not tested —Accused is entitled to have notice.

Where the prosecution under S. 476 has been ordered on evidence by witnesses whom the accused had no opportunity to cross-examine and whose evidence has thus not been tested, the accused is entitled to a notice before the order under S. 476 is passed, so that he will have an opportunity of showing cause why a complaint should not be made against him : *A. I. R.* 1923 *Mad.* 228, *Foll.* [P. 174, C. 1, 2]

Mukand Lal Puri—for Petitioner.

Dev Raj Sawhney for *Govt. Advocate*—for the Crown.

Judgment.—These are two petitions before me arising from the same proceeding : one is under S. 439 of the Criminal P. C. for revision of the order of the District Magistrate of Multan under S. 476 of the Criminal P. C. making a complaint against the petitioner and the other under S. 526 of the Criminal P. C. for transfer of the criminal case started against the petitioner in pursuance of the complaint made by the District Magistrate from the District of Multan to some other district. In view of my decision on the first of these petitions it will not be necessary to pass any orders on the second. The facts of the case appear to be as follows :

On the 30th August 1926, Sidhu Ram and Manghu Ram, father and son, filed a complaint in the Court of the District Magistrate of Multan, under S. 323/504 of the Indian Penal Code, against Dr. Gian Singh, Medical Officer of Health, Multan. It was alleged that about 8 in the morning the accused beat Manghu Ram complainant and abused his father Sidhu Ram. A prayer was added that owing to the official position of the accused the case be not sent to any of the Honorary Magistrates but to a stipendiary Magistrate. A certificate purporting to be signed by Dr. Amar Nath Kapur, a private Medical Practitionetr of Multan, was attached with the complaint. This certificate mentioned the fact of the doctor having examined Manghu Ram and having found bruises on his person. Both the complainants went to the house of the District Magistrate and presented the complaint there. The latter recorded the statement of Sidhu Ram, sent the complaint for euquiry under S. 202, Criminal P. C., to the President of the Municipal Committee and, failing him, to the Vice-President.

The 24th of August 1926, was fixed for the report. Immediately afterwards it appears that the District Magistrate examined the person of Manghu Ram and failed to notice any bruises. He, therefore, called Dr. Mehta and had the boy examined by him. The doctor also failed to notice any bruises and made a statement to that effect which was recorded. Thereupon the learned District Magistrate dismissed the complaint and recorded an order directing that a complaint under S. 193 of the Indian Penal Code be made against Dr. Amar Nath Kapur. A complaint was accordingly filed by the Public Prosecutor in the Court of Mr. Meehan, a Magistrate of the First Class.

From the explanation of the District Magistrate it appears that when Dr. Mehta examined Manghu Ram the petitioner was also present. There is no mention of this fact on the judicial record and it does not appear that the petitioner was asked to explain the absence of the injuries on the person of Manghu Ram, or the circumstances

under which he gave the certificate. While I unhesitatingly believe that the petitioner was called by the District Magistrate to be present at the time of the examination of the person of Manghu Ram by Dr. Mehta, I have no doubt that the learned Magistrate did not call upon the petitioner to show cause why action should not be taken against him under S. 476 of the Criminal P. C. The petitioner was no party to the complaint and Manghu Ram did not prove the certificate in his statement. He was not given an opportunity to cross-examine any of of the witnesses on whose statement it was decided to prosecute him. He was not even told that action was being taken against him under S. 476, so that he may volunteer any explanation. The complaint was filed in the Court of Mr. Meehan on the same day who took the very extraordinary step of sending immediate summons to the accused through his orderly, and not through the ordinary process serving staff, calling upon him immediately to appear in his Court to answer a charge under S. 193.

I confess that in spite of the explanation of the Magistrate I have not been able to discover any good reason for this extraordinary haste in prosecuting the petitioner. In any case the following remarks made by Wallace, J., *In re P. Venkatasubbiah* (1) fully apply to this case :

> The final and in my view, most important point taken by petitioner is that he was given no notice of the lower Court's intention to take action against him. Now, such notice is not as a matter of law necessary but, in a case like the present, where the prosecution has been ordered on evidence by witnesses whom petitioner had no opportunity to cross-examine and whose evidence has thus not been tested, I am of opinion that it was a materially irregular exercise of the lower Court's jurisdiction to direct such a serious step as a criminal prosecution in this matter without giving petitioner any chance to know and meet the case against him. The case is similar to that reported in *In re Kolli Appiad* (2) in which the order under S. 476 was set aside.

The present case is much stronger for the exercise of the revisional powers of this Court. The learned counsel for the petitioner contended that if the case had been a false one and the certificate filed with the complaint also false, it is very unlikely that the complainants would have gone to the house of the District Magistrate with a prayer that the case be sent to a stipendiary Magistrate. He also produced a number of certificates before me in which an opinion was expressed by medical men, that bruises such as were alleged to be on the person of Manghu Ram could disappear in four hours' time. It was at half-past twelve when the District Magistrate received the complaint and it must have been some time after that that he and Dr. Mehta examined the person of Manghu Ram. I, however, decline to accept these certificates at the present stage. I refrain from expressing any opinion on the other objections raised by counsel for the petitioner to the order of the District Magistrate. I hold that the petitioner was entitled under the peculiar circumstances of this case to a notice before the order complained against was passed. Section 476, Criminal P. C., contemplates a preliminary enquiry where one is considered necessary. This was a fit case for such an enquiry and the learned District Magistrate should have made one in the presence of the petitioner before deciding to make a complaint against him.

I set aside the order of the District Magistrate and direct him to re-hear the matter of passing an order under S. 476 of the Criminal P. C., after giving the petitioner an opportunity of showing cause why a complaint should not be made against him.

In view of this order I dismiss the application for transfer of the case from the District of Multan.

R.D. *Order set aside.*

(1) A. I. R. 1923 Mad. 228.
(2) [1912] M. W. N. 400=13 I. C. 832=11 M. L. T. 191.

A. I. R. 1927 Lahore 174

BROADWAY AND ZAFAR ALI, JJ.

Bhondu Mal—Plaintiff—Appellant.

v.

Mohammed Ahmad-Mushtaq Ahmad—Defendants—Respondents.

First Appeal No. 2764 of 1925, Decided on 11th November 1926, from the decree of the Dist. J., Delhi, D/- 27th July 1925.

(a) *Jurisdiction to try under ordinary procedure—Applying special procedure is no ground for dismissal—Civil P. C., O. 7, R. 10—Civil P. C., O. 41, R. 23.*

Where a Judge has jurisdiction to try a case under the ordinary procedure, the mere fact that

he tries it under a special procedure is no ground for dismissing that suit. The proper procedure is a remand. [P. 175, C. 2]

(b) *Civil P. C., O. 37, R. 1 (e)—Addition of Cl. (e) by Lahore High Court is intra vires—Rule merely empowers Courts to follow a special procedure provided for expeditious disposal of certain suits.*

The addition of Cl. (e) to O. 37, R. 1 by the Lahore High Court in the exercise of the powers conferred by S. 122, Civil P. C., is not ultra vires. The making of this rule does not confer on any Court any pecuniary or territorial jurisdiction, but merely empowers them to follow a certain definite procedure for the expeditious disposal of suits. [P. 176, C. 1]

Shamair Chand—for Appellant.

Broadway, J.—This and the connected appeal, No. 2765 of 1925, have arisen out of the two suits instituted by by Bhondu Mal against Mohammad Ahmad, Mushtaq Ahamad, both parties being of Delhi. The first suit was for a sum of Rs. 600-13-6 and the second suit for Rs. 1,002-13-6. They were both based on hundis and both the suits were instituted in the Court of the Senior Sub-Judge at Delhi whose powers are unlimited as to his pecuniary jurisdiction. The defendants, while admitting the execution of the hundis, pleaded an oral agrement to the effect that the parties had arranged that on the due dates only a certain portion of the moneys would be paid up, fresh hundis being executed for the balances remaining. The learned Senior Sub-Judge acting under Notification No. 225-G dated the 5th July 1923, by virtue of which Cl. (e) was added to O. 37, R. 1, proposed to deal with both these cases under O. 37, which prescribes a summary procedure for the disposal of suits of this nature. Objection to this was taken by the defendants in both cases. A reference was made by the learned Senior Sub-Judge to this Court purporting to be under S. 113 of the Civil P. C. This reference was returned by this Court under an order passed by Mr. Justice Harrison who held that it was incompetent. The learned Senior Sub-Judge thereupon proceeded to examine the question and holding that he was authorized to act under O. 37 dealt with both the suits in accordance with the procedure by that order. He decided the case on the merits against the defendants in both the suits and decreed the plaintiff's claim in each instance. The defendants, thereupon, preferred appeals against the decrees in the Court of the learned District Judge before whom all other grounds of appeal were abandoned, the only one pressed being the one attacking the jurisdiction of the learned Senior Sub-Judge to hear the suits under O. 37. It was contended that despite the fact that the addition referred to above to O. 37, R. 1 had been made by this Court with the sanction of the Governor-General in Council, the action of this Court was ultra vires inasmuch as it offended against the provisions of Ss. 122 to 128 of the Civil P. C. It was urged that inasmuch as this Court had not been mentioned in R. 1 of O. 37 as one of the Courts entitled to have resort to that order it was not possible for this Court to pass a rule which amounted to delegating powers that it did not possess to Courts subordinate to it. These contentions were given effect to by the learned District Judge and both the suits were dismissed.

The plaintiff has come up to this Court in second appeal against the dismissal of the two suits through Mr. Shamair Chand and it has been contended, firstly, that the rule in question was intra vires; and, secondly that in any event, inasmuch as the Senior Subordinate Judge had jurisdiction to try the suits, the learned District Judge should have remanded the case to that Court to be tried under the ordinary procedure for the trial of suits and not to have dismissed the plaintiff's claims. There can be no doubt that there is considerable force in the second contention. The learned Senior Subordinate Judge at Delhi certainly had jurisdiction to try these cases under the ordinary procedure. The mere fact that he tried them under a special procedure would not result in the plaintiff's claims being dismissed as they have been. In my judgmeni, however, the first contention also is correct, and this Court acted intra vires in making the rule in question. Order 37 of the Civil P. C. prescribes certain procedure to be adopted for the trial of suits, and in R. 1 a provision has been made that the special procedure shall only be followed by certain Courts. As originally enacted the Court of the Senior Subordinate Judge at Delhi was not one of the Courts so empowered. S. 121, Civil P. C., lays

down that the rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part, i. e., Part X. The body of the Code referred to is obviously composed of Ss. 1 to 158. Section 122 empowers the High Courts from time to time after previous publication to make rules regulating their own procedure and the procedure of civil Courts subject to their superintendence and may in the exercise of that power annul, alter or add to all or any of the rules in the First Schedule. Section 128 provides that any rules made in the exercise of this power shall not be inconsistent with the provisions in the body of this Code, that is to say the provisions contained in Ss. 1 to 158 but, subject thereto, may provide for any matters relating to the Civil P. C. and in particular, any matters relating to "summary procedure" in suits on contract: vide sub-Cl. (f) of S. 128. In the exercise of the powers conferred by S. 122 this Court added sub-Cl. (e) to R. 1 of O. 37 which was duly published and received the assent of the proper authority, and after that was gazetted in a proper manner. That addition is to the effect that the Courts of the District Judge and Subordinate Judges of the First Class of the Delhi Province shall have these powers. As I understand the situation this empowers the Courts named in the new rule to try cases which are within their pecuniary and territorial jurisdiction in accordance with the procedure prescribed in O. 37, Rr. 2 to 7. The making of this rule does not confer an any of the Courts any pecuniary or territorial jurisdiction but merely recognizes the jurisdiction that they already possess and empowers them to follow a certain definite procedure provided for the expeditious disposal of suits coming within their purview. In these circumstances, in my judgment, the view taken by the District Judge is wrong. I hold that the learned Senior Subordinate Judge was entitled to adopt the procedure he did. and inasmuch as the grounds attacking the decision of the trial Court on the merits were definitely abandoned before the learned District Judge I accept both the appeals and grant the plaintiff a decree in each case in the terms of the decree passed by the trial Court. The plaintiff will be entitled to his costs in this Court in both the appeals and in the Court of the District Judge.

Zafar Ali, J.—I agree.

J.V. *Appeals accepted.*

A. I. R. 1927 Lahore 176

SHADI LAL, C. J., AND AGHA HAIDER, J.

Firm Kidar Nath-Behari Lal—Defendant—Appellant.

v.

Firm Shimbhu Nath-Nandu Mall—Plaintiffs—Respondents.

First Appeal No. 1812 of 1922, Decided on 13th November 1926, from the decree of the Sub-J., Delhi, D/- 31st May 1922.

(a) *Contract Act, S. 51—To prove that buyer is willing to perform his part, it is not necessary that he should tender the price.*

In order to prove that a buyer was ready and willing to perform his part of the agreement, it is not necessary for him to show that he actually made a tender of the price. It is sufficient if he was able to perform his part of the contract,

[P. 177, C. 1]

(b) *Contract Act, S. 73—Suit for damage for breach of contract of sale—Measure is the difference in contract price and market price on date of breach—Date of performance extended—Breach will be deemed to take place on the extended date or when contract was finally broken.*

In a suit for damages for breach of a contract to sell the measure of damages is admittedly the difference between the contract price and the market price on the date of the breach. But where the time for performing the contract has been postponed at the request either of the vendor or the purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place. In such cases damages are to be calculated with reference to the last date, if any, to which the contract was extended, or to the date on which the contract was finally broken: *Ogle* v. *Earl Vane*, (1867) *L. R.* 2 *Q. B.* 275 and *Hickmon* v. *Haynes*, *L. R.* 10 *C. P.* 598 *Rel. on.*

[P. 177, C. 2]

Sardha Ram and *Shamair Chand*—for Appellants.

Tek Chand, *Gopal Chand* and *Hem Raj*—for Respondents.

Shadi Lal, C. J.—The parties to this appeal are two mercantile firms doing business in the city of Delhi. On the 24th November 1916, the defendants Kidar Nath-Behari Lal, contracted to sell to the plaintiffs, Shimbhu Nath-Nandu Mall, 25 cases of muslin at a price specified in the bought and sold notes executed on that date. The goods

were to be imported from England by a firm of commission agents in pursuance of an order placed with them by Nathu Mal-Miri Mal who it is alleged, had promised to deliver the consignment to the defendants. It appears that the goods arrived in Delhi in July and August 1917, but that Nathu Mal-Miri Mal, did not deliver them to the defendants, with the result that the latter, after some correspondence with the plaintiffs repudiated the contract. The plaintiffs thereupon raised an action for the recovery of damages arising from the breach of the contract and have obtained from the trial Court a decree for Rs. 3,196-14-0. Against this decree the defendants have brought the present appeal, and Mr. Sardha Ram for the appellants has expressly abandoned the plea that their liability to deliver the goods to the plaintiffs was contingent upon the performance of the contract made by them with Nathu Mal-Miri Mal.

It is to be observed that the contract between the parties did not expressly mention any date for the delivery of the goods, but the learned counsel on both sides are agreed that the delivery was to be made soon after the arrival of the goods in Delhi. Now the evidence on the record shows that 17 cases of muslin arrived on the 10th of July 1917, and that the remaining 8 cases reached Delhi about the third week of August. It was obviously the duty of the sellers to inform the buyers of the arrival of the goods, but it appears that the former gave no such information to the latter, and after a protracted correspondence in which they promised to deliver the goods after receiving them from Nathu Mal-Miri Mal they finally refused to perform the contract.

The learned counsel for the appellants while conceding that his clients were not in a position to deliver the goods argues that the plaintiffs cannot maintain an action for damages without proving that they were ready and willing to perform their part of the contract. In support of his contention he places his reliance upon S. 51 of the Indian Contract Act which provides that:

> when a contract consists of reciprocal promises to be simultaneously performed no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

There is, however, ample authority for the proposition, that in order to prove that a buyer was ready and willing to perform his part of the agreement, it is not necessary for him to show that he actually made a tender of the price. Considering that the market was rising and that the defendants did not possess the goods which they had contracted to sell, it would have been an act of supererogation on the part of the buyers if they had taken the money to the defendants' shop and made an actual tender thereof. The evidence on the record shows that the plaintiffs had entered into a contract for the sale of the goods to another merchant Ram Saran, and that the latter had sufficient cash at his disposal and could easily pay for the goods on delivery. We are satisfied that the non-completion of the contract was not the fault of the plaintiffs, and that they were willing and able to complete it if it had not been renounced by the defendants. It must, therefore, be held that the defendants broke the contract.

The measure of damages is admittedly the difference between the contract price and the market price on the date of the breach. What was the date of the breach in the present case? As pointed out above, no date for the delivery of the goods was fixed in the contract, but the parties intended that delivery should be within a reasonable time after the arrival of the goods in Delhi, and that the sellers should give intimation thereof to the buyers. The sellers, however, did not notify the buyers of the arrival of the goods, but on the other hand they wrote to them from time to time that they would deliver the goods on receipt thereof from the firm, who in turn had entered into a contract of sale with them, and finally repudiated the contract on the 27th August 1917, so far as 17 cases were concerned, and on or about the 19th of March 1918, in respect of the remaining 8 cases. It appears from the documentary evidence that there was in effect a request by the sellers to postpone the time for performing the contract and that this request was accepted by the buyers.

Now the rule, enunciated in *Ogle* v. *Earl Vane* (1), and subsequently affirmed in several cases (vide, inter alia *Hickmon*

(1) [1867] 2 Q. B. 275=7 B. & S. 855=36 L. J. Q. B. 175=15 W. R. 564.

v. *Haynes* (2), is to the effect that where the time for performing a contract of sale has been postponed at the request either of the vendor or the purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place. In such cases damages are to be calculated with reference to the last date, if any, to which the contract was extended, or to the date on which the contract was finally broken. As stated above the defendant must be deemed to have broken the contract on the 27th August 1917 and 19th May 1918.

The trial Judge has after considering the evidence produced by the parties determined the market price of muslin on the aforesaid dates, and calculated the amount of damages which the plaintiffs are entitled to recover from the defendants. The finding recorded by him on this point has been impugned by the appellants as well as by the respondents, who have preferred cross-objections, but we are not prepared to hold that the decision of the learned Judge is wrong or that there is any adequate ground for remitting the case to him for a re-trial of the issue on the quantum of damages. We accordingly dismiss both the appeals and the cross objections, and direct the parties to bear their own costs in this Court.

G.B. *Appeals dismissed.*

(2) [1875] 10 C. P. 598=44 L. J. C. P. 358=32 L. T. 873=23 W. R. 871.

A. I. R. 1927 Lahore 178

FFORDE AND ADDISON, JJ.

Emperor—Appellant.

v.

Abdul Latif—Accused—Respondent.

Criminal Appeal No. 786 of 1926, Decided on 4th November 1926, from an order of the 1st Cl. Mag., Delhi, D/- 31st March 1926.

Criminal P. C., S. 417—High Court cannot interfere unless trial Court's finding is manifestly wrong or perverse.

In an appeal against an acquittal High Court is not entitled to weigh the evidence and decide whether or not the trial Magistrate has come to a wrong conclusion, unless it is able to hold that the finding of the trial Court is manifestly wrong or perverse, or such as no reasonable man could have arrived at upon that evidence. [P. 179, C. 1]

R. C. Soni—for Appellant.

Dev Raj Sahni—for Respondent.

Fforde, J.—This is an appeal by the Crown from an acquittal of Abdul Latif, a warder in the Reformatory School at Delhi, on a charge of having received a clock and a watch from one Taj-ud-din knowing these articles to have been stolen.

It is not disputed that Taj-ud-din did steal these two articles from a Major Terris, and it is not disputed that these articles were found in the possession of the respondent two months after the theft. The sole question which the Court below has tried was whether or not the respondent when he received these articles knew, or had reasonable ground for believing, that they had been stolen. The evidence which the Crown put forward in the trial Court to establish this knowledge against the respondent is, first of all, the fact that the thief had at one time been in the Reformatory School of which the respondent is a warder, and the inference which the Crown seeks to draw from this circumstance is that the respondent should have known that Taj-ud-din was a bad character. As against this, it is admitted that Taj-ud-din was discharged in due course from the Reformatory School, and for all that is known to the contrary he has been leading a respectable life for seven years. There is no evidence whatsoever as to any sinister association between the respondent and Taj-ud-din during those seven years.

The Crown strongly relied upon an alleged statement made by the respondent when the articles were discovered in his possession, that they had been pawned with him for Rs. 9. This statement is supplied by the Sub-Inspector, Raja Hari Pal Singh, who added that certain other articles also were stated by the respondent to have been pawned with him. Certain other articles were found in possession of the respondent, but they are of a wholly valueless nature, comprising shoulder chains, a coral necklace, a toy in the shape of an acrobat, a leather case of a watch and a bronze medal. It is not conceivable that any person in his senses would have taken

any such articles as security for the advance of money. As against this evidence two other Crown witnesses, one a Manager of the Reformatory School, and the other a Compounder there, were produced. The Manager stated that he did not remember what the respondent said on the occasion in question. The Compounder stated that the respondent told the Sub-Inspector that Taj-ud-din had left the articles with him and that he did not state that he had pawned them. In view of his conflict of opinion as to what the respondent stated at the time, no Court would be safe in accepting the uncorroborated recollection of a public officer.

In the trial Court the respondent stated that the clock and the watch were given to him by Taj-ud-din for safe keeping and were not pawned with him. It has not been shown that the other trivial articles were stolen. There is no evidence whatsoever put forward by the Crown to show that the respondent had any knowledge that Taj-ud-din was addicted to theft, nor is there any evidence that Taj-ud-din was in fact so addicted. It is not suggested that he had ever been previously charged with any offence and, accordingly, the Court is not entitled to infer that the respondent should have suspected anything when Taj-ud-din brought him the two articles in question. The defence produced evidence to show that Taj-ud-din was the owner of a cigarette factory in Lahore called the Taj Cigarette Factory. No evidence was produced by the Crown upon this matter of his occupation. The owner of the clock and watch, Major Terris, stated that they had been in his possession for some time, and that he had originally paid a sum of Rs. 100 for the clock and Rs. 75 for the watch, but nobody has said what their present value is. Obviously the price of these second-hand articles could not be anything like the sum originally given.

The learned Magistrate upon these facts has acquitted the respondent. In an appeal against such an acquittal this Court is not entitled to weigh the evidence and decide whether or not the learned Magistrate has come to a wrong conclusion, unless it is able to hold that the finding of the trial Court is manifestly wrong or perverse, or such as no reasonable man could have arrived at upon that evidence. Under these circumstances I am of opinion that the appeal must be dismissed and that the respondent be discharged from his bail-bond.

Addison, J.—I concur.

R.D. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 179

COLDSTREAM, J.

Sm. Raj Kumari—Plaintiff—Appellant.

v.

Sardar Gurbakhsh Singh—Defendant. —Respondent.

Misc. First Appeal No. 1566 of 1926, Decided on 13th November 1926, from the order of the Sr. Sub-J., Lahore, D/- 20th January 1926.

* (a) *Civil P. C., S. 11—Execution proceedings—Objection once decided cannot be again raised in execution of the same decree.*

An objection which has been disposed of finally by an order in execution proceedings is not to be entertained a second time in execution proceedings relating to the same decree : *A.I.R. 1926 Oudh 291, Rel. on.* [P 181 C 1]

The binding force of such an order does not depend upon the provisions of the Civil P. C., relating to res judicata but upon the general principles of law : 6 *All. 269, Foll.* [P 181 C 1]

(b) *Decree—Construction—Mother to receive Rs. 500 to be contributed by her two sons——Amount to be realized from certain named properties—Sons are personally liable.*

Where a decree provided that K would be entitled to receive Rs. 250 p. m. from G. (K's son) out of the H estate and Rs. 250 p. m. from R. (K's second son) out of the rent of certain buildings, "independent of both the proprietors."

Held : that the two sons were to be personally liable for making the contribution. The words "independent of both the proprietors" did not absolve the sons from their personal liability. [P 180 C 1, 2]

Daulat Ram—for Appellant.

Badri Das—for Respondent.

Judgment.—On the death of Daulat Ram, a wealthy landowner in Kangra district, a dispute over the succession to his property arose between his son Gurbakhsh Singh on the one side and his widow Mt. Raj Kumari and her minor son Rajindar Kumar on the other. The matter was referred to arbitrators who submitted an award on the 15th of January 1920 in accordance with the terms of which a decree was passed by the Senior Subordinate Judge of Lahore

on the same date. It was decided by the decree that Mt. Raj Kumari was to be given Rs. 500 per mensem, to be contributed equally by the two sons of the deceased Rai Daulat Ram, besides certain other property with which we are not here concerned. After stating this the decree proceeded to specify the property allotted to Gurbakhsh Singh and Rajindar Kumar and then to make the following direction.

> Mrs. Raj Kumari Daulat Ram would be entitled to receive Rs. 250/- per mensem from Mr. Gurbakhsh Singh out of the Holta Estate and Rs. 250 per mensem from Rajindar Kumar of the rent of Daulat Ram Buildings, Lahore, independent of both the proprietors.

It appears that Gurbakhsh Singh did not pay his contributien punctually, for Mt. Raj Kumari recovered it by execution proceedings applying from time to time for a transfer certificate from the Lahore Court in order to execute the decree in Kangra district. Eight such applications were made between the beginning of May 1922 and the end of August 1924. On each occasion execution was apparently granted against Gurbakhsh Singh personally. On the 3rd August 1925 Gurbakhsh Singh petitioned the Senior Subordinate Judge, Lahore, with reference to the last of these applications, which was dated the 3rd of August 1924, objecting to the proceedings on the grounds that the decree was not executable as being merely a declaration so far as it related to the provisions in favour of Mt. Raj Kumari and that it could not be executed personally against Gurbakhsh Singh. The Senior Subordinate Judge decided that the decree was executable but held that as the contribution payable by Gurbakhsh Singh had been made a charge upon the Holta Revenues it could not be executed against Gurbakhsh Singh personally. Against this latter finding Mt. Raj Kumari has filed the present appeal through Mr. Daulat Ram.

It appears that the minor son Rajindar Kumar is dead and that Mt. Raj Kumari is in possession of his half of the Holta Estate as heir. This estate had been divided by the arbitration decree between the two sons. It is not disputed by Mr. Badri Das, who appears for the respondent Gurbakhsh Singh, that Mt. Raj Kumari is entitled to the contribution of Rs. 250 per mensem out of the half-share still in possession of Gurbakhsh Singh. His sole contention is that the award and decree cannot be executed against his client but only against the Holta revenues as decided by the Senior Subordinate Judge. Mr. Daulat Ram attacks the finding of the Senior Subordinate Judge with the arguments firstly, there is nothing in the decree justifying restriction of the execution to any particular property; and, secondly that the matter was decided finally by an order of the Senior Subordinate Judge, Kangra, in proceedings in execution of this decree in 1922. In support of his first argument he cites the ruling *Mahamaya Prasad* v. *Sakhdai Koer* (1). This ruling deals with facts very much on all fours with those of the present case. There also there was an award by which a widow was provided with maintenance out of the property of her husband's family and the award actually provided for the widow to take possession of the property on which her maintenance was to be a charge and to recover her maintenance from it herself. It appears to me that in the present case, as in that one, the charge was an ancillary remedy and the words that

> Raj Kumari be given Rs. 500 to be contributed equally by the two sons of the deceased

clearly indicate that the two sons were to be personally liable for making the contribution. What exactly was the intention of the words "independent of both the proprietors" is not clear. They may mean that this money was to be payable whether Gurbakhsh Singh and Rajindar Kumar themselves did or did not receive so much from the estate, but in any case I do not think that they absolved Gurbakhsh Singh from his personal liability.

The facts to which Mr. Daulat Ram's second contention relate are as follows: When Mt. Raj Kumari first attempted to recover her dues by execution in 1922 Gurbakhsh Singh raised an objection that the decree could be executed only against the Holta revenues and that she had already recovered what was payable to her out of that part of the Holta estate of which she was then in possession. In dismissing the objection the District Judge of Hoshiarpur held that the decree did not show that the decree-holder was given any separate portion of the estate for her main-

(1) [1918] 46 I. C. 169.

tenance. "The decree he remarked "was against Sardar Gurbakhsh Singh" and he seemed "to be liable for its satisfaction." It is urged by Mr. Daulat Ram that in face of this order the present dispute as to the personal liability of Gurbakhsh Singh cannot now be agitated. In reply Mr. Badri Das contends that the rule embodied in S. 11 of the Civil P. C. is inapplicable in this case because the learned District Judge of Hoshiarpur had neither jurisdiction to pass his order nor was his Court competent to dispose of the present proceedings. His argument is that the decree of the 15th January 1920 was of greater value than Rs. 5,000 and that the very fact that the present appeal has been preferred in this Court shows that this appeal is not within the competence of a District Judge's Court. I do not find force in these arguments. The sum for which Mt. Raj Kumari was taking out execution in 1922 consisted of arrears of payments amounting to less than Rs. 5,000 the order of the District Judge was not appealed against and became final.

The present appeal does not relate to an objection in respect of any particular sum, but an objection which disputes the executability of Mt. Raj Kumari's decree as a whole against Gurbakhsh Singh personally. There is here no question, however, of applying S. 11 of the Code of Civil Procedure, which relates to the trial in a subsequent suit of an issue which has already been adjudicated upon in a previous suit. The principle that an objection which has been disposed of finally by an order in execution proceedings is not to be entertained a second time in execution proceedings relating to the same decree has been repeatedly enforced by the Indian Courts: see for recent examples *Dip Prakash* v. *Dwarka Prasad* (2) and *A. I. R.* 1926 *Oudh* 291. As pointed out by their Lordships of the Privy Council forty years ago in the case *Ram Kirpal* v. *Rup Kuari* (3) the binding force of such an order does not depend upon the provisions of the Code of Civil Procedure relating to res judicata, but upon the general principles of law. In the present case there was in 1922 a clear objection to the execution of the decree against property other than the Holta revenues and it was then decided that the decree was not so restricted but could be executed against Gurbakhsh Singh personally. I see no reason why the principle enunciated above should not be applied in the present instance.

For the reasons given I accordingly accept the appeal with costs and order that the decree-holder may, if he so desires, proceed to execute the decree personally against Gurbakhsh Singh.

G.B. *Appeal allowed.*

(2) A. I. R. 1926 All. 71=48 All. 201.
(3) [1884] 6 All. 269=11 I. A. 37 (P. C.).

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* A. I. R. 1927 Lahore 118

BROADWAY AND ZAFAR ALI, JJ.

Delhi and General Mills Company, Ltd.—Petitioners.

v.

Commissioner of Income-tax, Delhi, and *another*—Respondents.

Misc. Civil Petition No. 551 of 1926, Decided on 18th December 1926, from the order of LeRossignol and Martineau, JJ., D/- 6th January 1926, in Civil Reference No. 2 of 1925.

* *Income-tax Act* (11 *of* 1922 *amended by* 24 *of* 1926), *S.* 66*A* (2)—*Leave to appeal to Privy Council—Question should be of great public or private importance—S.* 66*A* (2) *is in terms the same as Civil P. C., S.* 109 (c).

The newly added S. 66A (2) to the Income-tax Act is in terms the same as S. 109 (c) of the Civil P. C. Inasmuch as a reference under S. 66 of the Income-tax Act postulates the existence of a question of law, it is perfectly clear that the intention of the Legislature in adding S. 66A to the Income-tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance : 23 *All.* 227 ; *A. I. R.* 1924 *Mad.* 231; *A. I. R.* 1923 *Mad.* 232 ; *A. I. R.* 1921 *Patna* 33, *Ref.* [P. 182, C. 1]

Mehr Chand Mahajan—for Petitioners.

Government Advocate — for Respondents.

Order.—This is an application for appeal to His Majesty in Council. It purports to be made under Ss. 109 and 110 of the Civil Procedure Code, but really is an application under S. 66A, sub-Cl. (2) of Act 11 of 1922 as amended by Act 24 of 1926, which came into force on the first day of April 1926. The facts are that a reference was made under S. 66 of the Income-tax Act, 1922, by the Chief Commissioner of Delhi in connexion with the

assessment made on the Delhi Cloth and General Mills Company Limited, Delhi. The Company had set aside a sum of Rs. 1,00,000 in the year 1918 as a provision against bad and doubtful debts. In the year 1922 this sum of Rs. 1,00,000 was brought into account and shown as profits. At the same time the Company contended that the amount was not assessable in the year 1922 in as much as the said sum of Rs. 1,00,000 had accrued as profit in the year 1918. It was held by a Division Bench of this Court by judgment dated 6th January 1926, that the claim made by the Company was erroneous and that the said sum of Rs. 1,00,000 had been rightly included in the profits for the year 1922 and correctly assessed to income-tax. It is against the judgment of the Division Bench of this Court that the Company desires a certificate for leave to appeal to His Majesty in Council. Now at the date when this decision was pronounced the order of the Court was final and not open to appeal to the Privy Council. Act 24 of 1926 added to the Income-tax Act of 1922 S. 66A (2), sub-Cl. of which is to the following effect :

> An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

This in terms is the same as S. 109 (c) of the Civil Procedure Code. Inasmuch as a reference under S. 66 of the Income-tax Act postulates the existance of a question of law, it is perfectly clear that the intention of the Legislature in adding S. 66A to the Income-tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance ; it has been laid down by their Lordships of the Judicial Committee that the grant of a certificate under S 109 (c), Civil Procedure Code, is not a matter which is left entirely in the discretion of the Court but is a judicial process which could not be performed without special exercise of that discretion : vide *Banarshi Parsad* v. *Kashi Krishana Narain* (1). In *Nathu Kesava Mudaliar* v. *Gobinda Chariar* (2), a case decided by a Division Bench of the Madras High Court, it was pointed out that S. 109 (c) of the Civil Procedure Code contemplates a class of cases in which there may be involved questions of public importance or which may be important precedents governing numerous other cases or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance. In another case decided by a Full Bench of the Madras High Court, namely, *Raja of Ramnad* v. *Thiruneela Kantham* (3), it was pointed out that when in a case the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant putting him to the expense of an appeal to the Privy Council, leave to appeal should be refused. Again in *Mritunjoy Praharaj* v. *Balmokand Kanungo* (4), a Division Bench of the Patna High Court held that it was not enough to entitle a High Court to grant special leave to appeal to His Majesty in Council under S. 109 (c), Civil Procedure Code, that a decision upon the construction of a section of a Tenancy Act will affect incidentally the rights of those who have holdings or tenures subject to the Act. It may be that in the present case the decision sought to be appealed against might affect the action or the position of the other companies who sought to evade the payment of Income-tax by adopting the method that was adopted by the present petitioner. We do not think, however, that the point of law which is involved in the present case is one of such universal or paramount importance as would warrant the grant of the certificate prayed for and we therefore dismiss this petition with costs.

We would note that the application in the case as well as in another case with which we are about to deal, was filed in a very incomplete condition. It was filed on the 26th of April 1926, but was not ultimately put into proper form till 22nd July 1926. As, however, the learned Government Advocate did not press the question of limitation we have refrained from expressing any opinion on the point.

D.D. *Petition dismissed.*

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(1) [1901] 23 All. 227=28 I. A. 11=7 Sar. 825 (P. C.).
(2) A. I. R. 1924 Mad. 231.
(3) A. I. R. 1923 Mad. 232.
(4) A. I. R. 1921 Patna 33.

* A. I. R. 1927 Lahore 183

JAI LAL, J.

Pahlad Rai—Defendant—Petitioner.

v.

Shiv Ram and *others*—Plaintiffs—Respondents.

Misc. Civil Petition No. 485 of 1926, Decided on 14th December 1926, for transfer of Suit No. 24 of 1921.

(a) *Civil P. C., S. 22—Question of jurisdiction decided against defendant—Application for transfer is not absolutely barred—But where application is a mere attempt to evade the decision of the question of jurisdiction it will not be allowed.*

Section 22 does not absolutely bar an application for transfer where the defendant has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed, but where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the application will not be allowed; *A. I. R* 1925 *Lah.* 175, *Foll.*; *A.I.R.* 1923 *Lah.* 288, *Dist.*[P 184 C 1, P 185 C 2]

* (b) *Practice—Right of plaintiff to choose forum should not be interfered with except on very strong grounds—Balance of convenience—Plaintiff has to be primarily considered.*

It is the right of the plaintiff to choose the Court in which to institute the suit and the Court ought not to interfere with this right except on very strong grounds.

In considering the question of balance of convenience it is not the convenience of the defendant alone that has to be considered. The plaintiff has to be primarily considered as initially it is his right to choose the Court in which to institute the suit. [P 185 C 2]

C. Bevan Petman and *Badri Das*—for Petitioner.

Fakir Chand—for Respondents.

Jai Lal, J.—(*Order of 30th November* 1926.)—This is an application under S. 22 of the Civil P. C. for transfer of two Suits Nos. 24 of 1921 and 64 of 1922 pending in the Court of the Senior Subordinate Judge, Ludhiana, to the Courts competent to try the same in Burma.

A preliminary objection is taken on behalf of the plaintiffs-respondents that the application does not lie as it has not been made at the earliest opportunity. It is alleged that issues have already been settled in the case. It appears that after the institution of the suits the petitioner did not put in an appearance in the trial Court but preliminary pleas including an objection to the jurisdiction of the Court, were filed by other defendants in one suit and written statements including preliminary objections and defence on the merits were filed in the other suit. The Court framed issues in both the cases which arose out of such objections and pleadings but proceeded to try the issue relating to jurisdiction first and held that it had no jurisdiction to try the suits and returned the plaints for presentation to the proper Court.

Appeals filed by the plaintiffs in this Court were accepted, the present petitioner having appeared to oppose them. Then Letters Patent Appeals were filed by him which were dismissed at the end of April 1926. It is consequently contended by the petitioner that it was only at the end of April last that it was finally decided that the suits were cognizable by the civil Courts both in Ludhiana and in Burma. It also appears that formerly the petitioner was impleaded in the two suits as a defendant in his capacity as an executor of the Will of Indar Singh to whose estate in this province the present suits relate, and it was after the decision of the Letters Patent Appeals in this Court that he was impleaded in his personal capacity. It is, therefore, contended by his learned counsel in reply to the preliminary objection that the petitition has been presented (a) immediately after the decision of the Letters Patent Appeals and (b) soon after the petitioner was impleaded as a defendant in his personal capacity. It is explained that according to the Will whereby he was appointed an executor and which has duly been proved in Burma the petitioner is concerned only with the property of the deceased situated in that Province, and that he, as an executor, has nothing to do with the property in the Punjab and was, therefore, not directly interested in the suits as formerly framed but that he is very much interested now that he has been impleaded in his personal capacity.

Counsel for the respondents relied upon *National Engineering Co., Karachi* v. *Rattan Engineering Co., Lahore* (1) in which it was held that it is only when a suit may be brought in the one or other of the two Courts, both of which have jurisdiction, that an application may be made under S. 22 of the Civil P. C. and that where the jurisdiction of one of the Courts is denied an application for transfer under these sections cannot lie. It appears that in that case the defendant

(1) A. I. R. 1923 Lah. 288.

had alleged in his petition for transfer that the Court in which the suit had been instituted had no jurisdiction to entertain it, and that in any case owing to the peculiar facts of the case, it could more conveniently be tried in another Court. It was held that on the allegations made by the petitioner his application did not lie. In the case before me though an objection was raised to the jurisdiction of the Ludhiana Court to entertain the suits the matter has now been finally decided by this Court and the present petition is made on a clear assumption that they are cognizable by the Senior Subordinate Judge of Ludhiana. The case relied upon by the counsel for the respondent is, therefore, distinguishable from the present case.

He also cited *Firm Behari Lal-Kanhaya Lal* v. *Official Receiver, Insolvents' Estates, Lahore* (2), where it was held that the provisions of S. 22, Civil P. C., are mandatory and an application under the section must be made, in a case where issues are settled, at or before such settlement is made. The facts of that case are somewhat similar to the present one and it was held that after an objection to the jurisdiction of the Court to entertain the suit has been decided against the defendant, his application to transfer the case should not be entertained, as such an application almost amounts to an attempt to get this Court to exercise its revisional powers and thus evade the decision of the question of jurisdiction that the Court has arrived at against the petitioner.

There is this distinguishing feature in the present case that the defendants has not yet pleaded to the plaint and no issues have yet been framed between him and the plaintiff and I do not understand the learned Judge to hold that under no circumstances an application under S. 22 would lie if the defendant had raised an objection as to the jurisdiction of the Court and failed thereon. In my opinion, all that the learned Judge held was that under such circumstances this Court should be very reluctant to grant such an application. S. 22 does not absolutely bar an application for transfer where the defendant has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed. The matter has, however, an important bearing on the merits of the application though it does not present an absolute bar to the petition for transfer. I, therefore, disallow the preliminary objection and order that a very early date be fixed for the hearing of the application on the merits.

Judgment.—This order will be read in continuation of my order of the 30th November 1926. I have now heard counsel on the merits of the applications under S. 22 of the Civil P. C., for the transfer of the two Suits Nos. 24 of 1921 and 64 of 1922 from the Court of the Senior Subordinate Judge, Ludhiana, to Burma. The dispute relates to the estate of one Indar who died in February 1920, leaving property both moveable and immovable in Ludhiana and also in Burma. It appears that proceedings for grant of a Succession Certificate were instituted in Burma and on the 2nd March 1921, Shib Ram, a brother of the deceased instituted a suit in the Court of the Senior Subordinate Judge, Ludhiana, praying for a declaration that he was a member of a joint Hindu family with the deceased at the time of his death and was, therefore, entitled to all the property in Ludhiana and in Burma by right of survivorship. This is Suit No. 24 of 1921. In the meanwhile during the pendency of the proceedings for grant of a Succession Certificate a Will of the deceased was produced in Court on the 16th April 1921, and probate was granted in respect thereof some time in 1923 to Pahlad Rai, the petitioner before me. On the 11th March 1922, Shib Ram instituted Suit No. 64 of 1922 praying for the administration of the estate of the deceased Indar Singh claiming, inter alia, that he was entitled to the estate by right of survivorship as a member of a joint Hindu family and that the Will propounded by Pahlad Rai was a forgery and was invalid. Pahlad Rai and Mt. Ishari the widow of Indar Singh were impleaded as defendants in the suit.

It appears that Pahlad Rai did not appear in pursuance of summons served upon him and proceedings were ex parte against him. Mt. Ishari raised objections to the jurisdiction of the Senior Subordinate Judge at Ludhiana which were allowed. The plaintiff thereupon filed an appeal in this Court, The matter was finally settled by a Division Bench

(2) A. I. R. 1925 Lah. 175.

of this Court on a Letters Patent Appeal [*Shiv Ram* v. *Prahlad Rai* (3)] when it was held that the Senior Subordinate Judge, Ludhiana, had jurisdiction to entertain the suit. Pahlad Rai appeared for the first time in this Court to support the contention of Mt. Ishari as to the want of jurisdiction of the Ludhiana Court to try the suit. After the Letters Patent Appeal had been decided against the defendants Pahlad Rai filed his pleadings on the 16th August 1926, and on the same day asked the Court to stay proceedings as he intended to move this Court for the transfer of the suits and then presented the present petitions.

In my previous order I mentioned that the counsel for the petitioner stated that his client was originally impleaded as an executor and that he was impleaded in his personal capacity only after the decision of the Letters Patent Appeal, and further that as an executor he had no direct interest in the suit but in his personal capacity he was very much affected by the same. This statement of the learned counsel was not challenged at the hearing by Mr. Fakir Chand who appeared for the respondent, but, after I had announced my order of the 30th November disallowing the preliminary objection by Mr. Fakir Chand he presented an application for review stating that the above allegations by the counsel for the petitioner were wrong. Mr. Bevan Petman frankly admitted before me that the statements made by him on the previous occasion were wrong and were not supported by the record and were made by him under instructions from his client. That, however, does not absolve Mr. Fakir Chand from his duty to challange them at the hearing. It is, therefore, very doubtful whether, under the circumstances, there is any sufficient ground for review of my previous order.

Be that as it may, I expressly reserved the question of the effect of the delay in making the present application and of the objection to jurisdiction for consideration when deciding it on the merits. I merely held before that the fact that the petitioner had objected to the jurisdiction of the Senior Subordinate Judge at Ludhiana did not in law disentitle him to present an application for transfer of the suits. The facts now brought to my notice, however, materially affect the question whether an order transferring the suits should or should not be made. Moreover, *Firm Behari Lal-Kanhaya Lal* v. *Official Reciver, Insolvents' Estates, Lahore* (2), fully covers this case because in the absence of any new circumstances which entitled the petitioner to present this application, this is merely an attempt to get an order from this Court which would enable the petitioner to evade the question of jurisdiction which a Division Bench of this Court has decided against him. The petitioner had ample opportunity during the four and a half years that have elapsed between the institution of the suit and the present petition to get the relief that he is now applying for. His conduct in this case is such that the Court ought to hesitate in granting him the relief prayed for even if there be ground for such relief. But I am not satisfied that on the merits there is any good ground for transferring the suits from the Court of the Senior Subordinate Judge, Ludhiana. The property of the deceased is situated both in Ludhiana and in Burma, it may be that there is more property in Burma than in Ludhiana, still, it is the right of the plaintiff to choose the Court in which to institute the suit and this Court ought not to interfere with this right except on very strong grounds. I am unable to hold that the balance of convenience is in the transfer of the suits to Burma.

The principal question involved being whether the deceased and the plaintiff were members of a joint Hindu family, the witnesses are more likely to be in Ludhiana where the original home of the parties is. Moreover, in considering the question of balance of convenience it is not the convenience of the defendant alone that has to be considered. The plaintiff has, in my opinion, to be primarily considered as initially it is his right to choose the Court in which to institute the suit. I am, therefore, of opinion that the application for transfer has been unduly delayed, that an order of transfer at this stage will mean evasion of the decision by a Division Bench of this Court, and on the merits there are no good grounds for transferring the suits.

I dismiss this application with costs.

R.D. *Application dismissed.*

(3) A. I. R. 1926 Lah. 503.

A. I. R. 1927 Lahore 186

SHADI LAL, C. J., AND BROADWAY, J.

Abbas Ali Khan—Defendant—Appellant.

v.

Yusaf Ali Khan—Plaintiff—Respondent.

Letters Patent Appeal No. 24 of 1925, Decided on 8th January 1927, from the order of LeRossignol, J., D/- 24th November 1924, in Civil Appeal No. 1171 of 1924, D/- 24th November 1924.

Limitation Act, S. 14—S. 14 is inapplicable to a suit if the former proceeding founded on the same cause of action falls through on the merits and not from defect of jurisdiction.

The benefit of S. 14, Limitation Act, cannot be invoked by a plaintiff for showing that a present suit by him which is otherwise time-barred is within time, if his former civil proceeding founded upon the same cause of action as the suit, falls through not from any defect of jurisdiction in the Court wherein it is prosecuted, but on the merits. [P 186, C 2]

Fakir Chand—for Appellant.

Shamair Chand—for Respondent.

Broadway, J.—In this and the three connected Letters Patent Appeals Nos. 25, 26 and 27 of 1925 the only point for determination is whether the suits out of which these appeals have arisen were within time. The plaintiffs had instituted the said suits for possession of certain plots of land which they alleged had fallen to their share on a partition which was effected in October 1910. They alleged that they had obtained possession of the said lands through the revenue authorities on the 4th of June 1922, but had been subsequently dispossessed by the defendants. The suits were instituted on the 9th January 1923 and consequently were clearly time-barred. The plaintiffs alleged, however, that in November 1921 they had taken action under S. 45 of Punjab Tenancy Act and had notices of ejectment issued to the defendants. Subsequent to this the defendants instituted suits to contest their liability to ejectment in the revenue Court which suits were dismissed in default on the 25th May 1922 whereupon the plaintiffs had applied to be put into possession and were put into possession on the 4th June 1922, the land being in the possession of tenants; however, the plaintiffs' possession was merely symbolical and it appears that the requirements of law were not complied with and that, therefore, they could not be held to have received possession at all. On the 9th June 1922 the defendants applied for and obtained restoration of their suits which had been dismissed in default and these suits were ultimately decreed in their favour, the notices of ejectment being cancelled. Subsequent to the cancellation of these notices the present suits were instituted. The learned District Judge dismissed the suits as barred by limitation holding that inasmuch as there had been irregularities in the delivery of possession to the plaintiffs in June 1922 the defendants must be held to have been in continuous possession from 1910. On appeal it was held by a Judgs of this Court that the suits were within time having regard to the provisions of S. 14 of the Indian Limitation Act and the cases remanded for a decision on the remaining issues.

Mr. Fakir Chand on behalf of the appellants has argued that S. 14 does not apply. S. 14 (1) of the Indian Limitation Act is as follows:

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against the defendants, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Now the notices of ejectment in these cases were issued by a revenue officer and not a revenue Court and the subsequent suits for cancellation of the notices were successful on the merits. There was no defect of jurisdiction and it seems to me, therefore, clear that the plaintiffs could not claim the benefit of S. 14 of the Indian Limitation Act. I would, therefore, accept these appeals and dismiss the suits with costs.

Shadi Lal, C. J.—I concur.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 187 (1)

BROADWAY, J.

Firm Amin Chand-Kanshi Ram — Defendants—Petitioners.

v.

Firm Kanshi Ram-Mittar Sain — Plaintiffs—Respondents.

Civil Revision Petition No. 492 of 1926, Decided on 22nd December 1926, from the order of the 3rd Cl. Sub-J., Kasur, D/- 7th June 1926.

Civil P. C., S. 151—Appointment of arbitrator can be revoked even before making award.

A Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case, but this power should always be exercised with the greatest caution. [P 187, C 2]

Jai Gopal Sethi—for Petitioners.

Jagan Nath Aggarwal — for Respondents.

Judgment.—On the 21st April 1925, the Firm of Kanshi Ram-Mittar Sain of Kasur instituted a suit for the recovery of Rs. 2,000 on hundis against the firm of Amin Chand-Kanshi Ram also of Kasur. This case remained pending till 23rd October 1925, when the parties agreed to refer their disputes to arbitration and the parties each nominated their own arbitrator. The defendant firm nominated Lala Kishan Dial, vakil. Soon after this nomination in November 1925, the defendant firm asked the Court to allow him to cancel the appointment of Lala Kishan Dial as the said gentleman was related to the other arbitrator as well as to the plaintiff. Evidence was taken and Lala Kishan Dial was put in the witness-box and on the 7th June 1926, the Court came to the conclusion that there was no proof whatever to show that the defendant was not aware of the alleged relationship between Lala Kishan Dial and the plaintiff as well as between the arbitrators and finally came to the conclusion that this particular application was premature. It accordingly refused to allow the defendant to revoke the appointment of Lala Kishan Dial. Against that order, which is clearly of an interlocutory nature, the defendant firm came up to this Court under S. 44 of the Punjab Courts Act and Mr. Jai Gopal Sethi has endeavoured to satisfy me that this is a case in which I should interfere and has cited two decisions of the Allahabad High Court in which it was pointed out that a Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case but that this power should always be exercised with the greatest caution. I have no doubt that this Court has the inherent power claimed for it by Mr. Jai Gopal Sethi. In the present instance the Court below has exercised that inherent power and has come to the conclusion that no case has been made out for interference on its part. In revision I am unable to say that the view taken by the Court below is against law. It has not declined jurisdiction by merely saying that the application is premature for it is perfectly clear from the order itself that it has weighed the evidence led by the objector and has come to the conclusion that the objector has failed to prove that he had no knowledge of the alleged relationship prior to the selection of Lala Kishan Dial as his representative on the Arbitration Board. In these circumstances I am unable to interfere in revision and I, therefore, dismiss this petition with costs.

J.V. *Petition dismissed.*

A. I. R. 1927 Lahore 187 (2)

ADDISON, J.

Tuman Singh—Plaintiff—Appellant.

v.

Bija—Defendant—Respondent.

Second Appeal No. 2181 of 1926, Decided on 13th January 1927, from the decree of the Sr. Sub-J., Ambala.

(a) *Punjab Courts Act* (6 *of* 1918), *S.* 41—*Maintainability—Appeal—Right to.*

Absence of jurisdiction to hear an appeal is a good ground for second appeal.

(b) *Jurisdiction—Value of suit furnishes basis for valuing appeal for purposes of jurisdiction—Court-fees Act, Sch.* 1, *Art.* 1.

Jurisdiction for purposes of appeal follows the jurisdictional value of the suit. [P 188, C 1]

Gullu Ram—for Appellant.

Shamair Chand—for Respondent.

Judgment.—The plaintiff sued the defendant for the recovery of a sum of Rs. 1,200 principal and interest, on book account. A decree was passed for Rs. 758 with proportionate costs in the plaintiff's

favour. Against this decision the defendant appealed in the Court of the District Judge. It was noted in the appeal that the value of the suit for purposes of jurisdiction was Rs. 1,200, but Court-fees were only paid on Rs. 758 as that was the sum decreed. The District Judge sent the appeal to the senior Sub-Judge in order that he should decide it. Now, ths Senior Sub-Judge in question, under Notification No, 90-G, dated the 9th of February 1926, had power to hear appeals from decrees passed by any Sub-Judge, other than one of the First Class, in small causes of the value not exceeding Rs. 1,000. This, however, was a small cause of the value of Rs. 1,200 and obviously jurisdiction for purposes of appeal follows the jurisdictional value of the suit. The Senior Sub-Judge accepted the appeal and dismissed the suit with costs throughout. Against his decision this second appeal has been presented.

It was not contested before me that the Senior Sub-Judge had no jurisdiction to hear the appeal. It has been held that in cases, in which the wrong appellate Court has heard the appeal, this Court need not interfere on the Revision Side unless it can be shown that there has been injustice or prejudice resulting therefrom. This is, however, not a revision but an appeal, and it was admitted that the fact that the Senior Sub-Judge had no jurisdiction to hear the appeal was a good ground for a second appeal. As, therefore, the Senior Sub-Judge had no jurisdiction to hear the first appeal, I accept this appeal and setting aside his judgment and decree I order the first appeal to be heard and decided by the District Judge, Ambala. In fact it was owing to his mistake that the appeal was wrongly sent to the Court of the Senior Sub-Judge. The Court-fee on this second appeal will be refunded. Other costs will be borne by the parties themselves as neither of them can be blamed for what has happened.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 188

ADDISON, J.

Firm Tirkha Ram-Chuni Lal—Plaintiffs—Petitioners.

v.

Maman and *others* —Defendants—Respondents.

Civil Revision Petition No. 602 of 1926, Decided on 13th January 1927, from the decree of the 4th Cl. Addl. Sub-J., Sonepat, D/- 8th May 1926.

Transfer of Property Act, S. 109—*Mortgagee can sue a tenant of mortgaged property though not attorned.*

Under S. 109 a mortgagee though not attorned can maintain a suit for rent against a tenant of mortgaged property or for its equivalent, viz., damages for use and occupation. [P 189 C 1]

Shamair Chand—for Petitioner.

Rama Nand—for Respondents.

Addison J.—The house in suit belongs to Ram Richpal and his nephews, Defendants Nos. 2 and 3. They mortgaged it with the plaintiff firm. It is alleged that Defendant No. 1, Maman, was the tenant of the mortgagors and continued to be the tenant under the mortgagee. The mortgage was entered into on the 6th April 1925. On the 24th April 1925 the plaintiff firm gave a notice to Maman, demanding Rs. 6-12-0 for six months rent which they said was in arrears, and also asking him to vacate the house by the 25th May 1925, otherwise the rent would be increased to Rs. 36 a year instead of Rs. 13-8-0. The plaintiff firm then instituted the suit on the 19th April 1926 for recovery of Rs. 35-6-8 as rent from the 6th April 1925 to the 29th March 1926.

In the second paragraph of the plaint it was stated that Defendant No. 1 was the tenant of the mortgagors and that after the mortgage he continued a tenant as before, but the tenant of the plaintiff, i. e., of the mortgagee, at a fixed rent of Rs. 36 a year as to which a notice had been given by the plaintiff firm to him. In another paragraph of the plaint it was claimed that the mortgagors should be held liable if Maman was held not to be liable. The Judge, Small Cause Court, Somepat, has dismissed the suit and the plaintiff firm has presented this revision petition.

Maman's main plea was that he was not the tennat of this house at any time after the mortgage, i. e., he had vacated the

house before the mortgage. Had this issue been tried and determined that would have ended the matter. The Judge, however, seems to have dismissed the suit, so far as I can understand his judgment, on the ground that the tenant had to attorn to the mortgagee before he could become the mortgagee's tenant. This is against the principle laid down in S. 109 of the Transfer of Property Act. Under it the mortgagee possesses all the rights of the lessors. There is no doubt, therefore, that the plaintiff firm could maintain this suit for rent against Maman or for its equivalent namely, damages for use and occupation.

In these circumstances I accept this petition and remand the suit to the Small Cause Judge to decide it on the merits, that is to say, to decide whether Defendant No. 1 was not a tenant or whether he occupied or did not occupy the property during the period sued for, and if so, what he should pay as rent or as damages for use and occupation of the building, for the period after the 6th April 1925 he has been in occupation thereof. Costs here will be costs in the cause.

I might add that the mortgagor, Richpal Singh, pleaded that rent was payable by the tenant Maman to the mortgagee.

J.V. *Case remanded.*

A. I. R. 1927 Lahore 189

DALIP SINGH, J.

Lachhman Das—Defendant—Appellant.

v.

Baghu Ram—Plaintiff—Respondent.

Misc. Second Appeal No. 2186 of 1926, Decided on 4th January 1927, from the order of the Dist. J., Lyallpur, 12th June 1926.

Civil P. C., O. 1, R. 9—Co-sharers of a defendant, when necessary parties, must be joined as respondents in second appeal, although not so made in the first appeal.

Where the co-sharers of respondents were necessary parties to the appeal,

Held: that the mere fact that they were not made parties in the first appeal would not justify the appellant in not making them parties to the second appeal, especially when that fact was directly brought to his notice in the lower Court.

[P. 189, C. 2]

Fakir Chand—for Appellant.

R. C. Soni—for Respondent.

Judgment.—This was a partition suit in which a preliminary decree was passed. Thereafter on the application of one of the co-sharers Baghu Ram who, together with his three brothers owned a half share in the property, the Court directed that the property which was 9 feet 5 inches long and 8 feet wide and consisted of a house with a thara in front was not capable of being partitioned and hence should be sold. The appellant appealed to the District Judge and did not make the co-sharers (brothers of Baghu Ram), respondents in the appeal. The District Judge held that these persons were necessary parties and the appeal as presented was bad in law. He refused to take action under O. 41, R. 20, holding that the appellant ought to have known that the rights of the other co-sharers were also affected and should, therefore, have made them parties. He also held that the size of the property showed that the trial Court was right in holding that the property was incapable of partition. The defendant appellant has appealed to this Court. Two preliminary objections have been taken: (1) that the Court-fee should have been Rs. 10 as the case falls under Art. 17 (vi) of Sch. II of the Court-fees Act. Secondly, that even in this Court the appellant has not made the other co-sharers parties. In reply counsel for the appellant has asked for further time to put in Court-fees and has further stated that Baghu Ram is the only necessary party and that he could not make the other parties to this appeal when he (the appellant) had not made them parties in the lower appellate Court. I do not consider that any further time should be allowed in this case for the appellant to make up the proper Court-fees. The point is clear and there was really no excuse for the appellant not paying the proper Court-fee. There was also no real ground for the appellant not to have made the co-sharers parties in this appeal. They clearly were necessary parties and the mere fact that they were not made parties in the first appeal would not justify the appellant in not making them parties in this appeal when the fact had directly been brought to his notice. Moreover, I consider that the appellate Court was right in holding that the other co-sharers should have been made parties and there was no justification for the plaintiff not making them parties and

I consider that the Court cannot be held to have wrongly exercised the judicial discretion vested in it under O. 41. R. 20, and I, therefore, dismiss the appeal with costs.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 190

ZAFAR ALI, J.

Atta Ullah Khan—Judgment-debtor—Appellant.

v.

Bala Mal — Decree-holder — Respondent.

Misc. First Appeal No. 1294 of 1926, Decided on 11th December 1926, from the order of the Sr. Sub.-J., Amritsar, D/-19th March 1926.

(a) *Civil P. C., O. 21, R. 58—Objection to attachment disallowed—Objector obtaining a decree declaring the property to be not attachable—Executing Court cannot proceed against such property in face of that decree.*

Where an objection to the attachment of a property is disallowed but the objector succeeds in obtaining a decree declaring that the property is not liable to attachment, the executing Court has no power to proceed against the property in opposition to the decree. [P 190 C 1]

(b) *Civil P. C., O. 40, R. 1—Order appointing a Receiver, though made in execution, may fall within R. 1 and not exclusively under S. 51 (d), Civil P. C.*

Civil P. C., O. 40, R. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings, it may fall within the purview of O. 40, R. 1, so as to be appealable under O. 43, R. 1 (s): 3 *P. L. J.* 573 and *A. I. R.* 1924 *Nag.* 165, *Rel. on.* [P 190 C 2]

Niaz Muhammad—for Appellant.

D. C. Ralli—for Respondent.

Judgment.—It is obvious that where an objection to the attachment of a property is disallowed but the objector succeeds in obtaining a decree declaring that the property is not liable to attachment, the executing Court has no power to proceed against that property in opposition to that decree. In the present case the objector sued successfully for a declaration that the property was wakf and was not liable to attachment and the decree passed in his favour by the trial Court was confirmed on appeal by a Division Bench of this Court. The judgment-creditor then applied to the executing Court for the appointment of a Receiver to collect the income from that property representing that, he having appealed to the Privy Council against the decree of the High Court, his interests should be safeguarded keeping in view the possibility of his appeal proving successful. Thereupon, the executing Court ordered the objector to furnish security for keeping proper account of the income and for restitution thereof. As he failed to furnish it the Court appointed a Receiver of the property.

The objector appears in this Court with an appeal against either order and it is urged on his behalf that the Court below had no jurisdiction to pass these orders. Mr. Ralli who appears for the judgment-creditor, raises a preliminary objection that the objector not being a party to the suit in which the decree under execution was passed, he is not competent to appeal against the orders and that his remedy is to institute a suit. He further contends that the order appointing a Receiver was made under S. 51, Cl. (d) of the Civil P. C., and not under O. 40, R. 1 of that Code. These contentions appear to be untenable. O. 40, R. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings it cannot be said that it does not fall within the purview of O. 40, R. 1, and that the person affected by it has no right of appeal under O. 43, R. 1 (s). This view is supported by decisions in *Agabeg* v. *Sundari* (1) and *Ramswarup* v. *Raghunandan* (2). I, therefore, overrule the preliminary objection.

On the merits Mr. Ralli concedes that the executing Court had no power to proceed against the property which had been declared to be not liable to attachment. I, therefore, accept the appeal and set aside both the orders. The respondents will pay the appellants' costs in this Court as well as in the Court below.

J.V. *Appeal accepted*

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(1) [1918] 3 Pat. L. J. 573=48 I. C. 133.
(2) A. I. R. 1924 Nag. 165.

A. I. R. 1927 Lahore 191

FFORDE, J.

Ram Tikaya—Accused—Potitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 635 of 1926, Decided on 26th July 1926, from the order of the S. J., Multan, D/- 30th March 1926.

Punjab Excise Act (1914), *S.* 61 (1) (*a*)—*Imported article lawfully opened by Customs authorities in transit does not cease to be imported thereby.*

Cocaine was dispatched from Germany in two registered packets, one consigned to Multan and the other to branch post office in the Multan district to fictitious addresses. The packets, which came via Karachi, were opened at that port by the custom officials, who on examining them and ascertaining the nature of the contents, sent them on to the post office for delivery to the consignees. On the petitioners calling, at the post office for the packet in question, it was handed over to them after certain enquiries had been made and the petitioners were then arrested and convicted under S. 61 (1) (a).

Held: that the act of the Custom officials being authorized by the Customs Act and the regulations made thereunder, the article does not cease to be imported by the consignee merely because it was interrupted in transit by the Custom officials acting under and in accordance with their statutory powers: 2 *P. R (Cr.)* 1911, *Cons.* [P. 191, C. 1 & 2]

Tek Chand—for Petitioner.

D. R. Sawhney—for the Crown.

Fforde, J.—The petitioners have been convicted under the provisions of S. 61 (1) (a) of the Punjab Excise Act, 1 of 1914, of unlawfully importing and possessing cocaine. The cocaine in question was dispatched from Germany in two registered packets, one consigned to Multan city and the other to a branch post Office at Mian Channum in the Multan district, to fictitious addresses. The packets, which came via Karachi, were opened at that port by the custom officials, who, after examining them and ascertaining the nature of the contents, sent them on to the post office for delivery to the consignees. On the petitioners calling at the Mian Channun post office for the packet in question it was handed over to them after certain enquiries had been made, and the petitioners were then arrested.

The main argument of the counsel for the petitioners is that the conviction for importing cannot be sustained, inasmuch as the transit of the article in question was interrupted by the Custom officials and the subsequent act of forwarding was an act of the custcm officials for which the petitioners cannot be held responsible. Reliance is placed upon a decision of Sir Arthur Reid in *Bostan* v. *The Crown* (1) where it was held that where a parcel containing opium was tendered by the accused for dispatch to Burma, but was seized by the post master and eventually forwarded to Burma by the postal authorities, such a parcel could not be deemed to be exported by the accused. In that case, however, the learned Judge held that the parcel was seized by the postal authorities before dispatch, and that, consequently it was not exported by the petitioner. Without expressing any view as to the correctness or otherwise of this decision I am of opinion that in the present case, the act of the Custom officials being authorized by the Customs Act and the regulations made thereunder, the article does not cease to be imported by the consignee merely because it was interrupted in transit by the custom officials acting under and in accordance with their statutory powers. No doubt, if the custom officials had in fact interrupted the transit of the package in a mode which is not authorized by statute or the regulations made thereunder, it might reasonably be argued that the petitioners could not be held to have imported it. As, however, it has not been suggested that the Custom authorities departed from or exceeded their powers, this question does not require determination.

I am satisfied that the petitioners have been rightly convicted of importing the cocaine in question contrary to law. They should not, however, have been awarded separate sentences under S. 61 (1) (a) for both importing and possessing, and I accordingly set aside the sentence and fine on the count of possession. In other respects the petitions are rejected. The additional fine of Rs. 1,000, if realized, shall be refunded in each case.

D.D. *Revision partly accepted.*

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(1) [1911] 2 P. R. Cr. 1911=6 P. W. R. 1911 Cr.=9 I. C. 682=108 P. L. R. 1911.

A. I. R. 1927 Lahore 192

COLDSTREAM, J.

Babu Singh and *others*—Defendants—Appellants.

v.

Mangat Rai and *another*—Plaintiff and Defendant—Respondents.

Misc. Second Appeal No. 677 of 1926, Decided on 22nd November 1926, from the decree of the Dist. J., Ambala D/- 11th November 1925.

Limitation Act, S. 12—Second appeal—Time for obtaining copy of first Court's order is not to be excluded.

There is no legal authority empowering the High Court in second appeal to interfere with the provisions of S. 12 and allow an extension of time for obtaining a copy of the order of the Court of first instance : *A. I. R.* 1925 *Rang* 344, *not foll* ; *A. I. R.* 1923 *Lah.* 96 ; *A. I. R.* 1923. *Lah.* 461, *Foll.* [P 192, C 2]

Man Singh—for Appellants.

Shamair Chand—for Respondents.

Coldstream, J.—Mangat Rai, the present respondent, instituted a suit against Babu Singh, etc., the present appellants, to recover a debt. The suit was dismissed by the Subordinate Judge, Third Class, Ambala, on the 24th August 1925. Mangat Rai appealed and the learned District Judge of Ambala, accepting the appeal, remanded the case for retrial on the 11th November 1925. Against this decision of the District Judge, Babu Singh, etc., filed the present second appeal on the 18th February 1926.

On the appeal coming on for hearing Mr. Shamair Chand for Mangat Rai, the respondent, objects that the appeal is barred by limitation. Allowing three days for obtaining a copy of the decree appealed against, limitation for the present appeal expired on the 9th February 1926 and therefore the appeal is prima facie barred by limitation. Mr. Man Singh for the appellants pleads, however, that the time spent by his clients in obtaining a copy of the Subordinate Judge's order of the 24th August 1925 should also be excluded. Under Order 42, R. 2 of the Civil Procedure Code, as amended by this Court, a copy of the judgment of the Court of first instance must be filed with a second appeal, and Mr. Man Singh argues that this amendment has the effect of extending the privilege provided by S. 12 of the Indian Limitation Act so as to include the time required for obtaining a copy of the first Court's order. He cites a ruling of a single Bench of this Court reported in the Lahore Law Journal and the judgment reported in *Maung Po. Aung* v. *U. Bya* (1). In the latter cese the Rangoon Court extended time under the provisions of S. 12 of the Indian Limitation Act.

I find no legal authority empowering the High Court to interfere with the provisions of S. 12 of the Indian Limitation Act which do not allow an extension of time for obtaining a copy of the order of the Court of first instance nor in the present case is there any ground for extending the time in exercise of the discretion vested in a Court by S. 5 of the Act. The memorandum of appeal does not refer to any excuse for the presentation of the appeal after the expiry of the period of limitation, nor up to date has there been any application for extension of time under S. 5. Further I notice that the appellants were furnished with a copy of the order of the first Court on the 5th February 1926, that is to say, many days before the period of limitation for this appeal expired. The judgments of this Court published in *Madan Gopal* v. *Malawa Ram* (2) and *Chuhar Mal* v. *Bira Ram* (3) support my view of the law and the merits which, in my opinion, preclude the extension of time in this case.

The appeal is accordingly dismissed with costs. The cross-objections have not been pressed by Mr. Shamair Chand and they are dismissed.

R.D. *Appeal dismissed.*

(1) A. I. R. 1925 Rang 344=3 Rang. 310.
(2) A. I. R. 1923 Lah. 96.
(3) A. I. R, 1923 Lah. 461.

A. I. R. 1927 Lahore 193

JAI LAL, J.

Lajja and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 937 of 1926, Decided on 6th January 1927, from the order of the 1st Cl. Mag., Karnal, D/- 24th July 1926.

Penal Code, S. 141—Common intention is a matter of inference—Evidence of conspiracy is unnecessary to prove common intention.

In order to establish the common intention of any unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence, but such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons it is a perfectly valid and reasonable inference that they all had a common intention and were, therefore, members of an unlawful assembly. [P 193 C 2]

(a) Penal Code, S. 97—Decree-holder given possession of property in execution of his decree—Judgment-debtor only permitted to remove his crops—Judgment-debtor is not competent to resist decree-holder's entry on the plea of private defence.

Where, in execution of a decree, possession of certain land was given to the decree-holder with permission to the judgment-debtors to remove their crops.

Held; that the possession given was actual and not symbolical. and that such decree-holder being fully entitled to enter on such land, the judgment-debtors were not entitled to exercise the right of private defence against the decree-holders. [P 194 C 1]

Duni Chand—for Appellants.

I. C. Chopra—for the Crown

Judgment.—Tulla, Lajja, Kulla, Kanghi, Raja, Moti and Sadhu, appellants, have been convicted under S. 325 of the Indian Penal Code read with S. 149 and have been sentenced to various terms of imprisonment.

It appears that a suit for possession of certain land instituted by one Jai Ram against Lajja and Tulla was decreed and in execution of the decree possession of the land was given to decree-holder, but as the judgment-debtors crops were standing on the land they were not actually ejected, and were allowed to collect the crops. The fact of the possession having been given to Jai Ram was proclaimed by beat of drum on the spot. After Lajja and Tulla had removed their crops Jai Ram, who is stated to be an old man, and his two sons Ramji Lal and Karta Ram went to plough the land on 31st January 1926, and started ploughing it but Tulla apparently objected to doing so. Hearing some altercation between Jai Ram and his sons and Tulla the other appellants armed with lathis arrived on the scene and beat Jai Ram, Ramji Lal and Karta Ram. Jai Ram died as a result of the injuries received and the other two received 29 injuries both simple and grievous. The death of Jai Ram was due to a fracture of the skull. There is no doubt as to the facts stated above. They have been sufficiently established by the testimony of disinterested witnesses including Mai Dhan, Munshi Ram and Kundan. It may be mentioned that Mai Dhan also received injuries when attempting to separate the parties.

The learned counsel for the appellants contends that the accused did not form members of an unlawful assembly and that they acted in the exercise of the right of private defence of property. With these contentions I am unable to agree. In order to establish the common intention of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence, but such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons it is a perfectly valid and reasonable inference that they all had a common intention and were, therefore, members of an unlawful assembly.

With regard to the existence of the right of private defence the learned counsel contends that only symbolical possession had been given to Jai Ram. This does not, in my opinion, affect the criminality of the appellants. A decree had been passed against Tulla and Lajja and in execution of the decree possession had been given to the decree-holder. If instead of their actual dispossession the judgment-debtors were allowed to reap the standing crops they had no right to remain in possession when such crops had been removed. It cannot, therefore, be said that they were in lawful possession when Jai Ram and his sons went to plough the land. But I am of opinion that this was not a case in which symbolical possession was given. On the other hand, it was actual possession that had been given to the decree-holder with permission to the judgment-debtors to remove their crops. The decree-holders,

therefore, were not the aggressors when they went to plough the land and the judgment-debtors were not entitled to resist their action by force. In my opinion no right of private defence has been established.

Having regard to the brutal nature of the assault I do not think that there is any ground for interference with the sentences.

The appeal is dismissed.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 194

AGHA HAIDAR, J.

Ahmad Din and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1033 of 1926, Decided on 20th December 1926, from the order of the 1st Cl. Mag., Sialkot, D/- 21st August 1926.

(a) *Penal Code, S. 97—A person, when attacked cannot be expected to weigh coolly the means employed in resisting it.*

In the excitement and confusion of a fight or scuffle, it is too much to expect that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence, though, of course, the counter attack should not be out of all proportion to the form employed in the original attack. [P 195, C 2]

(b) *Penal Code, S. 96—Magistrates should not overlook importance of right of private defence.*

Magistrates should not, in their zeal to suppress crimes of violence, overlook the importance of the provisions of law as regards the right of private defence. [P 195, C 2]

Khurshaid Zaman—for Appellants.

C. L. Mathur for *Govt. Advocate*—for the Crown.

Judgment.—This is an appeal by Sultan and Ahmad Din father and son respectively, against the order of a Magistrate of the First Class exercising powers under S. 30 of the Code of Criminal Procedure convicting the appellants under S. 307 of the Indian Penal Code. Ahmad Din has been sentenced to six years' rigorous imprisonment including three month's solitary confinement and Sultan has been sentenced to six months' simple imprisonment on account of his old age and infirmity, he being about seventy years old. Both have appealed.

The case is a difficult one, and I have given it much anxious thought. Without entering into the details of the respective stories set up by the prosecution and the defence as regards the enmity between the party of the accused and the complainant's party, it may be taken that undoubtedly there was ill-feeling existing between Ahmad Din's and Budha's party. On the 28th July 1926, at about 9 p. m. there was admittedly a fight in one of the streets of Sialkot. Whether it was a chance encounter or the accused came purposely to attack Budha it is difficult to say. We may, however, take it that Budha with one or two others came face to face with Ahmad Din who, according to the prosecution, was accompanied by his father Sultan and his brother Abdullah. What makes the case a baffling one is the fact that two persons one from each party in this melee were injured. Budha, the complainant, got five injuries which according to the medical evidence, were inflicted with a sharp edged instrument. One of these injuries was in the abdomen and was grievous. The others were also bad cuts but not serious. Ahmad Din, the appellant got no less than seven injuries and one of them in the head was a contused wound which bled very profusely. And yet we find that, with the exception of Budha the complainant, and Muzaffar Din (P. W. No. 8) all the other witnesses for the prosecution who profess to have been present at the scene of occurrence are mysteriously silent as to how Ahmad Din came by his seven injuries. Sultan had a very slight abrasion somewhere on one of his arms.

The story for the prosecution is that Budha, after regaling himself at a milk shop, was engaged in conversation with one Ahmad Jan (P. W. No. 5) when he came face to face with Sultan, Ahmad Din and Abdullah. Budha, according to the prosecution story was discussing the alleged improper conduct of Ahmad Din accused in having assaulted a woman Mt. Hussain Bibi the wife of one Saifa. Ahmad Din remonstrated saying that Budha had no business to discuss him. There was an exchange of abuse, and the prosecution alleges that Sultan the old man, gave a dang blow to Budha which was followed by another dang blow by his son Abdullah who is absconding. On this Budha picked up a lathi from some-

where and hit Ahmad Din, the appellant, who slashed at Budha with a knife. At this stage some passers by intervened and the knife was snatched from the hand of Ahmad Din.

The First Information Report was made soon after by Budha and it is a very significant fact that Budha does not mention the name of Sultan as one of his assailants who actually hit him a blow, and what is more important, he does not mention the fact of any injuries having been inflicted upon Ahmad Din in this fight by anybody. He just kept quiet about these injuries. There was delay in the production of the knife by the witness Muzaffar Din, and Budha himself and some other prosecution witnesses are not positive whether the knife (Ex. P-1) was the identical weapon used by Ahmad Din. The knife, a sketch of which is placed on the record, is a formidable weapon such as is used by butchers for dressing 'red' meat. It was not handed over promptly to the Police but was produced later on by Muzaffar Din witness at the Hospital. This delay is not accounted for and it cannot be said with certainty that this was the very knife used by Ahmad Din. The knife used by Ahmad Din, according to the story for the defence, was an ordinary pocket knife.

The story for the defence is that Budha was accompanied by Sultan, a trunk-maker, and two other persons named Maina and Chhappa. Sultan, the trunk-maker, according to the defence, bore ill-will towards Ahmad Din because, according to the defence, Ahmad Din was instrumental in getting a report made by his aunt, Mt. Jan Bibi, against two women one of whom was the wife of Sultan, the trunk maker. As stated above, the difficulty which the case presents lies in the fact that none of the prosecution witnesses clearly states as to how Ahmad Din received no less than seven injuries. There can be no doubt that if Ahmad Din was attacked by Budha alone or by his companions, then Ahmad Din had a clear right to defend himself against his assailants. It should be remembered that in this fight Ahmad Din got a lathi blow on his head. It might have been a grievous hurt: certainly Ahmad Din must have reasonably apprehended grievous hurt at least after this onslaught upon him by Budha, which resulted in profuse bleeding. In the excitement and confusion of the moment it would be too much to expect that Ahmad Din should ascertain the nature and extent of the injury to his head before defending himself in the best way he could against very serious injury. We have in the evidence that in this fight at a certain stage Ahmad Din was thrown down and Budha got on to the top of him. In such a state of things it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though, of course, the counter attack should not be out of all proportion to the force employed in the original attack. It is sometimes noticed that Magistrates with the very best of intentions and in their commendable zeal to suppress crimes of violence overlook the importance of the provisions of law as regards the right of private defence. The present case is an illustration. The accused have produced evidence in their defence, and it cannot be said that the evidence on behalf of the prosecution is decidedly superior to that put forward by the defence. The witnesses for the defence support the story put forward by the accused and say that the first blows were struck by Budha and that it was only afterwards that Ahmad Din whipped out his knife and slashed at his assailant Budha. In this connexion a brief extract from the evidence of Muzaffar Din (P. W. No. 8) is not without interest. He says:

> Budha was grappling with Ahmad Din and he struck him first two or three fists and then two or three blows. He picked up a stick from somebody after he had received dang blows and he struck two or three blows to Ahmad Din before the latter stabbed him. I had stated before the Police that Ahmad Din and Budha had quarrelled and the latter had beaten him with fists.

This evidence, coming as it does from the mouth of one of the principal witnesses for the prosecution is not without significance and the appellant Ahmad Din is perfectly entitled to make full use of it in his defence. It should further be noted that the evidence of Dr. Lal Chand as regards the injuries found on the person of Ahmad Din is that they could not have been caused by a mere struggle with a person who was empty handed. Even Budha, the complainant, after making some confused statements

in his examination-in-chief gives away his whole case when he says in his cross-examination :

I had received only two dang blows when I struck a stick to Ahmad Din who was ahead of all the accused.

Now, the prosecution witnesses are unanimous that Ahmad Din never struck a dang blow to Budha and that the dang blows were struck by Sultan and Abdullah. This shows that the first attack upon Ahmad Din was made by Abdullah alone.

On the whole I think that the case on behalf of the prosecution is, to say the least of it, a doubtful one, and, under all the circumstances of the case, I think that the injuries inflicted by Budha on the person of Ahmad Din were inflicted in the exercise of the right of private defence. Under the circumstances I accept the appeal of Ahmad Din, set aside his conviction and sentence and order that he may be released forthwith.

As regards Sultan he does not seem to have taken a prominent part, and in fact the First Information Report does not say that he hit any blow. I, therefore, give him the benefit of doubt as I do not think that on the evidence on the record his guilt has been satisfactorily established. I accept the appeal of Sultan also, set aside his conviction and sentence and order that he may be acquitted. He is on bail already and need not surrender.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 196

COLDSTREAM, J.

Mohammad Shafi—Defendant — Appellant.

v.

Fatehgar and *others* — Plaintiff and Defendants—Respondents.

Misc. Second Appeal No. 2649 of 1925, Decided on 25th November 1926, from the order of the Dist. J., Gurdaspur, D/- 18th June 1925.

(a) *Civil P. C., O.* 41, *R.* 23—*Suit remanded for retrial on amended plaint—Remand is on a preliminary point.*

An order on appeal directing the addition of parties to a suit or amendment of a plaint and remanding the suit for retrial is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit and the order of remand is therefore under O. 41, 23 37 *Cal.* 171 and *A. I. R.* 1925 *Cal.* 716, *Rel. on.* [P 197 C 1]

(b) *Civil P. C., O.* 1, *R.* 8—*Suit by a panchayat through its president is representative.*

Members of a panchayat functioning as Municipality, who sue through its President are not suing in their personal capacity as panches but as representing the people within the territorial limits ; 30 *Mad.* 419, *Rel. on.* [197 C 2]

(c) *Court-Fees Act* (7 *of* 1870), *S.* 13—*Court-fee is refunded if remand is under O.* 41, *R.* 23 *Civil P. C.*

An order refunding Court-fee, when remand is made, can only be passed under S. 13 of the Court Fees Act in a case where the remand is under O. 41, R. 23. [P 197 C 2]

Shambhu Nath Puri for *Mohammad Alam*—for Appellant.

Hargopal and *Nanwan Mal*—for Respondents.

Judgment.—The village of Fatehgarh in Batala Tahsil of Gurdaspur District was at one time a Municipality. In 1896 it became a Notified Area under the provisions of the Punjab Municipal Act, and in 1912 the Notified Area Committee being abolished the affairs of the town were by an executive order of the Deputy Commissioner made over for Government to a panchayat. A dispute arose between the panchayat on one side and the proprietors of one of the pattis (subdivisions) of the town and Muhammad Shafi, to whom the pattidars had sold a site, on the other, and in June 1922 a suit was instituted by the Panchayat through its President for possession of the site in dispute.

The Subordinate Judge, Fourth Class, held that the Panchayat had failed to prove its ownership and dismissed the suit. The Panchayat appealed to the District Judge of Gurdaspur urging that the first Court had not understood the nature of the suit which had been brought by the Panchayat Committee on behalf of all the inhabitants.

On the date of hearing a preliminary objection was taken before the District Judge by the respondents to the effect that the Panchayat had no locus standi. The District Judge held that so far as could be discovered the Panchayat had no basis in Statute Law and he recorded the following order :

Under the circumstances I think the best course is to accept the appeal, set aside the decree of the lower Court and order a retrial on an amended plaint in which the members of the Panchayat shall sue under O. 1, R. 8 of the Code of Civil Procedure, on behali of the bashindgan

deh. Lala Iqbal Rai, Subordinate Judge, Batala should thereupon proceed according to law. Stamp on appeal to be refunded and other costs to be costs in the case. All the vendors were not served for this Court but they are not necessary parties to the appeal, the only point involved being that of ownership of the site in dispute, It is, however, desirable that the Subordinate Judge should give them the opportunity of appearing at the retrial.

Against this order Mohammad Shafi the vendee of the disputed site has filed the present appeal.

On behalf of the Panchayat Mr. Nanwan Mal raises the preliminary objection that no appeal lies against the order of the learned District Judge. He points out that in this case the suit had not been disposed of on a preliminary point and that the District Judge's order of remand must, therefore, be held to have been passed in exercise of the inherent powers conferred by S. 151 of the Code of Civil Procedure. He cites the Lahore ruling *Wisakhi Ram* v. *Alwal* (1) which states expressly that there is no appeal provided in the Civil P. C. against an order of remand made in exercise of such power and not made under the provisions of R. 23 of O. 41 of the Code. In reply to this objection Mr. Shambhu Nath urges that it is clear from the fact that the stamp on the appeal was refunded, that the District Judge intended his order to be one under O. 41, R. 23 and appeal against which is provided for by O. 43, R. 1 (u).

An order refunding Court-fee when remand is made can only be passed under S. 13 of the Court Fees Act in a case where the remand is made under O. 41, R. 23 [*Agent, Bengal Nagpur Ry.* v. *Behari Lal Dutt* (2).] The judgment in *Jadab Gobinda Singh* v. *Anath Bandhu Sahu* (3) is authority for holding that an order on appeal directing the addition of parties to a suit and remanding the suit for re-trial is an order upon a point which is necessarily preliminary to the proper decision and the trial of the suit. The circumstances of the present case appear to me to be analogous to those dealt with by that judgment and assuming the order appealed against to be one passed under the provisions of O. 41, R. 23, I proceed to dispose of the appeal on its merits.

(1) A. I. R. 1924 Lah. 487.
(2) A. I. R. 1925 Cal. 716=52 Cal. 783.
(3) [1910] 37 Cal. 171=5 I. C. 998.

The objection that the Panchayat had no locus standi was pleaded by the defendants in their written statements but was apparently not pressed, for no issue on the point was raised. It ought to have been obvious from the beginning that the plaintiffs who sued through the President of the Panchayat were not suing in their personal capacity as "panches," but as representatives of the people of Fatehgarh town. How the first Court failed to grasp (as apparently it did) the real nature of the suit when it came to write its judgment is difficult to understand. The facts, stated in the learned District Judge's order, that the Panchayat was constituted by the Deputy Commissioner in 1912 and has since then governed the town, are not disputed. The circumstances are very similar to those of the case reported as *Krishna Bai* v. *Collector and Government Agent, Tanjore* (4) and I think, that the learned District Judge's order fell within the express provisions of O. 1, R. 10 of the Civil Procedure Code, although that rule is not mentioned in his order.

Finding the order neither illegal nor improper but permitted by law and justified by the circumstances, I dismiss the appeal with costs.

J.V. *Appeal dismissed.*

(4) [1907] 30 Mad. 419.

A. I. R. 1927 Lahore 197

ZAFAR ALI, J.

Sultan Muhammad—Defendant—Appellant.

v.

Surkhru Khan and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 855 of 1926, Decided on 22nd December 1926, from a decree of the Dist. J., Attock at Campbellpur, D/- 19th December 1925.

(a) *Abadi—Non-proprietor can neither sell site nor right of residence—Sale, even to one of proprietors is not binding on the rest.*

A non-proprietor in a village abadi is only the owner of the material of his house and is not competent to sell the site or the right of residence. The sale of the house, therefore, by such non-proprietor owner though it be to one of the proprietors, is not binding on the rest: 24 *P. R.* 1878 and 48 *P. R.* 1899, *Foll.* [P. 198, C. 1]

(b) *Custom (Punjab)—Abadi—A non-proprietor so also his alienees can remove materials of the house in village abadi.*

A non-proprietor owner of a house in the abadi of a village in the Punjab is entitled to remove the materials of his house under a general custom of the province and so are his alienees who stand in his shoes. [P 198 C 1]

M. S. Bhagat—for Appellant.
Devi Dayal—for Respondents.

Judgment.—The house in dispute is situate in the abadi of village Lawa, and it was in the possession of a non-proprietor menial, namely, Shera Musalli. Shera sold it to one of the proprietors, namely, Sultan Muhammad, Defendant No. 5, and the latter sold it to two strangers who figure as Defendants Nos. 2 and 3. The abadi land is joint property of the plaintiffs and Defendants Nos. 5 to 9. The plaintiffs sued for possession of half the house, according to their share in the abadi land. Shera Musalli was only the owner of the material and was not competent to sell the site or the right of residence. The sale in favour of Defendant No. 5 though he was one of the proprietors was not binding on the rest as held in *Heba* v. *Ram Singh* (1) and *Kahan Singh* v. *Warris Khan* (2) and consequently the sale by him to strangers was also inoperative. The trial Court granted the plaintiffs a decree for possession of half the house as prayed for by them but on appeal the learned District Judge held that they were only entitled to joint possession of the site, and ordered that the purchasers should remove the materials within three months, and modified the decree of the trial Court accordingly. Defendant No. 5, the first vendee appeals and it is contended on his behalf that the plaintiffs were entitled only to a declaration that they were owners of a half share in the house and not to a decree for joint possession of the site and for demolition of the house and removal of the materials for which there was no prayer in the plaint. But according to the general rule of custom Shera was entitled to remove the materials and so are the alienees who stand in his shoes. As they have no right of residence in the house they should either vacate it or remove the materials. Further the plaintiffs are only entitled to joint possession of the site as the abadi land has not yet been partitioned. The decree of the lower Appellate Court is, therefore, correct and I dismiss the appeal with costs.

J.V. *Appeal dismissed.*

(1) [1878] 24 P. R. 1878.
(2) [1899] 48 P. R. 1899.

A. I. R. 1927 Lahore 198

SHADI LAL, C. J., AND AGHA HAIDAR, J

Mt. Nandan—Defendant—Appellant.

v.

Wazira and *others* — Plaintiffs —Respondents.

First Appeal No. 1943 of 1922, Decided on 20th November 1926, from the decree of the Sr. Sub.-J., Gujranwala, D/- 15th May 1922.

(a) *Specific Relief Act, S. 42—Gift by a limited heir — Some reversioners only recognize it—Others may sue under S. 42.*

Where some of the reversioners accept the validity of the gift by the limited heir and recognize the title of the donee, their action cannot adversely affect the claim of the other reversioners, any one of whom can bring a suit for and obtain a declaratory decree. [P 199 C 1]

(b) *Civil P. C., S. 2 (2)—Decree validly passed—Event cutting at root of decree subsequently happening—Appellate Court cannot set it aside.*

When a decree is validly passed, the appellate Court will not set it aside merely on the ground that an event happens subsequent to such decree which, happening before its passing, would have led to the dismissal of the suit. [P 199 C 1]

(c) *Limitation Act, Art. 125—Alienating female must profess Hindu or Mahomedan faith.*

Article 125 applies to every case where the female making the alienation is a Hindu or a Mahomedan and the immediate reversioners, who bring the suit, also profess the same faith. It is not necessary that the female making the alienation should be actually governed by the Hindu or the Mahomedan Law. [P 199 C 2]

Mehr Chand and *Kidar Nath Chopra*—for Appellant.

Mukand Lal and *Shambhu Lal*—for Respondents.

Judgment.—In October 1894, one Gulab Singh, a Jat of the village Mahya in the Gujranwala District, made a gift of 790 kanals and 4 marlas of land to Bahali the husband of his sister, and in August 1895, his reversionary heirs obtained a declaratory decree to the effect that the gift would not affect their rights when the succession opened out. At the time when the gift was made, Gulab Singh retained an area of about 160 kanals of land, and when he died in May 1909,

this area came into the possession of his step-mother Mt. Rajan. In January 1910, the aforesaid reversioners brought an action against Bahali to recover possession of the land gifted to him on the allegation that Mt. Rajan had abandoned her rights to the property, and that they were, therefore, entitled to immediate possession. Their claim was negatived on the ground that, though the lady was quite willing to let her daughter Mt. Nandan and the latter's husband Bahali enjoy the use and benefit of the land, her action did not indicate that she had given up all rights to the property or was prepared to abandon the estate in favour of Gulab Singh's reversioners.

In February 1912, Mt. Rajan made a gift of the entire estate, which originally belonged to her step-son Gulab Singh, in favour of her daughter Mt. Nandan and on the 20th May 1921, the reversioners brought the present action praying for a declaratory decree that the gift should not affect their right of succession after the death of the donor. The trial Judge has passed a decree in their favour, and in this appeal by Mt. Nandan we are asked to dismiss the suit on the short ground that by reason of the death of the donor during the pendency of the appeal in this Court, the reversioners are entitled to the immediate possession of the estate, and that the Court should decline to grant a declaratory decree which is a purely discretionary remedy. It must be remembered that the plaintiffs have been successful in the trial Court, and the appellate Court cannot set aside the decree in their place subsequent to that decree. Nor can the suit for a declaration be dismissed because some of the reversioners have now accepted the validity of the gift and recognized the title of the donee. Their action cannot adversely affect the claim of the other reversioners, any one of whom could bring a suit for, and obtain, a declaratory decree.

The main question debated before us is whether the suit brought by the plaintiffs was barred by time. Now, it is common ground that the suit is not governed by the Punjab Limitation (Ancestral Land Alienation) Act 1 of 1900; and that it would not be barred under the Punjab Limitation (Custom) Act 1 of 1920, if it was governed by Art. 125 of the Indian Limitation Act, 1908. The dispute between the parties, is, therefore, narrowed down to the issue as to whether Art. 125 or Art. 120 of the Indian Limitation Act prescribes the period of limitation for the suit. It is incontrovertible that Art. 120, being the residuary article, can have operation only if no period of limitation is provided for the suit elsewhere in the statute.

Article 125 prescribes a period of twelve years for a suit brought during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who if the female died at the date of instituting the suit, would be entitled to the possession of land to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage. Mr. Mehar Chand for the appellants seeks to take the case out of the scope of the article by contending that it applies only to those cases in which the female making the alienation is governed by the Hindu or the Muhammadan Law, and that the parties to the present case are governed, neither by the Hindu Law, nor by the Muhammadan Law. But the article covers every case where the female making the alienation is a Hindu or a Muhammadan, and the immediate reversioners, who bring the suit, also profess the same faith. There can be no doubt that under the Muhammadan Law a female never succeeds to a life-estate, and it is clear that if the contention of the learned advocate be accepted, the article would be rendered superfluous in so far as it refers to Muhammadans.

Mr Mehar Chand has expressed his inability to cite a single judicial authority which would support his contention. The suit is certainly brought by Hindu reversioners to impeach an alienation made by a Hindu female, and it is conceded that on her death they will be entitled to the possession of the estate. The case satisfies all the requirements of Art. 125 and consequently is not barred by time.

We accordingly confirm the decree of the lower Court and dismiss the appeal with costs.

J.V. *Appeal dismissed.*

✻ A. I. R. 1927 Lahore 200

HARRISON AND ADDISION, JJ.

Hari Singh—Plaintiff—Appellant.

v.

Muhammad Said and *others*—Defendants—Respondents.

First Appeal No. 2735 of 1920, Decided on 1st July 1926, from the decree of the Sub-J., 1st Cl., Lahore, D/- 31st August 1920.

✻ (a) *Civil P. C., O. 9, R. 13—Proceedings on application under R. 13 are proceedings independent of the suit.*

Proceedings consequent on an application for setting aside an ex parte decree are not merely a branch of the suit which is terminated when the ex parte decree is passed and the suit does not revive, if at all, until after the proceedings in the application are terminated successfully : *A. I. R.* 1926 *Lah.* 379, *Foll.* [P. 207, C. 1]

✻ (b) *Civil P. C., S. 13— Foreign judgment can be final even when an appeal is pending in foreign Court—Stay of execution does not take away finality of judgment.*

A foreign judgment may be final and conclusive though it is subject to appeal and though an appeal against it is actually pending in the foreign country where it was given. The pendency of an appeal in a foreign Court might afford ground for the equitable interposition of the English Court to prevent the possible abuse of its process and on proper terms to stay execution in an action but it would not be a bar to the action itself. Even a stay of execution does not affect the finality of the foreign judgment which nevertheless can be sued on. [P. 207, C. 2]

(c) *Limitation Act, Ss. 12 and 14—Sections do not apply to proceedings in foreign Court.*

Sections 12 and 14 are only applicable to suits in British India and not to proceedings in foreign Courts : 35 *Bom.* 139 and *A. I. R.* 1925 *Nag.* 321, *Rel. on.* [P. 208, C. 1]

(d) *Limitation Act, Ss. 12, 13 and 14—Saving of time.*

There can be no saving of limitation apart from the provisions of the Limitation Act. [P. 208, C. 2]

(e) *Limitation Act, S. 14—Foreign judgment —Suit on—Time during which defendant was applying to set aside ex parte decree cannot be deducted.*

Plaintiff suing on a foreign judgment is not entitled to deduct the time during which the defendants were applying before the foreign Courts to set aside the ex parte decree ; for until it is in fact set aside it remains a final decree capable of execution : (*Case Law discussed*). [P. 209, C. 1]

(f) *Civil P. C., O. 47, R. 9—Second or third review application on the same grounds is not maintainable.*

Although a second application for review on new grounds can be entertained if within limitation, it does not follow that a plaintiff can go on for ever presenting petition after petition containing the same grounds until somehow he succeeds and has the obnoxious order reviewed and reversed. A second review could be allowed only if the first was rejected as founded on insufficient grounds. [P. 211, C. 1]

✻ (g) *Civil P. C., O. 47, R. 9—Foreign judgment based on a second or third review on the same grounds is opposed to natural justice and cannot be basis of suit in British Indian Court—Civil P. C., S. 13.*

A foreign judgment based on a second or third review on the same grounds is one based on miscarriage of justice and a suit based on such judgment cannot be entertained in British Indian Courts. [P. 211, C. 2]

✻ (h) *Jurisdiction—Foreign Courts—Possession of property or partnership in respect of such property within foreign Court's jurisdiction does not give that Court jurisdiction in respect of an action in personam.*

Neither the fact of possessing property in a foreign country nor entering into a partnership there to deal with that property gives the Courts of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action provided he neither appeared to the process nor expressly agreed to the jurisdiction of the foreign Court : *Emanuel* v. *Symon*, (1908) 1 *K. B.* 302, *Foll.* [P. 212, C. 1]

✻ (i) *Jurisdiction— Foreign Court—Applying for setting aside ex parte decree and filing of appeal amounts to submission to its jurisdiction.*

Where defendants apply to set aside an ex parte decree passed against them in a foreign Court having no jursisdiction and appeal against the decree that amounts to submission to the jurisdiction of such Court. [P, 214, C. 1]

(j) *Civil P. C., S. 13 — Proceedings against minor defendant without appointing guardian ad litem are opposed to natural justice.*

Proceedings against a minor defendant without appointing a guardian ad litem to look after his interest in the suit are opposed to natural justice. [P. 214, C. 1]

(k) *Civil P. C., O. 5, R. 15—Service to servant is not sufficient.*

A servant is not a member of the family within the meaning of R. 15. [P. 215, C. 1]

(l) *Civil P. C., O. 22, R. 4—Foreign judgment —Legal representative not brought on record— Judgment is opposed to natural justice—Civil P. C., S. 13.*

It amounts to a denial of natural justice not to bring the legal representatives of a deceased defendant upon the record and a judgment passed without so impleading the legal representative cannot be given effect to against them. [P. 215, C. 2]

Sheo Narain, Tek Chand, M. L. Puri and *Sardar Partab Singh*—for Appellant.

Moti Sagar, Mehr Chand Mahajan, Mohsin Shah and *Raj Krishan* — for Respondents.

Judgment.—This is an appeal by the plaintiff Hari Singh whose suit in the Court of the Subordinate Judge, First Class, Lahore, on a foreign judgment obtained in the Poonch State was dismissed. The Poonch State is a dependency of the State of Kashmir and Jummu. One Nizam Din, who belonged to Riasi in the Kashmir and Jummu State, entered the service of the Poonch State and ended by being Wazir or Prime Minister there. He left Poonch State in Sambat 1950 (1893, A. D.) and went home to Riasi in the Kashmir and Jummu State were he died in Sambat 1951 (1894, A. D.). At one stage of his career in the Poonch State he was imprisoned. At that time he was succeeded as Wazir by Kartar Singh the brother of Hari Singh the present plaintiff. It would appear that Kartar Singh and Nizam Din took a joint farm of the revenue of certain villages of the Poonch State and the allegation is that Nizam Din for the most part collected this revenue and had not accounted to his partner for it.

The first we know about the matter in dispute is from the petition dated the 3rd July 1902 which Hari Singh presented to the Wazir of the Poonch State on his own behalf and on behalf of the minor son of his deceased brother Kartar Singh. He mentioned in this that he and Kartar Singh instituted a suit on the 15th April 1891 for possession of certain villages and recovery of profits from Nizam Din, the father of Feroz Din, Muhammad Din and Mahtab Din, the three defendants in this suit. According to this petition that suit was still pending and an order had been recorded in it that an account should be rendered and possession of the villages given. Thereafter, it was stated, they instituted another 'suit in March 1899 for rendition of accounts. In this latter suit summonses were issued to the three sons of Nizam Din from the Court of the Chief Judge, Jummu, on the 20th April 1899 and 'these were served at Riasi, their home in the Kashmir and Jummu State. Subsequent to this, the proceedings were ex-parte against the three defendants of whom Mahtab Din was a minor. It was admitted in the petition of the 3rd July 1902 presented to the Wazir, that no date was fixed in that case, nor had anything been done in it from 1899 to 1902 after the issue of the summonses. It was prayed that it should be proceeded with.

Prior to becoming Wazir, Sardar Devi Singh to whom the petition was presented had been Judge of the Chief Court of Poonch. It is obvious that the petition should never have been presented to him but to his successor as Judge of the Chief Court, namely Pandit Pyare Lal. There is no civil Court of the Wazir of Poonch and the Court which is over the Chief Judge is the Raja himself, though it would appear from the record that the Wazir advises the Raja in appeals coming to him.

However, Sardar Devi Singh issued summonses to the defendants in 1902 and they appeared before him. He applied to the Chief Judge for the record but nothing but some charred fragments could be produced as there had been a fire in the Courts a short time before the application had been made. The defendants appeared and protested before the Wazir that there was no pending case and that the suit instituted in 1899 had been struck off the list of pending cases. It is not now claimed that the appearance of the defendant before the Wazir in 1902 amounted to a submission to the jurisdiction of the Poonch Courts as obviously the Wazir had no power to take action. On the 23rd of August 1902 the Wazir appears to have passed an order that the application could not be heard as there was no record and that a fresh suit should be brought. He, however, explained this order in a note dated the 16th September 1902 as being not an order but a note of the objection of the defendants. Be that as it may, about June 1903, the petition was sent to the Court of the Chief Judge of Poonch, namely, Pandit Piyare Lal.

He recorded an order dated the 26th of June 1903 that as proceedings in the case were not going on at the time the record had been destroyed, fresh summonses should issue to the defendants. At the same time he ordered that the date of the institution of the suit which was numbered as No. 4 of 1903 should be taken as being 1899. He also ordered the plaintiff to prove that he had instituted the suit for accounts on a stamp of Rs. 10 and he left over till the defendants should appear, the question of whether a ten rupee stamp, this being the pro-

per stamp for declaratory suits only, was sufficient. Finally the plaintiff was directed to produce a copy of the original plaint.

It would appear that Feroz Din and Muhammad Din two of the brothers were served by post in April 1904 at Lahore where they were residing and where they had bought considerable property. None of the defendants appeared and ex-parte proceedings were taken against them including the minor brother Mahtab Din. Mahtab Din became a major about the beginning of October 1904. He was not informed after he became major that proceedings were going on against him in Poonch.

On the 3rd of January 1905 the Chief Judge of Poonch State, Pandit Pyare Lal, gave judgment ex-parte against all the three brothers for Rs. 1,63,509-5-0 to be satisfied out of the property inherited by them from their father. The finding was that the amount due was Rs. 82,890-3-0 but interest was allowed on that sum up to the date of the decree at 12 per cent. per annum. This brought the decretal amount up to the sum named and further interest at 6 per cent. per annum was allowed on the decretal amount. There was no law of limitation in the Poonch State until 1910 and the accounts taken were for this reason from about 1878.

On the 17th of February 1905, that is a month and a half after the ex-parte judgment was delivered the defendants presented an application to the Chief Judge of Poonch to have the ex-parte decree against them set aside on the ground that no summonses were duly issued to or served upon Feroz Din and Muhammad Din and that the minor Mahtab Din had received no notice. It was stated in this petition that Feroz Din was seriously ill at Lahore when the case was heard and that Muhammad Din could not leave him. The Chief Judge gave a very short time to produce evidence in support of this contention and none was produced. On the 14th of November 1905 the Chief Judge made a conditional order to the effect that the ex-parte decree would be set aside provided the defendants deposited within three months in cash or currency notes the full decretal amount together with Rs. 490 on account of costs and compensation for the plaintiff. On the 10th of February 1906 the Chief Judge extended the time for paying the decretal amount etc. by two months without any application having been made to him for this concession. Then on the 12th of April 1906 the conditional order of the 14th of November 1905 was vacated, as the money had not been deposited.

On the 13th of September 1906 the three defendants through their agents Hakim Karm Ilahi instituted an appeal in the Court of the Raja praying that the order of the Chief Judge to the effect that the total decretal amount in addition to damages and costs should be deposited, be set aside and that the suit be reheard without any condition. On the 8th of March 1908 Feroz Din applied to the Raja for an order that the decree now in question and certain other decrees should not be executed against the persons of the defendants as they had been passed against them only to the extent to which they had inherited property from their father. It was stated that the decree-holders intended to execute the decree against their persons and that this state of affairs prevented their coming into Poonch to prosecute their appeal. On the 14th of May 1908 the Raja granted this request. Then on the 7th of September 1909 the Raja wrote his order in the appeal of the defendants and that order went much further than what was prayed for in the memorandum of appeal ; for, after going into the facts very fully the Raja decided that not only should there be a rehearing of the old case but that in the circumstances already described the decree of the Chief Judge dated the 3rd of January 1905 should be completely set aside with liberty to the plaintiff to institute a fresh suit if he so desired on the same cause of action after he had paid full Court fees on the amount claimed. This order dated the 7th of September 1909 of the Raja was clear and well reasoned, and may be summed up as follows.

It was found that Nizam Din went to his home in Riasi in the Kashmir and Jummu State before he died and that the defendants had been living for some years at Lahore while they also held property there as well as in other parts of the Punjab. It was said that Feroz Din was to the knowledge of the Raja suffering from weakness of the brain for

some years and was not able to go about for this reason. It was held that the Chief Judge was wrong according to the procedure in vogue in the State, in ordering the defendants to be served at Lahore by post. After giving the history of the case the Raja stated that he would deal with it as a whole and would consider what would be the just and proper course to take in the circumstances, which were extraordinary as the proceedings from the commencement were against law. He considered it very probable that the suit which had been instituted in 1899, had been dropped by the plaintiffs as they had not paid proper Court fees and as the plaintiffs did not then think that they were likely to succeed. The Raja further noted that neither the original plaint nor a copy of it was produced by the plaintiffs in the Court of the Chief Judge and also that the Chief Judge had himself held in his judgment that Court fees should have been paid upon the approximate sum to which the plaintiffs thought they were entitled though he, the Chief Judge, had raised the question of the Court fee in his order of the 26th of June 1903, he finally dropped it and went on with the suit without compelling the plaintiffs to value it correctly. This was against the interests of the State and the action of the Chief Judge was to be deprecated. The Raja therefore, considered that the document before him was not a valid plaint and should not have been retained in the Court. The Raja also noted the wrong course taken by the plaintiffs in presenting their application of the 3rd of July 1902 to the Prime Minister who had once been the Chief Judge instead of to his successor. He held that the order of the Wazir dated the 23rd of August 1902 was an order rejecting the application of the plaintiffs dated the 3rd of July 1902 in spite of the subsequent explanation of the Wazir which he considered unintelligible. It was the successor of that Wazir who sent the application to the Chief Judge because it appeared to him to be a civil suit with which the Wazir had no connexion. The Raja further considered that there were no proper proceedings before the Chief Judge Pandit Pyare Lal, because the Wazir had definitely rejected the plaintiffs' application on the 23rd of August 1902 and this meant that there was no suit pending which could be sent by the next Wazir to the Chief Judge. He also held that it was not competent for the Chief Judge to proceed ex-parte against the minor without first appointing a guardian ad litem who was willing to act for him. The Raja further noted that though the Chief Judge fixed certain dates for evidence no proof was tendered beyond the statement of Hari Singh plaintiff. On the grounds of law and justice, therefore, he held it impossible to maintain such a decree in any form. Acting as a Court of revision he set aside the ex-parte decree dated the 3rd of January 1905 completely but gave permission to the plaintiff to institute a proper suit within three months on full Court fees. He pointed out that this would not affect the plaintiff's claim as there was no law of limitation in force in the State.

Though the Raja dated and signed the above order on the 7th of September 1909, it was not communicated to the parties until the 17th of August 1910 and this because of the failure of the Wazir to do his duty. As illustrating the procedure adopted in appeals before the Raja the order of the Wazir dated the 1st of August 1908 in the above appeal may be mentioned. It was the Wazir who heard the arguments and then recorded a note to that effect, adding that the record of the case would be submitted to His Highness the Raja so that all the facts might be related to him and that the parties should also appear before him. Presumably, therefore, they did so and finally the Raja wrote his order. This order was not communicated because the Wazir kept the record as he desired the Raja to modify his order. In fact the Wazir wrote to the Raja on the 24th of March 1910 suggesting that the best course would be to set aside the ex-parte decree unconditionally and to recommend the case for a rehearing on the merits, without ordering a fresh suit to be instituted on full Court fees. The Raja on the 15th of August 1910 passed an order refusing to go into this question which had previously been disposed of by him in detail. He accordingly ordered the Wazir to communicate the judgment to the parties and this was done on the 17th of August 1910 by an order signed

by the Raja and by the Wazir. This must be taken to be the date when the Raja's order was announced.

On the 12th of November 1910 the plaintiffs presented their first application for review of the judgment of the Raja which they noted in their petition as being dated the 15th of August 1910. It was to the effect that the whole decree could not be set aside as the appeal was only against that part of the Chief Judge's judgment which imposed the condition of the deposit of the full decretal amount before the ex-parte decree could be set aside. It was further claimed that the Wazir did not announce the Raja's order of the 7th of September 1909 till so long afterwards as he considered that it would only become final if both the Raja and the Wazir signed it. It was prayed that this matter should be further gone into. Other numerous grounds for review were given but the review was rejected apparently without notice to the defendants on the 6th of December 1910.

A second application for review was then presented on the 16th of February 1911, by the plaintiffs but this has not been proved nor has a copy of it been placed upon the record. It is obvious, however, from the Raja's order dated the 12th July 1911, which was signed both by the Raja and the then Wazir that the grounds of review were the same. This order dated the 12th of July 1911 gives nearly the same reasons as were given in the first order of the 7th of September 1909 but there is a very specific allusion to the plaint in this last order which requires further mention. According to this order the plaint was destroyed in the fire. Thereafter the plaintiffs put in an application on an eight anna stamp which seems to have been regarded as their written plaint and which apparently formed the basis of the proceedings before the Chief Judge. The Raja again examined it to see if it could possibly serve the purpose of a regular plaint and found that it could not as it did not contain the particulars that the plaintiffs were bound to enter in their plaint, such as a detailed statement of the facts relating to the partnership on which the plaint was based etc. The Raja, therefore, maintained his previous order in all respects except that he added a condition that the defendants would not to allowed to defend the new suit when and if it was instituted unless they deposited Rs. 5,000 by way of security. This order of the 12th July 1911, therefore, left matters in much the same state as they were.

On the 9th of October 1911 the plaintiffs presented still another application regarding the Rajah's order. They definitely prayed for review of the orders dated the 7th of September 1909 and the 12th of July 1911. This has only to be read to see that it was a petition seeking the review of a review. On it an order dated the 29th of August 1914 was passed setting aside the order dated the 7th of September 1909 as being illegal and restoring the original conditional order of the Chief Judge dated the 14th of November 1905 subject to this qualification that instead of depositing the full decretal amount the defendants had to deposit only Rs. 25,000 in order to get the ex-parte decree dated the 3rd of January 1905 set aside and the case reheard on the merits. This means that the old ex-parte decree dated the 3rd of January 1905 was again in force on the 29th of August 1914 and was capable of execution from that date though the defendants could have the case reheard on the merits if they paid into Court Rs. 25,000 within three months. Nothing is said in this order about the illegality of the procedure regarding service and proceeding with the suit against the minor without a guardian ad-litem etc. The order was of course ex-parte.

On the 21st of November 1914 Feroz Din and Mahtab Din, two of the defendants, applied for a review of the order dated the 29th of August 1914. In their petition they pointed out that when a review is once rejected it cannot be again accepted on the same grounds and while the last petition for review was also barred by time as the law of limitation came into force in Poonch in August 1910. Other reasons were advanced. On the 3rd of May 1915 the plaintiffs applied to the effect that the three months allowed by the Raja for the deposit of Rs. 25,000 by the defendants had passed and that, therefore, the decree of the Chief Judge dated the 3rd of January 1905 should be held to be final. By order dated the 16th of June 1915 the Raja rejected the application

for review of the defendants and ordered that the original ex-parte decree of the Chief Judge dated the 3rd of January 1905 should stand. On the merits of the case he said nothing as there was no appeal before him on the merits and he only dealt with his own order of the 7th of September 1909 passed in the proceedings to set aside the ex-parte decree. The same remark was made in the order, dated the 29th August 1914. The Raja, therefore, as an appellate Court did not go into the merits of the original ex-parte decree dated the 3rd of January 1905 so that it cannot be said that it merged in his last orders.

The plaintiff, Hari Singh, then brought the present suit in the Court of the Subordinate Judge, 1st class, Lahore on the basis of the above mentioned judgment on the 15th of August 1916. He sued for the recovery of Rs. 2,79,307-8 to which sum the original decretal amount had grown by reason of interest. He also claimed further interest on the above sum at 6 per cent. per annum from the date of the suit. The suit was brought against Feroz Din the minor son and widows of Muhammad Din, and Mahtab Din. Feroz Din died during the pendency of the suit and his minor son and daughters and widows were brought upon the record as his representatives. The plaint stated that the ex-parte judgment was obtained on the 3rd of January 1905. It also mentioned the order of the Raja, dated the 7th of September 1909, cancelling the decree then obtained but it added that the last mentioned order was set aside by the Raja on review on the 29th of August 1914 and that a petition for review presented by the defendants was rejected on the 16th of June 1915. It was said that this last order of the 16th of June 1915 was a final and conclusive order which fully maintained the ex-parte judgment of the Chief Judge dated the 3rd of January 1905. Lastly the plaint stated that Mahtab Din had given up his rights in his father's property but he had been impleaded as a defendant by way of precaution.

The defendants pleaded that the ex-parte judgment of Pandit Piyare Lal was illegal and without jurisdiction no suit having ever been legally instituted in his Court; that the decree passed by Pandit Piyare Lal was declared null and void by the Raja for the various reasons given by him in his exhaustive judgment dated the 7th of September 1909; that those reasons still held good; that two distinct and independent applications for review of that order had been rejected; that the judgment in question was the result of intrigue among the State Officials against Nizam Din the late Wazir and his sons and offended against natural justice; that the order accepting the third review was illegal and was opposed to the principle of finality and was thus against natural justice; that Mahtab Din was a minor when the case was started in the Court of Pandit Piyare Lal, was not represented in the proceedings which led to the ex-parte judgment and had no knowledge of them, while Feroz Din and Muhammad Din also had no notice of these proceedings in the third review and his legal representatives were not brought on the record and had no knowledge of them and were, therefore, not bound by the last order passed; that the suit was instituted long after Nizam Din had left the State and had died outside it and that neither he nor his sons were residents of the Poonch State at the time it was instituted nor were they subjects of the State and thus Pandit Piyare Lal had no jurisdiction to hear this suit; that Feroz Din was mentally deranged during the proceedings in the Court of Pandit Piyare Lal and also afterwards when steps were being taken to get the Raja's order of the 7th of September 1909 set aside; that Mahtab Din had not given up his rights in his father's property; and finally, that the suit was barred by limitation.

The plaintiff denied that Feroz Din was ever insane and alleged that Mahtab Din was duly represented by Feroz Din in the proceedings in Poonch. He further alleged that the defendants were resident in and subjects of, the Poonch State, that they in any case, submitted themselves to the jurisdiction of the Poonch Courts and were estopped from raising this plea; and that it was not necessary to bring the legal representatives of Muhammad Din upon the record of the proceedings in the third review as he died after arguments were heard. In reply to this the defendants rejoined that they never sub-

mitted to the jurisdiction of the Poonch Courts.

The following issues were framed :

1. Has this Court jurisdiction to try the case ?

2. Is the suit within limitation and what would be the starting point for limitation to run from ?

3. (a) Did the defendant submit to the jurisdiction of the Poonch Courts ? (b) If so, can they now plead want of their jurisdiction ?

4. If they can, have not the Poonch Courts jurisdiction to try the case ?

5. Was the decree passed by the Court there unjust and illegal and obtained frandulently and thus could be attacked under S. 13 of the Civil Procedure Code ?

6. When did Muhammad Din die and how will his death affect the review proceedings ?

7, Was not Mahtab Din minor properly represented in the State proceedings and so is not bound by them now ?

8. Was the Defendant No. 1 during the State proceedings mentally unfit to defend himself ?

9. If so is he bound by these proceedings ?

10. Is the plaintiffs' claim for interest untenable ?

11. Is not the order of the Raja dated the 6th of June 1915 a judgment which can form the basis of a decree ?

The findings of the trial Court were as follows :

On Issue No. 1 it held that it had jurisdiction to hear the suit. On Issue No. 2 it held that limitation started on the 3rd of January 1905 and that the suit was within time as the following periods were to be excluded :

(1) from the 14th November 1905 to the 14th February 1906 the period of three months allowed by the Chief Judge to the defendants to deposit the decretal amount ;

(2) from the 12th September 1906 to the 7th September 1909 during which the appeal against the condition attached to the above order of the Chief Judge was pending in the Raja's Court ;

(3) from the 7th September 1909 to the 29th August 1914 the time spent by the plaintiffs in the proceedings which resulted in the review order of the latter date ; and (4) from the 29th August 1914 to the 16th of June 1915 when the defendants' application for review was dismissed. On the 10th issue the trial Court held that there was no legal order passed in the Poonch State after that of the 12th July 1911, rejecting the plaintiffs, second review application, and that therefore the order of the 16th of June 1915 was not an order which could be enforced by a suit in the Courts in British India. On the third and fourth issues the trial Court held that the defendants were not residents of the Poonch State when the suit was instituted and were also not subjects of that State by that they had submitted that the jurisdiction of the Poonch Courts by applying to set aside the ex-parte decree against them.

On the 5th, 6th, 7th and 8th issues the trial Court held that the defendants were not bound by the order of the Raja dated the 29th of August 1914 accepting the plaintiffs' third application for review as it offended against natural justice in that it reopened a matter which had been finally closed and was incapable of being re-agitated ; that Mahtab Din was not bound by the ex-parte judgment becase he was a minor whose interests were not looked after when the suit commenced and he had no notice of the proceedings leading up to ex-parte judgment because he was insane from sometime in October 1904 to some time in February 1905 during which period the ex-parte judgment was obtained ; that Muhammad Din's representatives were not bound by the order passed ni the third review on the 29th of August 1914 as he was not served in those proceedings and because his legal representatives were not brought upon the record when he died during the pendency of those proceedings. It was held, however, that Feroz Din and Muhammad Din had knowledge of the proceedings in the Court of Pandit Piyare Lal which ended in the ex-parte judgment dated the 3rd of January 1905. The trial Court also held that there was ample evidence of intrigue in the State between the Hindus and Muhammadans but that there was no proof that the ex-parte judgment was obtained by means of such intrigue. Lastly in the 9th issue, it was held that as interest had been allowed by the foreign Court, it should be allowed in the Courts in British India. As, however, the judgment offended against the principles of natural justice for the

reasons given, the plaintiffs' suit was dismissed with costs.

We shall first discuss the question of limitation. In our opinion, the suit is clearly time barred. There can be no doubt that the foreign judgment sued upon is that of Pandit Piyare Lal decided ex-parte on the 3rd of January 1905. It has been contended in the alternative (1) that that judgment ceased to exist altogether on the 7th September 1909 or the 17th August 1910 and a new judgment took its place on the 29th August 1914 from which date limitation began to run and (2) that the judgment was in a state of suspended animation between the above dates and was revived or resurrected by the third order of review. If the latter position be accepted, counsel contends that to this period the first two periods allowed by the trial Court should be added and the deduction of the total of the three would bring the suit within time. If the judgment of the 3rd January 1905 be ignored we fail to see on what basis the suit is founded or can proceed; for the Raja too laid stress on the fact that his order was wholly outside the merits and had only to do with the setting aside of the ex-parte proceedings so that there was no merger of the judgment of the 3rd January 1905 in the order of the 29th August 1914. Besides, it was held in *Piroj Shah* v. *Qarib Shah* (1) that proceedings consequent on an application for setting aside an ex-parte decree are not merely a branch of the suit which is terminated when the ex-parte decree is passed and the suit does not revive, if at all, until after the proceedings in the application are terminated successfully, It was also held in *Parvati Shankar* v. *Ishvardas Jagjivandas* (2) that an application to set aside an ex-parte decree was not strictly speaking an application for a rehearing. It follows that the proceedings taken by the defendants were not proceedings in the suit but distinct proceedings which might have had the effect of causing a rehearing of the suit but which in the present case finally ended in leaving the ex-parte judgment of the 3rd of January 1905 to stand as it was. The first contention therefore fails and the second alone remains. It was not claimed that the order dated the 16th of June 1915 was the final order which could be enforced though this is what is stated in the 15th ground of appeal.

It is laid down in Dicey's Conflict of Laws at page 448 of the third edition that a foreign judgment may be final and conclusive though it is subject to appeal and though an appeal against it is actually pending in the foreign country where it was given. The pendency of an appeal in a foreign Court might afford ground for the equitable interposition of the English Court to prevent the possible abuse of its process and on proper terms to stay execution in the action, but it would not be a bar to the action itself. Similarly in the 7th edition of Westlake's Private International Law at page 396 the same position is laid down.

Further, even a stay of execution does not affect the finality of the foreign judgment which nevertheless, can be sued on (vide Piggots Foreign Judgments, Part I, pages 73 and 74, (1908) where two English rulings are given).

In the present case it is undoubted that the ex-parte judgment obtained on the 3rd of January 1905 could have been executed at once and was final judgment which did not become incapable of execution if an appeal was presented. In fact no appeal was ever instituted on the merits and all that was done was first to apply to the Chief Judge to set aside the judgment and then to appeal against the condition imposed by the Chief Judge. Certainly until the Raja's order of the 7th of September 1909 was announced on the 17th of August 1910 the judgment remained final judgment and capable of execution in the Poonch Courts as it was never satisfied and never set aside. From the 3rd of January 1905 therefore up to the 17th of August 1910, a period of five years seven months and fourteen days, the present action could have been brought in the Courts of British India. It follows that the two other periods which it is claimed should be deducted cannot be allowed.

The article of the Limitation Act applicable is 117. It gives six years from the date of the foreign judgment within which the present suit should have been brought. Even therefore, if it were held that the foreign judgment was in suspense from the 17th of August 1910 to the 29th of August 1914 when the Raja

(1) A. I. R. 1926 Lah. 379=7 Lah. 161.
(2) [1895] 19 Bom. 208.

accepted the plaintiff's third review still the suit would be barred by limitation as by that order the ex parte decree of the 3rd of January 1905 again became capable of execution while the present suit was not instituted till the 15th of August 1916 and the plaintiff had only four months and sixteen days from the 29th of August 1914 within which he could file a suit. It makes no difference if it were held that the foreign judgment was in suspense from the 7th of September 1909, the date of writing the Raja's order to the 29th November 1914 the date of expiry of the time allowed to fulfil the condition imposed by the Raja before the ex-parte decree was to be set aside for even then the suit would be barred by four months and twenty days. The above finding is sufficient to dispose of this appeal, but in view of its importance we shall proceed to discuss all the other points raised.

Section 9 of the Limitation Act lays down that when once time has begun to run no subsequent disability or inability to sue stops it, subject to one proviso, which does not apply in the present case. It was conceded that there is nothing in the Indian Limitation Act to warrant the deduction of any of the periods claimed. Further it has been held in *A. I. R.* 1923 *Nagpur, page* 321 that Ss. 12, 14, etc. of the Limitation Act are only applicable to suits in British India and not to proceedings in foreign Courts. This ruling followed *Chanmalapa* v. *Abdul Vahab* (3), which is to the effect that the Courts contemplated by S. 14 of the Limitation Act are British Indian Courts. Apart from that the fact that the ex parte decree was set aside for a time simply constituted a temporary inability to sue and that would have no effect upon limitation under S. 9 of the Indian Limitation Act. So far has this principle been carried in England that it was held in a case during the English Civil wars that the running of the statute was not interrupted in spite of the fact that when the cause of action accrued rebels had usurped the Government and none of the Kings' Courts were open. The Calcutta High Court held in *Deutsche Asiatische Bank* v. *Hira Lal Burdhan and sons* (4) that S. 9 of the Indian Limitation Act makes no exception in favour of alien enemies who were prevented from suing in consequence of a declaration of wars; that the suspension of an alien enemy's right to sue was disability within the meaning of S. 9 and that statutes of limitation were in their nature strict and inflexible and were not susceptible of an equitable construction. This Court held in *Hukum Chand* v. *Shahab Din* (5) following *Muthu Korakkai Chetty* v. *Mudar Ammal* (6) that there can be no saving of limitation apart from the provisions of the Limitation Act and there are no provisions in that Act to save limitation in the present case. It was held in *Sidraj Bhojraj* v. *Alli Haji* (7) that the time during which insolvency proceedings which were subsequently annulled, were pending could not be deducted in a suit by the creditor against his debtor, that is, that S. 9 of the Indian Limitation Act applied when once time commenced to run and no subsequent disability or inability to sue could stop it.

A leading case is *Soni Ram* v. *Kanhaiya Lal* (8) decided in 1913, where it was held that there was nothing in Art. 148 of the Limitation Act of 1877 to justify holding that by reason of the fusion of the interests of the mortgagor and mortgagee between certain years, during which a suit could not have been instituted the period of limitation, which began to run on the 3rd of January 1842 was suspended that being contrary to S. 9 of the Indian Limitation Act, the proviso to which did not apply. *Baijnath Sahai* v. *Ramgat Singh* (9) another decision of the Judicial Committee, is not against this principle. In that case the Board of Revenue discharged the Commissioner's order dated the 25th of January 1884, confirming a sale by the Collector in 1882, but afterwards on the 21st of August 1886, the Board of Revenue discharged its own order and revived that of the Commissioner as it discovered that it had no jurisdiction to deal with the matter. It was held that the cause of action arose on the 21st of

(3) [1911] 35 Bom. 139=8 I. C. 645=12 Bom. L. R. 977.
(4) [1918] 47 I. C. 122.
(5) A. I. R. 1924 Lah. 40=4 Lah. 90.
(6) [1920] 43 Mad. 185=54 I. C. 66=38 M. L. J. 1 (F. B.).
(7) A. I. R. 1923 Bom. 33=47 Bom. 244.
(8) [1913] 35 All. 227=19 I. C. 291=40 I. A. 74 (P. C.).
(9) [1896] 23 Cal. 775=23 I. A. 45=7 Sar. 1 (P. C.).

August 1886 when it must be taken that the sale was confirmed. This decision does not introduce any equitable doctrine of suspension of the cause of action.

In *Lakhan Chander* v. *Madhusudan Sen* (10), however, which was confirmed by the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra* (11) it was held that there was a suspension of the right to bring an action between certain dates as for the periods in question there was a decree in favour of the plaintiffs which was afterwards set aside on appeal on the ground that such a decree should not have been given to them as they were only defendants in the first suit. This was the case principally relied upon by the learned counsel for the appellant before us. At the most, however, that ruling would only help him to the extent of excluding the time from the 17th of August 1910 to the 29th of August 1914 or from the 7th September 1909 to the 29th November 1914 and in either case the suit would still be barred. It cannot be concluded from the above ruling that the plaintiff is also entitled to deduct the time during which the defendants were applying before the Chief Judge of Poonch and before the Raja to have the ex-parte decree set aside; for until it was in fact set aside it remained a final decree capable of execution against the property of Nizam Din in the hands of the defendants.

This subject is exhaustively discussed in *Sarat Kamini Dasi* v. *Nagendra Nath* (12) where it was held that, apart from the provisions of the Limitation Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions. It was also laid down there that the decision of the Judicial Committee in *Ranee Sarno Moyee* v. *Shoshee Mokhee Burmonia* (13) did not create an exception beyond what was provided by the statutes of limitation of this country. It might also be noted that the majority of the Judges in *Muthu Karakkai Chetty* v. *Madar Ammal* (6) did not hold that there was any suspension of the cause of action. Further in *Kuppaswami Chettiyar* v. *Rajagopala Aiyar* (14) which distinguishes *Nrityamoni Dasi* v. *Lukhan Chandra Sen* (11) it was held that the time during which the judgment-debtor's application to enter satisfaction of the decree was pending could not suspend the period of limitation for applying for execution of the decree. Reference was made to *Ranganatha Rao* v. *Rama Pandithar* (15), where the plaintiff sued in 1919 as a reversioner under the Hindu Law for the recovery of possession of certain properties of the last male holder whose widow had died in 1897. N, whose heir the plaintiff was, had instituted a suit during the widow's lifetime for a declaration that an alienation she had made was not binding on the estate but it was dismissed on the ground that B and not N was heir to the reversioner. In 1909 B sued for possession but his suit was dismissed in 1916 on the ground that his alleged adoption into the family was not proved. The plaintiff's allegation was that he could not sue for possession till 1916 when B's title was negatived. It was held, however, that time having commenced to run from the death of the widow it was not suspended by these events. Lastly it was held in *Heera Monee* v. *Promothonath Ghose* (16) that the right to sue on a final foreign judgment was barred after six years from the date of the judgment and the time spent in executing the decree in the foreign country could not be excluded though this might mean that there were two decrees for the same sum in force, capable of being executed in the two countries.

In the present suit, therefore, the applications to set aside the ex parte decree or the appeal against the condition imposed by the Chief Judge did not suspend the period of limitation for the present suit, and further the period of limitation expired six years after the 3rd January 1905 in spite of the order of the Raja dated the 7th of September 1909 and announced to the parties on the 17th of August 1910. The suit of the plaintiff could have been instituted in British India at any time within the six years mentioned and would not have been liable to dismissal even towards the

(10) [1908] 35 Cal. 209=12 C. W. N. 326=7 C. L. J. 59.
(11) [1916] 43 Cal. 660=33 I. C. 452=20 C. W. N. 522 (P. C.).
(12) A. I. R. 1926 Cal. 65.
(13) [1867] 12 M. I. A. 244=2 B. L. R. 11=10 W. R. P. C. 5=2 Suther. 178=2 Sar. 424 (P. C.).
(14) A. I. R. 1922 Mad. 79=45 Mad. 466.
(15) A. I. R. 1923 Mad. 108.
(16) 8 W. R. 32.

end of that period as the plaintiff could have stated that steps were being taken to review the ex parte judgment of the 3rd of January 1905 though the suit or the execution thereof might have been stayed pending the result of the further proceedings in the Poonch State. It is not for the Courts of this country to introduce any equitable principle to help the plaintiff in a case like the present. We therefore hold that the plaintiff is not entitled to the exclusion of any time and that the suit became barred on the 4th of January 1911.

It was argued on behalf of the appellant that it should not be held that the plaintiff ought to have sued when there was a chance of the ex parte decree passed in his favour being set aside. It was pointed out in this connexion in *P. Sethu Rao* v. *S. Lakhshmi Ammal* (17) that the only inconvenience to the plaintiff might be the loss of his Court fee but that was no fault of the law. We have already mentioned that a suit lies on a foreign judgment though an appeal against it is pending in the foreign country and the original judgment is thus liable to be set aside. There is little difference between this and the case put to us.

To sum up the cause of action arose on the 3rd January 1905 from which date time began to run. Having once commenced to run it was not suspended by any subsequent disability or inability to sue. Even if the contrary view be taken as to the continuous running of time the only period during which it could be said that the cause of action was suspended was from 1909 or 1910 to 1914 and the exclusion of this period still leaves the present suit time-barred.

The next question that arises is whether the proceedings in the Court of the Raja of Poonch offend against the principles of natural justice in that he accepted on the 29th of August 1914 a third review directed against his order announced on the 17th of August 1910 on the same grounds as the first two, which were rejected, such procedure going against the principle of finality which has been held to be of the highest consideration in law so much so that it has been laid down that even an application for review on the ground of the discovery of new evidence should only be admitted after the strictest enquiry. It is, we think, obvious that the acceptance of a third review in these circumstances amounts to a mere travesty of judicial procedure and that it cannot be recognised by a Court outside the jurisdiction of the Poonch State. It has been urged that in consequence of the introduction of the Law of Limitation into the Poonch State in 1910 the third application for review was barred by time. This is a point which we are precluded from considering for we are in no sense a Court of Appeal exercising jurisdiction over the Poonch Courts and as such entitled to question or to criticise the action taken in technical matters of procedure. In spite of this we are bound to give a decision on the question of whether the action taken in this third application for review offended against the great principles of natural justice.

This third review application dated the 9th of October 1911 has already been mentioned but it is necessary to discuss it in greater detail. The grounds given in it are obviously the same as before but it is significant that it makes no mention of the allegation that the Raja's order of the 7th of September 1909 did not become final as it was not signed by the Wazir—a point that was raised in the first review. Yet this was one of the grounds on which this review was accepted. It might again be noted here that it was not necessary for the Wazir to sign it and in any case the order rejecting the second review was signed both by the Raja and the Wazir. The Wazir is the instrument used by the Raja to lay the facts before him. In *Mulk Shah* v. *Taru Singh* (18) this Court held that the Raja was the final court of appeal. It is also significant that in this third review application the plaintiff stated that if he were compelled to present a new plaint there would arise complicated questions regarding the jurisdiction of the Poonch Courts over the defendants whereas the Courts had jurisdiction originally and the defendants submitted to that jurisdiction. This is obviously the true reason why the plaintiff was desirous of getting the original ex-parte decree restored at any cost. Further the Wazir who advised the Raja what order should be passed in this final review frankly treated it as a

(17) A. I. R. 1925 Mad. 1188.

(18) [1916] 13 P. W. R. 1916=34 I. C. 255.

review of the previous reviews: vide lines 27 and 28 of page 342 of paper book B.

It is laid down in O. 47, R. 9 of the Civil P. C., that no application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained. This does not mean that a second application for review on new grounds cannot be entertained if made within limitation and the view held is that this can be done. But nowhere has it ever been held that a plaintiff can go on for ever presenting petition after petition containing the same grounds until some how he succeeds and has the obnoxious order reviewed and reversed. It was argued on behalf of the appellant that the Calcutta Courts used to allow review after review but all that *Fukheerooddeen* v. *Kala Chand* (19), decided was that a second review could be allowed if the first was rejected as founded on insufficient grounds. This does not go beyond what is now the law. Again *Nusseeruddin* v. *Indurnarain* (20), only went to the length of stating that the Court might in the exercise of its discretion admit a second review even after a prior order rejecting a first review and that applications for review dismissed for mere default might be re-admitted like appeals dismissed for default. But in the body of the judgment towards the bottom of the second column of p. 95 the words used are that when there is an order rejecting a review application that is not a final order, and the Court is not precluded from admitting the review upon another ground.

It is not, however, a question of what is or is not the law in British India and what iuterpretation has been put on certain sections in the past but rather a question of basic principles without which there can be no such thing as law or justice. Once a decision has been given and no appeal lies that decision can only be questioned on certain grounds which are not technical in the sense in which the word is often used, of being almost arbitrary and not based on any principle but technical in the sense that the reasons justifying any modification or alteration must be reasons which strictly fulfil the condition of being such that they could not be taken into account at the time the original order was passed and this for no default of the party who seeks reconsideration. A review is not an appeal. It is not a means of putting right a mistake, however heinous apart from clerical error or mistake of calculation and reluctant as all Courts must be to admit an application for review they must be doubly reluctant to admit a second application and in the nature of things it is radically in the truest sense of the word, unjust to admit a second application on the same grounds for to do so must be tantamount to reconsidering the correctness of the second if not of the first decision on the same materials. And if this be the case with the second application what is to be said of a third? It can mean nothing more nor less than the denial of all justice to the unfortunate respondent who has succeeded up to that point and sees the success which he has achieved imperilled once more and for all he knows to be imperilled once again should he defeat this last attack. It follows therefore that a suit in a foreign Court based on what amounts to a miscarriage of justice cannot proceed and must be dismissed.

The next question to be decided relates to the jurisdiction of the Poonch Courts and the submission of the defendants to that jurisdiction. We agree with the trial Court that the defendants were not residents in the Poonch State when the suit was instituted, whether it be taken that the suit was instituted in 1899 or 1903. Feroz Din was in the service of the Poonch State probably because of the position his deceased father held there, from Sambat 1952 to 1954 (1895 to 1897 A. D.) then again from Sambat 1957 to 1959 (1900 to 1902 A. D.) and finally for a short time in 1910. It is admitted in the plaintiff's petition dated the 3rd of July 1902 presented to the Wazir, Sardar Devi Singh after the fire that the summonses in 1890 were issued to the defendants at their home in Raisi in the Kashmir and Jummu State. It was after that date that Feroz Din again became an official in the Poonch State and both he and Mohammad Din were officials there in 1902 when the Wazir, Sardar Devi Singh ordered them to attend before him. Mohammad Din was only in the State for a short time in 1902. That appearance, however, is not relied upon as the

(19) [1864] 1 W. R. 287.
(20) 5 W. R. 93=B. L. R. Sup. Vol. 367.

proceedings before the Wazir were absolutely without.....jurisdiction as already explained. Similarly, when the suit was revived if it ever was revived and came before Pandit Pyre Lal the summonses had again to be issued outside the jurisdiction of Poonch and in fact they were sent to Lahore in the Punjab by post. There was therefore no jurisdiction in the Poonch Courts by reason of the defendant's residence there when the suit was instituted. It is true that the defendants described themselves in certain documents as sons of the Wazir of Poonch of which fact they seem to have been proud, and as residents of Poonch but in other documents they are described as residents of Lahore and other places. These documents, therefore, prove nothing.

We also agree with the trial Court that the defendants were not subjects of the Poonch State. Their father belonged to Riasi in the Kashmir and Jummu State and he went home there to die after many years of service in the Poonch State, which is a dependency of the Kashmir and Jummu State. The property he acquired was for the most part in British India. He did acquire some immovable property in the Poonch State but the evidence does not establish that only a subject of that State could then acquire property there. In the State records Riasi was shown as the defendants' home and the fact that Nizam Din was an official in a State which was a dependency of the State of his birth, would not give him either a domicile in, or make him a subject of, the State in which he served. It was held in *Emanuel* v. *Symon* (21) that neither the fact of possessing property in a foreign country nor entering into a partnership there to deal with that property gave the Courts of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action provided he neither appeared to the process nor expressly agreed to the jurisdiction of the foreign Court.

Though, therefore in accordance with the evidence, it must be held that Muhammad Din and Mahtab Din were born in Poonch but not Feroz Din that would not make even the two who were born there, subjects of the Poonch State. There is no evidence as to what is the principle of nationality whether the *jus soli* or the *jus sanguinis* followed in the Poonch State or in the Kashmir and Jummu State. In English Law they would be held to be subjects of the same country as their father and he obviously was a subject of the Kashmir and Jummu State. This point is practically covered by the decision in *Gibson & Co. Ltd.* v. *Gibson* (22). The fact that Mohammad Din was there for less than a year as an official and Feroz Din was also an official there for three short periods would not make them subjects or residents of Poonch. They undoubtedly went there because of the position their father had held in the State but they always returned either to Riasi in the Kashmir and Jummu State or to Lahore in the Punjab. It is unnecessary to pursue this subject further.

It was contended, however, that the Poonch Courts had jurisdiction because of certain powers of attorney which the defendants executed in favour of residents of the State and that their having done so amounted to a submission to the jurisdiction of the Poonch Courts. The rulings relied upon do not support this.

It was held in *Janoo Hussain* v. *Mahomed Ohuthu* (23) that where a business was being carried on in Ceylon by a person with a power of attorney authorizing him on behalf of the firm to sue and to defend suits in the Ceylon Courts and that person was served with a notice by the Ceylon Courts and did not appear with the result that an ex parte decree was passed against the firm, that amounted to submission to the jurisdiction of the Ceylon Courts and a suit would lie in British India on the judgment obtained in Ceylon against the defendants who were members of the firm. It was further held that if it was proved that at the time the agent in Ceylon was served, he was in no sense the defendants' agent it might be an answer to the validity of the foreign judgment. To a similar effect is *Asanally Nogoor* v. *Mahadu Meera* (24). In the present case there was no business in Poonch and no attempt made

(21) [1908] 1 K. B. 302=98 L. T. 304=77 L.J., K. B. 180=24 T. L. R. 85.

(22) [1913] 3 K. B. 379=82 L. J. K. B. 1315=29 T. L. R. 665=109 L. T. 445.

(23) A. I. R. 1925 Mad. 155=47 Mad. 877.

(24) A. I. R. 1926 Mad. 259.

to serve any agent of the defendants in Poonch. The principle followed in the above rulings has thus no application. Besides, most of the powers of attorney in question relate to the period when the defendants were trying to get the ex-parte decree set aside without any condition while of the three that remain two were by Feroz Din alone, the first being executed while the illegal proceedings were going on before the Wazir in 1902, and the second being executed for the purpose of another case. The only one remaining is dated the 3rd of October 1904 and was executed by the three brothers. It appointed an agent to defend several unspecified suits which were pending against the brothers in the Poonch Courts. There were other suits besides the present one and it cannot be said that it was executed for this suit. It is also undoubted that the agent appointed did not appear in the present suit up to the time of the ex parte decree on the 3rd of January 1905 though he seems to have used this power in the appeal which the defendants presented in the Raja's Court. The defendants themselves also did not appear prior to the 3rd January 1905 so that there was no submission to the Poonch Courts prior to that date.

The question remains whether the fact that the defendants applied to the Chief Judge to set aside the ex-parte decree and later filed an appeal in the Court of the Raja against the order of the Chief Judge, amounted to a submission to the jurisdiction of the Poonch Courts. We think it did. In fact they succeeded at first in their appeal in the Raja's Court beyond their expectation though in the end as the result of the order passed in the third review, their position became worse than it would have been had they never taken any steps to set aside the ex-parte decree for had they not applied to do so the decree would have been without jurisdiction. But having applied they become subject to the jurisdiction of the Poonch Courts by reason of their submission to that jurisdiction. This is a curious result but it seems to follow from the decisions on this point. It is true that it cannot be said that proceedings to set aside an ex-parte decree are preceedings in the suit and it was argued that the submission to the jurisdiction must be in the suit ; but at the same time when the defendants asked the Poonch Courts to set aside the ex-parte decree and rehear the suit they must be held to have been ready to accept the decisions of the Poonch Courts, provided always that they were not opposed to natural justice etc. That this was a voluntary submission follows from *Guiard* v. *De Clermont and Donner* (25) and it is unnecessary to discuss any other authorities. We hold, therefore, that the three defendants submitted to the jurisdiction of the Poonch Courts by reason of their endeavour to get the ex-parte decree dated the 3rd of January 1905 set aside and for that reason only.

We have now to consider whether the ex-parte judgment of the 3rd of January 1905 upon which this suit is based is opposed to natural justice because it was passed when Feroz Din was insane. That question obviously remains open though the defendants later submitted to the jurisdiction of the Poonch Courts, as the final result of their submission left the ex-parte judgment to stand. There is considerable evidence that Feroz Din was mentally deranged for various periods and it is difficult to discount all of it. He obviously led a dabauched and irregular life and in consequence suffered from nervous irritability and insomnia which were treated with sedatives. At the same time we find that all along he was dealing with his property executing deeds, drawing cheques, making purchases and doing all the usual acts which a man has to do. The trial Court held it proved that he was insane from some time in October 1904 to some time in February 1905 because it is not established that for that period he had been attending to the ordinary affairs of life. It was during that period that the ex-parte judgment was passed though it was before this namely in April 1904 that summonses issued by post to the defendants at Lahore. This, however, was too severe a burden to place upon the plaintiff. Feroz Din was undoubtedly most eccentric and probably suffered from slight mental derangement from time to time, but it is impossible to fix the time when he was thus affected or to hold that he was completely incapable at any time of looking after his own affairs. He remained throughout the head of the

(25) [1914] 3 K. B. 145=83 L. J. K. B. 1407=111 L. T. 293=30 T. L. R. 511.

family and no attempt was ever made to deprive him of this power or to get him certified as of unsound mind. We hold that it cannot be said that the ex parte judgment was obtained against him at a time then he was insane.

The learned counsel for the appellant contended that the trial Court erred in holding that the ex parte judgment which it is sought to enforce was also opposed to natural justice so far as Mahtab Din is concerned as when notice issued to him from the Court of Pandit Pyre Lal he was still a minor and no guardian was appointed to look after his interests, though Feroz Din, his brother, was described as his guardian ad litem. The Raja in his appellate order dated the 7th of September 1909 which was announced on the 17th of August 1910 held that there was no order of the Chief Judge appointing any one the guardian ad litem of the minor defendant and that this by itself was a sufficient reason for setting aside the ex parte judgment. He further held that it was necessary to appoint some one who was willing to act as his guardian ad litem and that the Chief Judge neglected his duty by not appointing some one willing to act for him. There is much force in these remarks of the Raja and the case should not have proceeded ex parte against the minor. It was the duty of the Chief Judge to see that some one was present who was willing to act in his interests. It is true that Mahtab Din became a major at the beginning of October 1904 before the judgment but no notice of the suit was ever given to him after he became a major and it must be held in the circumstances described above that he had no notice of the suit when he was a minor. This means that we hold that Mahtab Din had at no time prior to the date of the ex parte judgment any notice of the suit. This is the usual ground on which the English Courts held the procedure of foreign Courts to be opposed to natural justice, vide Rule 107 at page 440 of Dicey's Conflict of Laws, 3rd edition. We hold that for this reason the ex parte judgment obtained from the Poonch Court cannot be sued upon in this country so far as Mahtab Din is concerned.

It was then argued on behalf of the respondents that the ex parte judgment in question cannot be enforced in British India against Feroz Din and Mohammad Din also as they too had no notice of the suit. As regards this question we are in general agreemsnt with the finding of the trial Court, There is no doubt that summonses were sent to these two defendants who were majors by post to Lahore and the Chief Judge of Poonch held when the registered postal acknowledgments returned to him that they had been duly served. In these circumstances it was for these two defendants to prove that they did not receive notice of the suit. It is true that it has not been established what was the address on the registered envelopes which went to these defendants but as they returned to the Court at Poonch duly signed the presumption is that they reached the defendants. Besides when these defendants applied to the Chief Judge on the 17th February 1905 to have the ex parte decree set aside all they said was that the summonses were not duly issued to or served upon them. It must be held that this meant that the summonses were not sent according to the procedure in vogue in Poonch and this in fact was held by the Raja in his appellate order announced on the 17th of August 1910. However the question that the summonses were not served in the proper way cannot be taken before us. All we have to see is whether these two defendants had notice and we find that they had.

The learned counsel for the appellant next argued that so far as Mohamad Din was concerned the trial Court was wrong in holding that the proceedings in the third review which resulted in the ex-parte decree being restored, were contrary to natural justice in that : (1) Muhammad Din was not served in them; and (2) he died on the 17th of November 1912 and his minor son and widows were not brought upon the record as his representatives though the order in this review was not made till the 29th of August 1914 the application for review having been filed on the 9th October 1911. He contended that Mohammad Din was served and that the doctrine of *nunc pro tunc* applied and thus it was not necessary to bring his legal representatives upon the record, arguments having been heard on the 6th of August 1912 before his death. The notice to Mohammad Din in this third review was sent to the Deputy Commissioner, Guj-

ranwala, in the Punjab to be served on him at Shiekhupura. The Deputy Commissioner's order was that it should be given to Sher Singh process-server to effect service. The hearing at Poonch was fixed for the 5th of August 1912. Sher Singh went to Sheikhupura and he himself wrote two reports on the 23rd of July 1912. The first was to the effect that he left the notice with Khushal servant of Mohammad Din as the latter was absent and that this servant promissed to make it over to Mohammad Din on his return. The second purports to be an affidavit written by Sher Singh himself but not attested by any qualified person, to the effect that Sher Singh made over the notice to Khushal in the presence of one Jhanda and that Khushal sent it to Mohammad Din by private post that very day at 2 p. m. These two reports are contradictory and Sher Singh has not been examined as a witness. The only witness examined on this point was one Kartar Singh a servant of the plaintiff who was not mentioned in either of the two reports of Sher Singh. He stated that he went to Gujranwala and that it was he who got the summons from the Court official there though the order was that it should be given to the process-server. There were other indications in his statement that he was not a truthful witness and his testimony must be rejected. This leaves the two reports of Sher Singh which agree to this extent that he made over the notice to Khushal.

This was not proper service in British India it having been specially enacted by the explanation to O. 5, R. 15 of the Civil Procedure Code, that a servant is not a member of the family within the meaning of that rule. This was probably done because both the process serving establishment and servants can be easily influenced in this country. When the case came on for hearing on the 5th of August 1912 the Wazir did not note that the service was sufficient but only recorded that the respondents were absent and that the papers should be laid before him next day. All that we are concerned with is whether it can be held in these circumstances that Mohammad Din had notice of the review application. We are of opinion that he had not. It is not sufficient to say that he must have learnt from his brothers who did receive notices that the review was pending. In order to bind him it was necessary to give him direct notice in some form.

The learned counsel for the appellant then contended that as Feroz Din was the general agent of Mohammad Din, service upon Feroz Din was sufficient. There are certain documents upon the record which are signed by Firoz Din on behalf of Mohammad Din as his general agent but the power of attorney has not been proved, and it cannot be said what its terms are. There is thus no force in this argument. Feroz Din had on a previous occasion namely the 5th May 1912, refused to accept the notice sent to Lahore to Mohammad Din though he gave information where Mohammad Din was. Besides no attempt was made to serve Mohammad Din through his agent Feroz Din. It was attempted to give him notice direct and this failed. It must therefore be held to be against natural justice to have proceeded with the successful third review without notice to Mohammad Din. For this reason the foreign judgment cannot be enforced here against Mohammad Din's representative.

We are further of opinion that it amounted to a denial of natural justice not to have brought the legal representatives of Mohammad Din upon the record of the third review when he died on the 17th of November 1912 and for that reason the judgment sued upon cannot be given effect to against them. An application to bring his minor son only on the record of the third review was made by the plaintiff on the 16th of August 1914, long after the time for doing so had expired. It was alleged in this application that the least hearing, the date of which was not stated took place in the lifetime of Mohammad Din the date of whose death was not given, and that only the final order remained to be announced. It was held on the 19th August 1914 that the doctrine of *nunc pro tunc* applied vide : O. 22, R. 6 of the Civil Procedure Code. Nothing else was said. The Wazir did order on the 5th of August 1912 that the papers should be laid before him on the 6th but he did not note that the plaintiff or anybody on his behalf appeared on the 6th. The record of that day's proceedings as proved by the copy produced, consists of certain notes headed " notes from appel-

lants' address " which the respondent's counsel contends were simply excerpts from previous written arguments on the record. Appellant's counsel argues that this shows that arguments were heard ex parte then. The order dated the 19th August 1914 does not decide this question as O. 22, R. 6, Civil Procedure Code, is to the effect that there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment which may in such case be pronounced notwithstanding the death. In the final note of the Wazir, dated the 27th of August 1914, to the Raja who accepted his conclusions, he interpreted this note dated the 6th of August 1912 as showing that his predecessor at that time studied the case and intended from the purport of the note he recorded to do justice to the plaintiff. This would mean that it was a note made by the former Wazir from materials on the record and that no arguments were heard.

In this final note it was also mentioned that the Raja, who was in fact the Court, the Wazir being only his instrument and adviser, meant to hear the parties when he went in 1913 to Lahore. It follows that he did not consider that there had been a final hearing on the 6th of August 1912 when the plaintiff's arguments were heard. We, therefore, hold that there was not a final hearing of the review on the 6th of August 1912, that ex parte arguments were not heard on that date, that the doctrine of *nunc pro tunc* did not apply and that it was necessary to bring the representatives of Mohammad Din on the record of the third review. The judgment sued upon cannot, therefore, be enforced against Mohammud Din's representatives here as the procedure adopted in the third review was opposed to natural justice so far as they were concerned.

We are unable to hold that the evidence establishes that the ex parte judgment was the result of intrigue in the State. There was certainly intrigue but it has not been proved that the judgment was influenced by it. In this respect we agree with the trial Court.

It was mentioned on behalf of the appellant that it did not matter whether Mahtab Din had notice or not, or whether he was a minor, in the proceedings leading up to the ex parte judgment as when he became a major he came to an arrangement with his brothers by which he gave up his interest in his father's property. He did write a deed of release on the 21st of October 1904 on receipt of Rs. 10,000, but Feroz Din gave him some immovable property on the 15th of August 1914 and noted in the deed executed then that it was always the idea of the brothers to restore Mahtab Din to his original position though it was thought best at first to get a deed of release from him until he became of good character. On the same date Mahtab Din executed a second deed of release as regards the ancestral property. He was, however, never asked in the suit to explain these documents though it was specifically denied in the plea that he had lost his right to succeed to the estate left by his father. Further, this matter was not put in issue, and though the trial lasted for many years the plaintiff did not request that an issue should be framed and decided. This shows beyond all doubt that this question was dropped and not pressed. It cannot be raised now. Besides, the appellant has prayed for a decree against him also to the extent that he holds property which came from his father Nizam Din and he has not offered to strike his name off the record. The matter has thus no importance.

No other grounds were argued, but it requires mention that Moti Sagar, on behalf of the respondents, raised several objections regarding irregular procedure in the Poonch Courts, which we have not discussed as they cannot be made a defence here though they could be taken in the Poonch Courts.

For the several reasons already given we dismiss the appeal with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 216

ADDISON, J.

Tunnan and *another* — Defendants — Appellants.

v.

Tota—Plaintiff—Respondent.

Second Appeal No. 2341 of 1926, Decided on 17th January 1927, from a decree of the Senior Sub-J., Kangra, D/- 15th June 1926.

(a) *Limitation Act, S. 26—Taking water course through another's property is an easement.*

Taking a water-course through another person's property is an easement within the meaning of S. 26. [P 217, C 2]

(b) *Limitation Act, S. 26—One co-sharer cannot grant easement without consent of the rest.*

None of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers, e. g., one co-sharer cannot grant an easement to the detriment of the other co-sharers. [P 277, C 2]

M. C. Mahajan—for Appellants.

A. N. Chona for *Faqir Chand*—for Respondents.

Judgment.—The plaintiff owns a gharat and an orchard. He obtained permission in January 1914, from Sangara, one of numerous co-sharers, to take a water-course through the joint land of Sangara and the other co-sharers so as to water his orchard and drive his mill. This means that the plaintiff, or rather the plaintiff's son, got from one co-sharer the right of easement of taking a water-course through the joint land of the grantor and the other co-sharers. Two of the co-sharers, that is the two defendants named in the plaint, obstructed the plaintiff in the exercise of his right on the 7th June 1924. The plaintiff accordingly sued them for Rs. 76 on account of damages for loss of income from the mill together with Rs. 23 as compensation on account of certain fruit trees in the orchard, which had dried up. The plaintiff further said that he had been taking water for 20 years in this way. The two defendants denied the plaintiff's right to take the water-course through their land and added that one co-sharer could not grant such a right. It would appear that Sangara, who granted this right, is paid Re. 1 a year by the plaintiff. The trial Court found that the water-course had been taken through this joint property for a little more than 12 years, i. e., since January 1914, and not for a period of more than 20 years, which was the period about which the parties went to trial. It, however, held that a period of 12 years was sufficient to oust the other co-sharers from any right to prevent the plaintiff from getting water. Damages were assessed at Rs. 47-8 and this sum was decreed. The lower appellate Court dismissed the appeal and the defendants have presented this second appeal.

It is obvious that permission to take water through another person's property is an easement within the meaning of S. 26 of the Limitation Act. It was admitted before me that the plaintiff had not acquired an easement under that section, but the respondent's counsel contended that one co-sharer out of numerous co-sharers could grant such an easement to the plaintiff. It is the case that one co-sharer can sell his share of joint property and he may be able to lease his share of joint property but this is not as sale or lease but the grant of an easement to the detriment of the other co-sharers. As stated in para. 225 of the Rattigan's Digest of Customary Law, in the absence of custom (which is not alleged here) none of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers. This is a well-established rule. It follows that Sangara had no right to grant such an easement to the plaintiff without the permission of his co-sharers and that the defendants were justified in obstructing the plaintiff in the exercise of this alleged right. This they probably did in order to prevent the plaintiff from acquiring permanent rights in the water-course and they were fully entitled to do so. No easement has been established and Sangara had no right to give an easement by grant without the consent of all the co-sharers.

The appeal must, therefore, be accepted and the suit dismissed with costs throughout.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 217

HARRISON, J.

Emperor

v.

Sher Singh and *another*—Accused.

Criminal Revision Petition No. 1238 of 1926, Decided on 15th January 1927, from the 1st Class Mag. Gurgaon, D/-30th March 1926.

(a) *Criminal P. C., S. 439—Right to reopen in revision question of guilt is lost when there is a finding on it by High Court in a previous proceedings.*

Where a High Court has given a finding on appeal as to the guilt of the accused person and

subsequently a notice is served upon that person to show cause why his sentence should not be enhanced the right which he would have under S. 439 (6) to reopen the question of his guilt had no such finding been given vanishes because of the inherent incapacity of any Judge of a High Court to reconsider the decision given by another. This principle applies equally to a previous order on revision and a previous order on appeal: *A. I. R.* 1926 *Bom.* 555, *Foll.*; *A. I. R* 1925 *Bom.* 268, *Diss. from.* [P 218 C1]

(b) *Penal Code, S.* 325—*A man was beat and received very serious injuries excepting his head which received only one injury—Offence is committed under S.* 325 *and not under S.* 307.

Two persons armed with lathis attacked a third person, beat him to the ground, broke his thigh and ulna bone struck him at nine places and continued to strike him after he had fallen on the ground. But there was only one injury on the head.

Held: that thinking the injuries as a whole the legitimate inference was that they did not intend to kill him. They are therefore guilty not under S. 307 but under S. 325. [P 218 C 2]

Ram Lal—for the Crown.

N. C. Mehra—for Respondents.

Judgment.—Sher Singh and Bhup Singh sons of Nand Lal were convicted by Mr. Khan Chand Janmeja of having attempted to murder Nanu Ram *Lambardar* and were sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 200 each. On appeal the convictions were changed and shown under S. 325 and the sentences of imprisonment were reduced to one year in the cases of both the accused. From this order an application for revision was presented which was dismissed by a Judge of this Court. Subsequently an application was made by the Government Advocate for revision of the sentences by enhancement and at the opening of the hearing Mr. Ram Lal, who appears for the Crown, has drawn my attention to a very recent authority, *Emperor* v. *Jorabhai* (1), which Mr. Nihal Chand concedes lays down good law. This is to the effect that where a High Court has given a finding on appeal as to the guilt of the accused person and subsequently a notice i· served upon that person to show cause why his sentence should not be enhanced the right which he would have had under S. 439 (6) to re-open the question of his guilt had no such finding been given vanishes because of the inherent incapacity of any Judge of a High Court to reconsider the decision given by another. This principle, it appears to me, applies equally to a previous order on revision and a previous order on appeal, and I followed this authority which dissents from the view taken in *Mangal Naran* v. *Emperor* (2). The only question, therefore, is whether the finding of the Sessions Judge is correct, and whether on that finding the sentence is adequate. Counsel has drawn my attention to the fact that the Sessions Judge is wrong in saying that the assailants scrupulously avoided all vital parts for there was one contused wound on the back of the head of Nanu Ram, and he has asked me to find that the facts establish a deliberate attempt to murder.

The facts are that about half past ten in the morning the two accused armed with lathis rushed out and made an attack upon their enemy Nanu Ram, beat him to the ground, broke his thigh and ulna bone, struck him at nine places and continued to strike him after he had fallen on the ground. There was only one injury on the head. It is contended by the counsel for the Crown that had they not been interrupted they would have put an end to their victim. This no man can tell. Taking the injuries as a whole I think the inference drawn by the Sessions Judge is correct that they did not intend to kill him but merely intended to cause him very serious injuries. I, therefore, maintain his finding.

The question of sentence remains, and this, I think, is very inadequate indeed. It is one thing for two men to quarrel and for one to strike the other with a lathi and it is quite another matter for a determined premeditated attack to be made by two men on one as in this case. I accept the application for revision presented by the Crown to the extent of enhancing the period of imprisonment to three years. I have taken into account the fact that substantial fine has been imposed in addition to the imprisonment.

J.V. *Application accepted.*

(1) A. I. R. 1926 Bom. 555=50 Bom. 783

(2) A. I. R. 1925 Bom. 268=49 Bom. 450.

A. I. R. 1927 Lahore 218

ADDISON, J.

Beli Ram—Defendant—Appellant.

v.

Prem Kaur and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2313 of 1925, Decided on 13th January 1927, from a decree of the Dist. J., Lahore, D/- 8th July 1925.

(a) *Hindu Law—Widow—Maintenance, unless charged on property, is enforceable like other liabilities.*

A widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. [P 219, C 2]

(b) *Hindu Law—Widow—Right of residence over ancestral house is indefeasible.*

If a Hindu widow is living in the ancestral family house, then any transfer or purchase of the same will be subject to that right. But when she is living in the family dwelling house, which is not ancestral, she has a right of residence in it unless the property is transferred for family necessity. [P 220, C 1]

Hargopal—for Appellant.

Judgment.—On the 26th of March 1915, Makhan Singh mortgaged a house to one Shrimati Ishar Kaur, wife of Madho Ram, for Rs. 2,000. According to this deed the money was required for business and for a deposit which had to be made in some Court. On the 6th June 1916, a second mortgage was effected of this house for Rs. 2,500 in favour of Beli Ram. Of the sum advanced on the second mortgage Rs. 2,205 were paid to the first mortgagee, Rs. 55 were on account of the expenses in connexion with the registration of the deed and the stamp, while the small balance of Rs. 240 was paid to the mortgagor. The reason for the second mortgage seems to have been that the husband of the first mortgagee was pressing for his wife's money. The second mortgagee later sued the mortgagor on the mortgage and obtained the usual decree for sale of the property. The mother of the mortgagor, namely, Mt. Prem Kaur then instituted the present suit for a declaration that she had rights of residence and maintenance in the house in question and that it should be sold subject to her rights. The two Courts below decreed her claim, and the mortgagee-decree-holder has preferred this second appeal.

The issue framed was: Whether the plaintiff had any right of maintenance and residence in the house in suit, and it is sufficiently wide to cover all the points arising. All, however, that the lower appellate Court has held is that Makhan Singh, the mortgagor, used to drink heavily, that the first mortgage was not for necessity and that the second mortgage was also not for necessity as the second mortgagee knew the whole circumstances. The learned District Judge considered that on this finding Makhan Singh's mother was entitled both to maintenance from and residence in the house in question.

The questions of maintenance and residence are, however, different. The subject of maintenance is discussed at length in Mayne's Hindu Law and Usage, 9th Edition, page 663 et seq. It is also summarised at page 487 of Mulla's Hindu Law, 4th Edition. The widow's right to maintenance is liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. In fact, a widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. But, where maintenance has been made a charge upon the property or it has been agreed that it will be a charge on certain property then the transferee must hold it subject to that charge. It is pointed out in Mayne's Hindn Law that the texts which are relied on as making the widow's maintenance a charge upon the inheritance are exactly similar to those which charge it with the payment of debts, the expenses of marriage and funeral ceremonies, etc. This is the reason why it is first necessary to have the maintenance made a charge upon the property before a transferee will be bound by this circumstance.

In the present case no attempt has been made to prove that the sale in question was to defeat the widow's right of maintenance or that the purchaser had notice of such intention. Her indefinite right of maintenance has so far not been a charge and was not a charge upon any part of the property at the time of the transfer in question. As regards maintenance, therefore, it follows that the appeal must be accepted.

I come next to the question of the widow's right of residence in this house. The principle is laid down in para. 465 at page 668 of Mayne's Hindu Law,

9th Edition, where it is said that there is a distinction between the right of a widow to continue to live in the ancestral family house, and her right over other parts of the property. If she is living in the ancestral family house then any transfer or purchase would be subject to that right. In the present suit no attempt has been made to prove that she is living in the house in question or that it is the ancestral family dwelling house. In fact it is admitted that this house was purchased by the widow's husband, so that it would appear that it cannot be the ancestral family house. As she has neither proved that she is living in the house or that it is the ancestral family house in which she has a right to live, it seems to me that the appeal must also be accepted as regards the widow's right of residence. If the son had sold the family dwelling house for family necessity his mother would have no right of residence in it. In the present case, however, it has been held by the Courts below that there was no family necessity, so that she would have been entitled to the right of residence, had it been established that she was living in it and that it was the family dwelling house.

For the reasons given above I accept the appeal ex parte and dismiss the suit with costs in the two Courts below. There will be no costs here as the respondents did not appear.

J.V. *Appeal accepted.*

A. I. R 1927 Lahore 220

ADDISON, J.

Qaimi—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1212 of 1926, Decided on 24th January 1927, from an order of the S. J., Shahpur, D/-3rd September 1926.

Penal Code, S. 419—Accused convicted under S. 419—Considering previous convictions for theft and burglary for enhancing sentence seems anomalous—Penal Code, S. 75.

It seems somewhat anomalous that previous convictions of an accused for theft and burglary should be taken into account in increasing his sentence where the subsequent offence is cheating by personation under S. 419. [P222 C1]

Din Dayal Kapur—for the Crown.

Judgment.—The appellant pleaded guilty to a charge undar S. 419, Indian penal Code, and was sentenced to seven years rigorous imprisonment under that section, read with S. 75 of the Indian Penal Code. His grounds of appeal which were sent from Jail, are to the effect that he was drunk when he represented as a witness for the defence in a particular case that he was another person. It has been clearly established that he did falsely represent himself to be another person when giving evidence for an accused in a particular case and he was properly convicted under S. 419, Indian Penal Code, an offence to which he pleaded guilty. I maintain his conviction.

He has been previously convicted as ofllows :

(1) He was sentenecd to six months rigorous imprisonment on the 17th of March 1915, under S. 457, Indian Penal Code.

(2) He was sentenced to two years' rigorous imprisonment on the 9th of December 1918, under S. 380, Indian Penal Code.

(3) He was sentenced to two years' rigorous imprisonment and a fine of Rs. 300 on the 31st January 1921, under S. 429, Indian Penal Code.

It seems somewhat anomalous that previous convictions for theft and burglary should be taken into account in increasing his sentence in the present case where what he did was to appear in Court and falsely represent himself to be another person when he was giving evidence on behalf of a particular accused. The maximum sentence under S. 419, Indian Penal Code, standing by itself, is three years rigorous imprisonment. In the circumstances I accept the appeal to the extent of reducing the sentence under Ss. 419/75, Indian Penal Code, to four years rigorous imprisonment.

J.V. *Sentence reduced.*

A. I. R. 1927 Lahore 220

SHADI LAL, C. J.

Emperor

v.

Sardara Singh — Accused

Criminal Revision No. 1774 of 1926, Decided on 28th January 1927, reported by the S. J., Montgomery.

Criminal Trial—Detterrent sentence is necessary for offences relating to coins.

Offences connected with counterfeit coins are detected with great difficulty and call for a deterrent sentence. [P 221 C 1]

Facts.—The accused Sardara Singh has been convicted under S. 235, Indian Penal Code, of the offence of being in possession of instruments and material for the purpose of using the same for counterfeiting the King's coin, or knowing that it was intended to be used for that purpose. This conviction has been upheld by me on appeal, the other accused being acquitted.

The sentence awarded by the trial Court is one of one year's simple imprisonment, with a fine of Rs. 50. The reason given for awarding simple imprisonment is the youth of the accused. The prisoner's age is stated to be 23. This might be a reason for reducing the term of imprisonment, but is wholly inadequate for awarding simple imprisonment in place of rigorous imprisonment as punishment for such a serious offence.

Grounds.—Offences connected with counterfeit coins are detected with great difficulty and call for a deterrent sentence, the maximum provided in the section being ten years. I, therefore, recommend that the sentence be enhanced, at any rate to the extent of imposing rigorous imprisonment in place of simple imprisonment for the same term.

Order.—The prisoner Sardara Singh has been convicted under S. 235 of the Indian Penal Code of the offence of being in possession of instruments and material for the purpose of using the same for counterfeiting King's coin and has been sentenced to simple imprisonment for one year and a fine of Rs. 50. I have carefully considered the judgmennt of the trial Magistrate as well as that of the learned Sessions Judge, and I have no hesitation in holding thas the conviction is fully justified.

As regards the punishment, I am of opinion that in view of the serious nature of the offence committed by the prisoner, the sentence imposed by the trial Magistrate is wholly inadequate. Accordingly I accept the recommendation made by the learned Sessions Judge and sentence the convict to rigorous imprisonment for one year in addition to the simple imprisonment already undergone. The sentence of fine and imprisonment in default of payment thereof shall stand.

J.V. *Sentence enhanced.*

A. I. R. 1927 Lahore 221

SHADI LAL, C. J. AND BROADWAY, J.

Qamar-ud-din—Plaintiff — Appellant.

v.

Rahmat Ali Shah—Defendant—Respondent.

Letters Patent Appeal No. 91 of 1925, Decided on 8th January 1927, from the judgment of Harrison, J., D/- 18th December 1924, in Civil Appeal No. 989 of 1924.

Punjab Courts Act, S. 41—Question of law—Construction of a document forming the basis of a suit is question of law.

The construction to be placed on a document on which a suit to a large extent is based is one of law. [P 222, C 1]

Badri Das—for Appellant.
Devi Dayal—for Respondent.

Broadway, J.—This is an appeal under S. 10 of the Letters Patent against an order of Mr. Justice Harrison. The facts briefly are that the plaintiff instituted a suit for the recovery of Rs. 432 with interest claiming that he had advanced that amount to the defendant as a loan. In support of his contention he produced the receipt Ex. P-1. The defendant denied the loan and alleged that he and the plaintiff with certain other persons had entered into a partnership with the object of purchasing certain immovable properties and selling them at profit. The partners contributed certain specified sum of money out of which the purchase was to be made, and were to share the profit in certain specified shares. The trial Court decreed the plaintiff's suit holding that the sum in question had been advanced as a loan.

This decree was maintained in appeal by the learned District Judge. A second appeal was preferred by the defendant and was heard by Mr. Justice Harrison who after careful consideration of the document in question Ex P-1 and other circumstances came to the conclusion that the transaction was a partnership one and dismissed the plaintiff's suit.

Before us it is urged by Mr. Badri Das that the view taken by the learned Judge in Chambers was erroneous and

also that the finding of the learned District Judge was a finding of fact which ought not to be impugned in second appeal.

The point for determination involved is the construction to be placed on a document on which the suit to a large extent was based and the question was one, therefore, of law, and as such a second appeal was competent. The constructions placed on this document by the learned Judge in Chambers is clearly a possible one and I see no reason to take a different view. I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I agree.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 222

ZAFAR ALI, J.

Mahraj Din—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1178 of 1926, Decided on 11th January 1927, from the order of the 1st Cl. Mag., Lahore, D/- 29th October 1926.

Penal Code, Ss. 375 and 511—Girl alleged to be raped found seated on naked thighs of accused —Private parts not bleeding—Offence is attempt to rape.

Though rupture of the hymen is by no means necessary in law to constitute a rape the Courts are reluctant to believe that there could have been penetration without that, which is so very near the entrance, having been reptured.

A lad of 18 was convicted of rape on a female child of 5½ years. The child, stripped of her trousers, was found seated on the naked thighs of the accused, but there was no bleeding from her private parts with the exception of fresh redness at the entrance to the vagina. The girl bore no other mark of injury and her hymen was intact. She also did not cry out ;

Held : that this was not merely an indecent assault by the accused but that he attempted, though unsuccessfully to effect penetration and hence the offence was an attempt to commit rape. [P. 223, C. 2]

Feroze Din—for Appellant.

Judgment.— The appellant, Mahraj Din by name, has been convicted of rape, and sentenced under S. 376 of the Indian Penal Code to rigorous imprisoment for five years. He was an itinerant seller of glass bangles and his victim was a female child aged about 5½ years. He himself is a lad of eighteen years.

On the fateful day at about 2 p. m. he sold some bangles to Mt. Sawatri Devi (P. W. No. 3), the mother of the child, for 13 annas. This transaction took place in the deorhi of Mt. Sawatri Devi's house. She paid him annas 10 and leaving him in the deorhi went upstairs to fetch the balance, but instead of returning herself she sent the money by hand of her daughter. As the child did not go back for a long interval, Mt. Sawatri Devi herself came down and saw her seated on the naked thighs of the appellant. He was sitting with his knees on the ground. His trousers were half way down. The girl's trousers were lying on the ground close by. Seeing Mt. Sawatri Devi the appellant stood up and tied up his trousers. She seized him and began to beat him with shoes. Hearing the noise made by her Mt. Sohagwanti (P. W. No. 4) who lived in that very house and her neighbours Babu Charan Das (P. W. No. 5) and Sher Singh (P. W. No. 10) came up. Babu Charan Das left immediately to fetch the father of the child from his office and he came home in about half an hour, and it was he who made the First Information Report to the Police that very afternoon. Dr. D'Abreau, Assistant to the Civil Surgeon of Lahore, examined the girl as well as the appellant the same day. With the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury, and her hymen was intact. There were no marks of blood or semen on her person. The mother of the child deposed, on the other hand, that the girl was bleeding from her private parts and that her legs were full of (besmeared with ?) blood and water (semen) and that her suthan was soiled with blood and water. Mt. Sohagwanti (P. W. No. 4) stated that the child was without any trousers ard was bleeding from her private parts. Babu Charan Das stated

the suthan of the girl was in her legs but was loose. The suthan was smeared with blood. The legs were clean.

Sher Singh (P. W. No. 10) stated " there was a boy (i. e., the appellant) present there with many choories. * * * * The girl was wearing only a shirt. Her pyjama was lying close to her. There was blood and semen on the upper part of one of her thighs.

As the trousers of the child had been taken off and were lying on the ground close by it is difficult to see how they could be soiled with blood, etc. The trousers had no blood on them when they were made over to the Sub-Inspector of Police, and it was stated that they had been washed by Mt. Sawatri Devi before that. But this could not be true, because evidently the trousers could not have been soiled with blood or semen. Further, the child could not have bled as she bore no wound nor was there anywhere a rupture of her skin. After Dr. D'Abreau had been examined Mt. Sawatri Devi was re-called and then she stated that there were only two or three drops of blood. The Sub-Inspector of Police found no blood on the trousers of the accused, nor on the trousers of the girl; but the Chemical Examiner detected blood on the trousers of the accused but no semen on either. It cannot be said that the invisible stain of blood on the trousers of the appellant was caused by the blood of the girl. The Doctor when re-called stated:

> A bruise of the mucuous membrance might cause the exudation of a little blood. There may have been a little exudation of blood but very little.

But what the Doctor had originally observed was redness and not a bruise. However, he could not positively say that the redness of the labia was the result of an attempt to effect penetration. As the girl did not cry out, it appears that she felt no pain which an attempt to effect penetration resulting in discharge of blood must have naturally caused. Her mother stated that she began to cry on seeing her. This indicates that she had not cried before that. But at that stage the accused had already gratified his lust if there was semen on the thighs of the child.

It may, therefore, safely be concluded that there was no bleeding from the private parts of the girl and that the redness of the labia might or might not have been the result of the act of the appellant.

Counsel for the appellant concedes that he did make an indecent assault, but he contends that he was not guilty of rape. This however, was not merely an indecent assault. From the state in which the appellant and the child were found together, it may be inferred that he attempted, though unsuccessfully, to effect penetration. It may be observed here that

> though rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been reptured.

He was, therefore, guilty of an attempt to commit rape and I alter the conviction accordingly.

Having regard to the age of the appellant, whipping appears to be the most appropriate punishment in this case. I, therefore, set aside the sentence of imprisonment and sentence him to receive thirty stripes with a light rattan.

J.V. *Sentence altered.*

A. I. R. 1927 Lahore 223

DALIP SINGH, J.

Pahlad Das-Chhote Lal—Defendants—Petitioners.

v.

S. R. Sohan Lal & Co.—Plaintiffs—Respondents.

Civil Revision Petition No. 699 of 1926, Decided on 21st January 1927, from a decree of the Small Cause Court J., Delhi, D/- 5th July 1926.

Contract Act, S. 107—Contract for sale—Documents of title not presented to a vendee as stipulated — Property in the goods does not pass to vendee—Vendor cannot resell it.

In a contract of sale, where the vendor plaintiff did not perform his part of the contract by presenting the Bill of Lading as stipulated in the contract :

Held : that the property in the goods did not pass to the defendant vendee and no right of resale accrued to the plaintiff. [P. 224, C. 1]

Sardha Ram—for Petitioners.

Nawal Kishore—for Respondents.

Judgment.—This is a revision from the Small Cause Court's order in a suit brought by plaintiff for the balance of the price of certain goods which were sold by him and which he re-sold on the defendant's failure to take delivery. The Small Cause Court decreed the suit. The defendant had raised various pleas.

Among them in para. 13 he raised the plea that the plaintiff had not given him any notice of the arrival of the goods, nor had given the shipment patterns, nor had tendered the Bill of Lading. The contract was a c. i. f contract and clause No. 1 of the indent is as follows :

We hereby agree to purchase from you the under-mentioned goods at the limits and terms stated below and for reimbursement we authorize you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need seller's invoice to be taken in lieu of drafts which drafts we engage and bind ourselves to accept on presentation and pay at maturity etc.

The Court held that there had been no presentation of the draft. There was only one witness produced on this point, and the Court rightly or wrongly considered his evidence unconvincing. I, therefore, hold that it is a finding of fact that the draft was not presented. The Court, however, held that the property had passed to the defendant, and, therefore, under S. 107 of the Contracs Act statutory right had been given to the plaintiff for re-sale.

In revision it is contended that there was no proof that the Bill of Lading was ever tendered or any relative shipping documents were tendered to the defendants along with the draft. As the contract was a c. i. f. contract, it was essential for the plaintiff to prove that he had performed his part by delivery or tender of these documents. He has failed to prove this and there is an issue as to whether the plaintiff has performed his part of the contract. I cannot hold that the plaintiff was not given an opportunity to prove this point. As it is, therefore, not shown that the Bill of Lading or the Insurance Policy was ever presented to the defendant or the Bill of Lading was ever endorsed in his favour, I cannot hold that the property in the goods had passed to the defendant. It follows that no right of re-sale accrued to the plaintiff under S. 107 of the Contract Act, and the suit of the plaintiff, therefore, fails, and I accept the revision and dismiss the plaintiff's suit. In the circumstance of the case, however, I am not prepared to give the defendant his costs in the Court below, and I only allow him his costs in this revision.

J.V. *Application accepted.*

A. I. R. 1927 Lahore 224

DALIP SINGH, J.

Biru Ram—Petitioner.

v.

Roda Mal and *others*—Respondents.

Misc. Civil Petition No. 456 of 1926, Decided on 18th January 1927, for restoration of the Appeal Case No. 616 of 1926, on 29th June 1926.

Civil P. C., O. 9, R. 9 — Mis-judgment of a counsel as to when his case would be taken is not a sufficient cause.

A misjudgment by a counsel, as to the time when his case would be taken up, who does not state that he was engaged in some other Court, of the length of time that a particular case would take, is not a sufficient ground for absenting himself when his case is taken up : *A. I. R.* 1925 *Lah.* 617, *Dist.* [P 224 C 2]

Lal Chand Mehra—for Petitioner.

Jagan Nath Aggarwal and *Duni Chand Gupta*—for Respondents.

Order.—This appeal was dismissed for default on the 29th of June, 1926. On the 3rd of July 1926, an application was put in for restoration. An affidavit accompanied the application, and in this the petitioner stated that the petitioner's counsel was present in Court on the 29th of June. The first case in the Court was not finished till 1 o'clock and the petitioner's counsel thought that his case which was No. 4 on the list would not come up till after lunch and so went away. In the meantime, the case called on and was dismissed in default. The fourth ground stated that the petitioner did not attend because the case had not been put in the weekly list. This last point is incorrect and counsel for the respondents has shown me that the case was in the weekly list on the 15th of June, 1926. There is nothing to show why this application to restore was not put in on the same date when counsel for the petitioner came to know of the dismissal in default. Counsel for the petitioner has cited *Mohar Chand* v. *Hbib* (1), but in that case the facts are quite different. I do not see that a misjudgment by the petitioners' counsel, who does not state that he was engaged in some other Court, of the length of time that a particular case would take is any ground for absenting himself, and I, therefore, dismiss the application to restore with costs.

R.D. *Application dismissed.*

(1) A.I.R. 1925 Lah. 617.

* A. I. R. 1927 Lahore 225

DALIP SINGH, J.

Abdul Rahim—Plaintiff—Appellant.

v.

Municipal Committee of Delhi—Defendant—Respondent.

Second Appeal No. 1819 of 1926, Decided on 12th January 1927, from the decree of the Dist. J., Delhi, D/- 12th April 1926.

* *Lease—Perpetual lessee of structure on land is not entitled to build a projection above the structure.*

A perpetual lessee of a structure on a piece of land as distinguished from the permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. [P 225 C 2]

Sardha Ram—for Appellant.

Raj Narain and *Mehr Chand Mahajan*—for Respondent.

Judgment.—The plaintiff-appellant in this case is a perpetual lessee of certain nazul land situate in Delhi. Over this land the plaintiff has built certain shops. Originally there were certain wooden takhtas in front of these shops. The Committee ordered the removal of these takhtas. Thereupon the predccessor-in-interest of the plaintiff brought a suit for injunction restraining the Municipal Committee from asking them to remove these takhtas. They asserted in that suit that the land under the takhtas formed a part of the nazul land, which had been leased to them. The Municipal Committee on the other hand asserted that the land did not form part of the nazul land but formed part of a public street. The suit was compromised by razinama dated 18th August 1896. By that compromise it was agreed between the parties that the Municipal Committee were to build a chabutra in place of the takhtas and keep it in repairs. Rs. 16-8-0 per annum was fixed as rent. Reduction and enhancement of rent was to be according to the terms of the lease of the nazul land, dated the 1st April 1903. It was further provided that a saiban which had been built at the lessee's expenses was to remain and that the plaintiff had no further claim left qua this suit. The plaintiff now wishes to build a verandah in the second storey of a shop and he has already built a chhajja. The Committee served him a notice to demolish the chhajja or to pay rent, for the same. The plaintiff has asked for a perpetual injunction restraining the Committee from demolishing the chhajja and from demanding rent for the erection of the verandah projecting on the chabutra. Both Courts have dismissed the plaintiff's suit.

In second appeal it is argued that the land under the chabutra forms part of the land leased to the plaintiff's predecessor in 1903. Reliance is placed on the evidence of P. W. No. 1 the girdawar of the Committee. It is contended that if the land belongs to the plaintiff the perpetual lessee, then by the terms of the lease he is entitled to build on the same. In reply the Counsel for Committee contends that the rights of the parties were determined by the compromise of 1896. It seems to me clear that by the compromise the plaintiff gave up his claim to be a perpetual lessee of the land under the chabutra, and accepted in lieu thereof a perpetual lease of the chabutra. This being so it is not open for the plaintiff to raise this point in second appeal.

It may further be noted that his claim to be the perpetual leasee of the land under the chabutra was not raised in the plaint, and seems to have been taken in arguments only after the admission made by the girdawar of the Committee. I, therefore, hold that by the compromise the plaintiff or his predecessor gave up their claim to be the lessees of the land.

The second point urged by Counsel for the appellant is that he is perpetual lessee of the chabutra, that he is, therefore, entitled to the space above the chabutra and is, therefore, entitled to project his verandah and his chajja in the space above chabutra provided that he does not alter the nature of the chajja. No authority is cited for this proposition. It seems to me that a perpetual lessee of a structure on a piece of land as distinguished from the permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. It is clear that a structure may have only limited user and the projection might have wholly different effects to what were contemplated when a lease of the structure was given. I, therefore, repel this contention of the appellant's Counsel.

The last point urged by the Counsel but not seriously pressed was that under the rulings *Damodar Das* v. *Municipal Committee, Delhi* (1) and *Ali Mardan* v.

(1) [1900] 27 P. R. 1901=395 P. L. R. 1900.

Municipal Committee of Kohat (2) the condition as to rent was ultra vires. I do not see that these rulings at all apply to the present case.

The appeal fails and is dismissed with costs.

Appeal dismissed.

R.D.

(2) [1905] 45 P. R. 1905=50 P. L. R. 1905.

A. I. R. 1927 Lahore 226

SHADI LAL, C. J., AND BROADWAY, J.

Rahmat Ali—Plaintiff—Appellant.

v.

Shadi Ram and *others*—Defendants—Respondents.

Letters Patent Appeal No. 128 of 1925, Decided on 25th January 1927, from the decree of LeRossignol, J., in Civil Appeal No. 2221 of 1922, D/- 24th March 1925.

Transfer of Property Act, S. 60—Mortgagee entitled to call in mortgage money at any time—Provision postponing redemption is a clog.

The right of redemption is generally co-extensive with the right of foreclosure and if the mortgagee has power to foreclosure or call in the mortgage money at any time the Court would refuse to give effect to a unilateral agreement postponing the mortgagor's right of redemption : 20 *Bom.* 677 and 22 *Bom.* 375, *Foll.*

[P. 226, C. 2 ; P. 227, C. 1]

Fakir Chand—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Judgment.—On the 31st July 1916 one Allahditta executed a mortgage of certain property for Rs. 500 in favour of Gangu ; out of the consideration a sum of Rs. 200 was to be paid to prior mortgagees. On the 10th November 1919 Gangu having died his sons sued to recover the money due under the mortgage and obtained a decree. In execution of their decree they had the property attached and sold, the decree-holders purchasing it at the auction. One Rahmat Ali objected to the sale on the strength of a mortgage in his favour dated the 17th April 1916 for a sum of Rs. 250. Under this mortgage Rahmat Ali claimed to be entitled to retain possession of the property for five years. His claim to the money due under the mortgage was allowed, but it was held that the purchases were not bound to leave him in possession for five years. On the 6th March 1921 Rahmat Ali instituted a suit asking that he should be declared to be the mortgagee of the property and entitled to hold possession thereof for a period of five years from the date when a certain prior mortgage should be redeemed. The suit having been dismissed on the ground that the condition in his mortgage that after redemption from prior mortgagee he should be allowed to retain possession of the property for a term of five years was a clog to redemption and therefore void, he preferred a second appeal to this Court which was dismissed by Mr. Justice LeRossignol who agreed with the view taken by the Court below.

Rahmat Ali has preferred this appeal under the Letters Patent through Mr. Fakir Chand, who contended that the mortgage in the appellant's favour was not open to any objection and did not contain any condition which in any way postponed or barred redemption and which could be regarded as a clog. Mr. Jagan Nath, on behalf of the respondents, urged that the view taken by the learned Judge in Chambers was correct and that in order to decide whether the condition under consideration in the mortgage deed in favour of the appellant was a clog to redemption it was necessary and allowable to examine the prior mortgages referred to in the mortgage deed, and that a reference to the said prior mortgages made it perfectly clear the condition in question was a clog to redemption. He also urged that a condition existed which created a compelling equity in the respondent's favour, and, finally, that inasmuch as the appellant under his mortgage is entitled to recover his money at any time the mortgagor's right to redeem was co-extensive and entitled him to pay off the mortgage without being compelled to carry out the provision as to giving the appellant possession for a period of five years under the appellant's mortgage ; the mortagor undertook to redeem the previous mortgages which had been executed in favour of the appellant's brother and, after redemption, to place the appellant in possession for a period of five years during which the mortgagors would not be entitled to redeem. On the other hand the appellant was given the right to call in the mortgage money at any time.

Now the right of redemption is generally co-extensive with the right of

foreclosure and it has been held that where the mortgagee has power to foreclose at any time the Court would refuse to give effect to a unilateral agreement postponing the mortgagor's right of redemption. In *Sayad Abdul Haq* v. *Ghulam Jillani* (1), it was held that the right of redemption and the right of foreclosure are always co-extensive and that a Court of equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage. To the same effect was the decision in *Sari* v. *Moti Ram Mahadu* (2), where it was held that

a stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money is inoperative.

As has been said above under the terms of the appellant's mortgage he was entitled to call in his money at any time, and after examination of the mortgage deed in question I am unable to see that there was any condition restraining the mortgagor from redeeming his mortgage without first redeeming the mortgages prior to it. As the appellant was expressly allowed to call in his money at any time, the right of the mortgagor to redeem at any time must be held to be co-extensive, and I would therefore dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

D.D. *Appeal dismissed.*

(1) [1896] 20 Bom. 677.
(2) [1898] 22 Bom. 375.

A. I. R. 1927 Lahore 227

CAMPBELL, J.

Hari Chand—Accused—Petitioner.

v.

Durga Datt—Complainant—Respondent.

Criminal Revision Petition No. 1505 of 1926, Decided on 21st January 1927, from an order of the Dist. Mag., Simla.

Criminal P. C., S. 139 A (ii)—Section does not entitle Magistrate to say which party is to file suit—Stay ordered under S. 139 A (ii)—Magistrate cannot decide any question of title.

If under S. 139-A (ii) the Magistrate stays his proceedings, those proceedings remain stayed until there is a decision by a competent civil Court, and there is nothing in the new section which entitles the Magistrate to say which party is to file that suit. In fact, by passing an order of stay under S. 139-A (ii) the Magistrate ousts his own jurisdiction to decide anything about the question of title, including the onus of proof: 42 *Cal.* 158 and *A. I. R.* 1922 *Cal.* 59 (*F. B.*). *Dist.* [P. 228, C. 1]

Hargopal for *Nawal Kishore*—for Petitioner.

Judgment.—In this case Durga Datt presented an application to the Magistrate of the First Class, Simla, under S. 133, Criminal Procedure Code, complaining that Hari Chand had unlawfully obstructed a path or road alleged by him to be public, The Magistrate passed a preliminary order under S. 133, Criminal Procedure Code, calling upon Hari Chand to remove the obstruction within 10 days or to appear before him in accordance with S. 135(b). Hari Chand appeared and objected that the place alleged to have been obstructed was not public, but was his private property. Under S. 139-A, he was directed to produce evidence in support of his claim in order that the Magistrate might enquire into the matter. Four witnesses are produced, and Durga Datt produced other witnesses in rebuttal. The Magistrate came to a finding that the claim by Hari Chand that the place was private property was not frivolous and was not intended merely to oust the jurisdiction of the Court. Accordingly the Magistrate recorded an order staying proceedings under S. 139-A (ii).

He then proceeded to decide which party should be ordered to go to the civil Court and after referring to *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1) ordered Hari Chand to file a civil suit to establish his claim and directed that, if within reasonable time a suit was not filed he intended to proceed under the law and would either discharge the Rule or make it absolute. Hari Chand has come to this Court on revision contending that S. 139-A (ii) gave the Magistrate no jurisdiction to order him to file a civil suit. The petition has been heard ex-parte since the respondent has not appeared.

It seems to me that this contention is correct. *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1) and the subsequent Full Bench decision *Ram Sagar Mondal* v. *Alek Naskar* (2) were delivered before S. 139-A

(1) [1915] 42 Cal. 158=26 I. C. 146=18 C. W. N. 1086.
(2) A.I.R. 1922 Cal. 59=49 Cal. 682 (F. B.)

of the Code of Criminal Procedure was enacted. If under S. 139-A (ii) the Magistrate stays his proceedings, those proceedings remain stayed until there is a decision by a competent civil Court, and there is nothing in the new section which entitles the Magistrate to say which party is to file that suit. In fact it seems to me that by passing an order of stay under S. 139-A (ii) the Magistrate ousts his own jurisdiction to decide anything about the question of title, including the onus of proof.

I accordingly accept the petition, and set aside that portion of the Magistrate's order directing Hari Chand to file a civil suit

R.D. *Petition accepted,*

A. I. R. 1927 Lahore 228

BROADWAY AND ZAFAR ALI, JJ.

Alliance Bank of Simla, Ltd.—Plaintiffs—Appellants.

v.

Mohan Lal—Defendant—Respondent.

First Appeal No. 1653 of 1924, Decided on 19th October 1926, from the decree of the Sr. Sub-J., Simla, D/- 18th March 1924.

Civil P. C., O. 8, R. 6—S. 229, Companies Act—Prov. Ins. Act 3 of 1907, S. 30—Defendant in account with a Bank in two capacities, personal and representative—Suit for dues under personal account by liquidators—Moneys due by Bank under the joint account claimed to be set off—Such dealings are not "mutual dealings" under S. 30 of Act 3 of 1907—Set-off disallowed.

A person had a personal account with a Bank on which he had overdrawn. He was also interested in another account which was in the name of a firm of which he was partner and which he alone operated on. This latter account was in credit. The liquidators of the Bank sued the person for the amount due under his personal account. He claimed to set off against the plaintiffs' claim the amount due to him by the Bank under the account in the firm's name on which the Bank was indebted.

Held: that S. 229 of the Indian Companies Act made the provisions of S. 30 of Act 3 of 1907 (Provincial Insolvency Act) applicable to the case, that the dealings in question were not "mutual dealings" within the meaning of S. 30 and the set-off clafmed could not be allowed: 63 *P. R.* 1915 and *A. I. R.* 1921 *Bom.* 66, *Rel. on*; 2 *Pat. L. J.* 451, *Dist.* [P 230 C 1]

Aziz Ahmad, M. Obedulla and *Mahommad Amin Khan*—for Appellants.

Mehr Chand Mahajan—for Respondent.

Judgment.—The Alliance Bank of Simla, Limited, suspended payment on the 28th April 1923, and on the 9th of May following went into vol ntary liquidation. On the date of the suspension of payment Mohan Lal, Vakil, of Simla, was one of the said Bank's constituents having an overdraft with the Bank. He was also interested in an account with the Bank in connexion with a business he was carrying on in partnership with R. B. Sultan Singh of Delhi under the name and style of "Sultan Singh & Co." This account was in the name of the firm or partnership and it would seem that Lala Mohan Lal and Sultan Singh held equal shares. Lala Mohan Lal carried on the business and alone operated on the account, the specimen signature of the firm, i.e., "Sultan Singh & Co," having been written and supplied to the Bank by him. On the 28th April 1923 this account was in credit to the amount of about Rs. 23,000 while his own personal account was in debit to the extent of some Rs. 18,000.

By an arrangement entered into by the liquidators of the Alliance Bank with the Imperial Bank of India, Limited, the latter Bank undertook to pay the creditors of the Alliance Bank to the extent of 50 per cent of their claims on certain conditions. When the liquidators called on Lala Mohan Lal to pay the amount due by him in his personal account he entered into correspondence with them. I do not deem it necessary to discuss this correspondence in detail as it is sufficient to say that Lala Mohan Lal asked them to arrange to pay (through the Imperial Bank of India Limited) Sultan Singh 50 per cent. of the amount due to "Sultan Singh & Co." and to give him (Lala Mohan Lal) credit for the remaining 50 per cent. he undertaking to reduce the debt due by him to that figure by paying up the balance.

The liquidators being unable to agree to the proposal so far as it related to the set off claimed intimated this fact to him and called on him to pay up the whole amount due by him. He paid certain sums and as he had not paid up in full by the 28th August 1923 the liquidators instituted a suit for the amount due which they stated to be Rs. 12,113-13-10. They prayed for a decree for this amount with costs and future interest at the agreed rate, which was a minimum rate of 8 per

cent from the date of institution to the date of realization. Lala Mohan Lal contested the suit and claimed a set-off of Rs. 11,5000, the amount (approximately) still payable to Sultan Singh & Co.

The following issues were settled :

1. Is the defendant entitled to make the set-off claimed by him.

2. In what respects, if any, are the plaintiffs' account incorrect ?

3. What amount, if any, is due by defendant to plaintiffs or by plaintiffs to defendant ?

The learned Senior Subordinate Judge held "that a legal set-off as embodied in O. 8, R. 6, Civil P. C." was not permissible as although the amount claimed was an ascertained sum of money which was legally recoverable, the defendant did not fill the same character in relation to the two accounts. He, however, held that justice, equity, and good conscience required that the set-off should be allowed and decreed it to the extent of Rs. 11,448-12-0 with costs. He then went into the accounts, and after giving the defendant credit for the amount decreed by way of set-off granted the plaintiffs a decree for the balance due, amounting to Rs. 389-0-10 with future interest at 8 per cent from the date of the decree to the date of payment, and directed the parties to pay their own costs. Against this decree the plaintiffs have preferred this appeal and the only point argued at the Bar is as to the decision on the first issue.

For the respondent it was urged that the set-off was permissible under O. 8. R. 6, Civil P. C., and that in any event it was permissible on equitable grounds. As to the applicability of O. 8, R. 6, Civil P. C., I am in agreement with the trial Court. Before a set-off can be allowed, the parties must "fill the same character as they fill in the plaintiffs' suit" and in the present case it seems to me that they do not. The defendant respondent was being sued in his personal capacity for a loan for which he alone was responsible. The set-off claimed by him was on quite another account and the amount, even if ascertained, was not "legally recoverable by him" in his personal capacity, but as one of the partners in "Sultan Singh & Co." It is true that it was Lala Mohan Lal who alone operated on Sultan Singh & Co.'s" account, but he did so as the partner who was controlling and carrying on the business of that firm. It was stated that he had withdrawn a sum of Rs. 40,000 on that account on the 27th April 1923 and had drawn a cheque for the balance which was not presented in time. This only means that Lala Mohan Lal had become aware of the impending failure of the Alliance Bank and was taking steps to withdraw the firm's money before payment was suspended. His ability to do this before suspension does not give him the right to do so after the Bank had failed. Section 229 of the Indian Companies Act makes the Bankruptcy rules applicable and it is perfectly clear that Lala Mohan Lal could not claim to set-off a debt due by the Bank to the firm of Sultan Singh & Co. against a debt due to the Bank by him alone. This has been clearly laid down in *Mehr Chand* v. *Amritsar Bank* (1). The case of *Bishan Chand* v. *Babu Audh Behari Lal* (2), relied on by the trial Court has no real bearing on the point and did not deal with the situation that exists in the present case.

Mr. Mehr Chand referred to three decisions which do not however assist him. In the first, *Raghavendra Raoji Kathawate* v. *Yalgurad Ramchandra Padki & Co.* (3), the plaintiff sued for the price of goods supplied ; the defendant admitted the claim but urged by way of set-off the amount of pay due to him by the plaintiff. In *Maiden* v. *Bhoodu* (4) it was merely held that the provisions of O. 8, R. 6 Civil P. C., were not exhaustive and that the defendant could set-off the value of sheets lost by the plaintiff, a washerman, against a claim for wages.

In *M. Annapurnama* v. *V. A. Akkaya* (5), the question now before the Court was not raised and all that was held was that "one of several payees of a negotiable instrument could give a valid discharge of the entire debt without the concurrence of the other payees."

On the other hand *Trimbak Gangadhar* v. *Ramchandra Trimbak* (6) is an autho-

(1) [1915] 63 P. R, 1915=89 P. L. R. 1915=28 I. C. 975=69 P. W. R. 1915.

(2) [1917] 1 Pat. L. W. 615=2 Pat. L. J. 451=40 I. C. 350=(1917) P. H. C. C. 279

(3) [1917] 41 Bom. 163=39 I. C. 17=19 Bom. L. R. 67.

(4) [1910] 77 P. R. 1910=108 P. W. R. 1910=7 I. C. 1006=145 P. L. R. 1910.

(5) [1913] 36 Mad. 544=(1913) M. W. N. 328=19 I. C. I2=24 M. L. J. 333 (F.B.).

(6) A. I. R. 1921 Bom. 66=45 Bom. 1219.

rity that supports the appellant. In this case a bank in liquidation sued two defendants on a joint promissory note. One of the defendants sought to set-off an amount admittedly due to him from the Bank on his own separate deposit account; it was held that under S. 229 of the Indian Companies Act (1913) the provisions of S. 30 of the Provincial Insolvency Act (1907) applied and as the dealings in question were not "mutual dealings" within the meaniag of that section the set-off claimed could not be allowed.

In my judgment the dealings in question in the present suit were not "mutual dealings" within the meaning of S. 30 of Act 3 of 1907 and the set-off claimed by Lala Mohan Lal cannot be allowed either in law or equity.

As no other question was argued I accept the appeal and grant the plaintiffs a decree for the full amount claimed with interest from date of suit till date of payment at the rate of 8 per cent per annum (the rate agreed on) and costs throughout.

Zafar Ali, J.—I agree.

J.V. *Appeal allowed.*

A. I. R. 1927 Lahore 230

ZAFAR ALI, J.

Ganga Ram—Defendant—Appellant.

v.

Hasan Shah and *others*—Plaintiffs—Respondents.

Second Appeal No. 1268 of 1926, Decided on 13th December 1926, from the decree of the Dist. J., Shahpur D/- 4th January 1926.

Limitation Act, Arts. 142 *and* 144—*Waste land presumed to be in owner's possession—Encroachment on waste land—Trespassing defendant has to prove encroachment—Art.* 144 *applies.*

Where land is lying waste, possession follows title. Where therefore an entire strip of land is lying waste, it must be presumed to have been in the possession of its owner till it was encroached upon, and in an encroachment case it is on the defendant, who is a trespasser, to prove when the encroachment was made. The Article applicable to this case is Art. 144 and not Art. 142. [P. 230, C. 2.]

Amar Nath Monga—for Appellant.

Ghulam Mohi-ud-Din — for Respondents.

Judgment.—This was a banna shikni or boundary encroachment case. Between the plaintiffs' fields on the east and the defendant's garden on the west there is a foot-path 4 karams wide and 2 kanals in area which belongs to the plaintiffs. In the Jamabandi 1912-13 it was shown that the defendant had encroached upon the foot-path to the extent of half a kanal and had annexed it to his garden. The plaintiffs instituted the present suit on the 7th June 1924, for possession of this half kanal. The defendant pleaded adverse possession but the trial Court overruled that plea and decreed the plaintiff's suit. On appeal the learned District Judge proceeded on the erroneous assumption that the entry in the Jamabandi 1912-13 related only to one-fourth of a kanal and holding that the defendant's possession with regard to that quarter had been adverse for over 12 years dismissed the plaintiffs' suit with regard to that quarter. The defendant appears in this Court in second appeal and his learned counsel pointing out the error into which the learned District Judge had fallen argues that the plaintiffs' claim for the reason assigned by the District Judge should have been dismissed with regard to the entire half kanal.

Now, it is quite clear that where land is lying waste possession follows title, and that as the entire strip of land two kanals in area was lying waste, it must be presumed to have been in the possession of the plaintiffs, its owners, till it was encroached upon. It was, therefore, on the defendant, who was the trespasser, to prove when that encroachment was made, and the article applicable was Art. 144 and not Art. 142 of the Indian Limitation Act. The only reliable evidence on this point was furnished by the entry in the Jamabandi 1912-13 which related to the period from Kharif 1912 to 1913 and must have been verified in 1913 and not before. The defendant's possession could not have been presumed to have commenced from before July 1912 and as the suit was instituted in June 1924 it was within time.

Counsel for the plaintiffs-respondents urges that though they did not prefer an appeal against the order of the District Judge, this Court should, by virtue of O. 41, R. 33, restore the decree of the trial Court. I am of opinion that this is

a fit case for interference under the said rule and I, therefore, dismiss the appeal with costs and restore the decree of the trial Court.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 231

ADDISON, J.

Abdul Qadir and *another*—Defendants—Appellants.

v.

Imam Din—Plaintiff—Respondent.

Second Appeal No. 2540 of 1926, Decided on 5th February 1927, from the decree of the Dist. J., Jhelum, D/- 31st August 1926.

(a) *Limitation Act, Art.* 83—*Suit based on express indemnification—Art.* 83 *and not Art.* 61 *applies.*

Where the plaintiff's case was that there was an express contract by the defendant to indemnify him :

Held : that the suit was governed by the special Art. 83 and not the general Art. 61 of the Limitation Act : 15 *P. L. R.* 1915, *Foll.* [P 232 C 1]

(b) *Practice—New plea—Appellate Court cannot set up a new case from one arising on pleadings in lower Court.*

Parties to suit are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance, and they cannot rely upon a point, which has not been raised and which depends upon facts for its determination. [P 232 C 1]

(c) *Contract Act, S.* 23—*Bond given as security for the debt by a debtor is valid though the transaction covered by the bond involves a criminal act.*

Where a bona fide debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a bond given by a debtor as security for the debt constitutes a valid and enforceable agreement : *A. I. R.* 1925 *Lah.* 364, *Foll.* and *Criminal Appeal No.* 522 *of* 1926, *Ref.* [P 232 C 2]

Niaz Muhammad—for Appellants.

Muhammad Azam Khan and *Muhammad Amin*—for Respondent.

Addison, J.—Abdul Aziz and Abdul Qadir are two brothers. The former preferred a complaint for criminal breach of trust under S. 406, Indian Penal Code, against the latter. Later, he withdrew this complaint because Imam Din, who is the brother of the wife of Abdul Qadir, gave him a promissory note for Rs. 2,000 thus assuming civil liability for the debt in question. Imam Din has now sued Abdul Qadir and has joined Abdul Aziz as defendant as well. His plaint is to the effect that Abdul Qadir requested him to pay the sum of Rs. 2,000 to Abdul Aziz and that Abdul Qadir promised that he would repay this amount later. Accordingly, Imam Din executed a promissory note in the sum of Rs. 2,000 in favour of Abdul Aziz and paid Rupees 1,000 shortly afterwards, which sum was repaid to him by Abdul Qadir. Later he paid the other moiety of Rupees 1,000 on the 31st October 1921 and he now sued Abdul Qadir for that amount on the ground that he requested him to pay the money and promised that he would repay it later, that is, expressly contracted to idemnify him.

Abdul Qadir pleaded that there was a criminal complaint but that he did not ask his brother-in-law, the plaintiff, to execute the promissory note in question or to pay the money, that in any case the agreement was unenforceable on the ground that it was entered into in order to stifle the prosecution in a non-compoundable case, that the suit was barred by time and, that, if plaintiff had paid anything, he had done so out of the accounts of the partnership in which the plaintiff and Abdul Qadir were partners. Abdul Aziz pleaded that he had been paid and that he got the promissory note from the plaintiff but that Abdul Qadir did not come to him in order to settle the matter in dispute between them.

The following issues were framed :

1. Whether the plaintiff executed the promissory note in favour of Defendant No. 1 and the latter promised to repay him ?
2. Whether the suit is time barred ?
3. Whether the contract between Defendant No. 1 and the plaintiff is not enforceable ?
4. Can the plaintiff recover from Defendant No. 2 ?
5. Whether the plaintiff has recovered this amount from Abdul Qadir ?

On the first issue the trial Court held that there was no evidence that Defendant No. 1 requested the plaintiff to pay and promised to pay him and that this was the plaintiff's case.

On Issue No. 2 the trial Court held that Article 83 of the Limitation Act applied and not Article 61 as the plaintiff's case was that there was an express

contract to idemnify. For that reason the limitation was three years under the special Article 83 and not six years under the general Article 61, as amended by Punjab Act 1 of 1904. On appeal the learned District Judge seems to have accepted the view that there was no evidence to establish the express contract pleaded by the plaintiff. He has said as follows:

> In this case there is no question of Abdul Qadir having contracted to idemnify Imam Din in any way, but it is a suit pure and simple for the recovery of Rs, 1,000, payable to Imam Din for the money paid by him for Abdul Qadir. It is therefore clearly covered by Article 61;

and accordingly the District Judge held that the suit was within time. He then went on to decide Issues Nos. 3, 4 and 5 and held that the agreement was enforceable, that it could be recovered from Abdul Qadir but not from Aziz, and that there was no satisfactory evidence to show that the sum of Rs. 1,000 had been paid out of the partnership accounts or otherwise. Against this decision this second appeal has been preferred.

There is no doubt that the plaintiff's case was that there was an express contract by Abdul Qadir to idemnify him. That being the case, the suit was clearly barred under Article 83 of the Limitation Act and it was not permissible for the appellate Court to set up a new case for the plaintiff. It was held by this Court in *Dayal* v. *Hirde Ram* (1) that the parties are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance and they cannot rely upon a point, which has not been raised in that Court and which depends upon facts for its determination. It seems to me that the special Article 83 must be held to apply as it was the plaintiff's case that there was an express contract to idemnify. On his own statement of the case the suit was time-barred and for that reason alone should have been dismissed. It was not permissible to make out a new case for the plaintiff on appeal to the effect that it was a suit pure and simple for the recovery of Rs. 1,000 payable to Imam Din for money paid by him for Abdul Qadir.

There is another consideration. The plaintiff bound himself by the promissory note to pay this amount of Rs. 2,000 and he did pay it. He had contracted to pay it and it seems to me that it cannot be said that he was paying this money for the defendant. In this view of the case also Art. 61 would not apply.

It was also argued by appellant's counsel that the agreement was not enforceable as it was entered into to stifle a prosecution in a non-compoundable offence. I agree, however, with the decision of the District Judge on this point. It was held by this Court in *Ram Gopal* v. *Ganeshi Lal* (2) that where a bona fide debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a bond given by a debtor as security for the debt constitutes a valid and enforceable agreement. This applies in the present case with full force. This subject is discussed at length in *Civil Appeal No.* 522 *of* 1926.

Another point taken by the appellants' counsel was that the finding on Issue No. 5 was not satisfactory. There is a finding, however, and in my opinion that finding is sufficient.

It was further argued by appellant's counsel that costs should not have been awarded against Abdul Aziz as he had been absolved from liability to pay. This is certainly correct, but in view of my finding that the present suit is barred by limitation it is no longer important.

On the ground that the suit is barred by limitation I accept this appeal with costs and dismiss the plaintiff's suit. Parties will bear their own costs in the lower Courts.

J. V. *Appeal accepted.*

(1) [1915] 80 P. W. R. 1915=29 I. C. 895=153 P. L. R. 1915.

(2) A. I. R. 1925 Lah. 364.

* A. I. R. 1927 Lahore 232

SHADI LAL, C. J., AND BROADWAY, J.

Nathu Mal — Decree-holder—Appellant.

v.

Mohan Singh and *another*—Judgment-debtors—Respondents.

Letters Patent Appeal No. 86 of 1925, Decided on 26th January 1927, from the judgment of Harrison, J., D/- 12th January 1925, in Civil Appeal No. 1190 of 1924.

* *Civil P. C., S. 11—Execution proceedings—Every order in execution need not be appealed against—Such interlocutory orders can be attacked in appeal from final order.*

An appeal need not be preferred against every order in execution proceedings. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings : 36 *Cal.* 422, *Foll.* [P 234 C 1]

A person obtained a decree for realization of money by sale of certain property of judgment-debtor. He applied for execution but the Court held that the decree was preliminary and could not be executed. He then applied to have the decree made final and at the same time protested that the decree as it stood was capable of execution. The application for final decree was held as time barred. He preferred an appeal in which he again reiterated his plea that the decree could be executed.

Held : that he could urge the plea though he did not appeal from the order of the executing Court disallowing execution. [P 234 C 2]

Jagan Nath Aggarwal—for Appellant.

Jai Gopal Sethi—for Respondents.

Judgment.—On the 6th June 1916 one Nathu Mal instituted a suit against Sohan Singh and Mohan Singh asking for a decree for a certain sum of money to be realized from certain specified property and from other property belonging to the judgment-debtors if the specified property proved insufficient. On the 27th June 1916 a decree was passed in plaintiff's favour for Rs. 1,898-8-6 and interest payable by the judgment-debtors and in default of such payment the specified property was to be sold, and, if that proved insufficient, making the amount recoverable from other property of the judgment-debtors.

On the 4th January 1917 the decree-holder applied for execution of his decree by the attachment and sale of certain property specified in the application. Notice was issued to the judgment-debtors calling upon them to appear in Court on the 31st January 1917 to "settle the terms of the sale." The judgment-debtors failed to appear on the date fixed and the sale was ordered to be held by the 13th March 1917. On that date proceedings were stayed as the judgment-debtors had obtained an order to that effect from another Court.

On the 29th October 1919 the decree-holder again applied for execution but this application was dismissed in default. A third application was filed on the 10th March 1920 which met with the same fate on the 23rd April 1921.

After this, on the 4th July 1921, the decree-holder applied for execution of his decree by sale of the property. These proceedings continued to the 12th April 1922 when the executing Court held that the decree was a preliminary one and, therefore, not capable of execution.

On the 1st May 1922 the decree-holder filed an application in the Court asking that the decree be made final and, at the same time, strenuously urged that strictly speaking the decree was final already and, therefore, capable of execution. The executing Court issued notice and finally held that the application to make the decree final was barred by limitation. Against this order the decree-holder preferred an appeal to the District Court. In this appeal he again urged that the decree of which he was seeking execution was a final one already and as such capable of execution. At the same time he also urged that his application to have it made final should be treated as within time. The learned District Judge held that although the decrree sought to be executed was not in the form of a preliminary decree prescribed in appendix (D) to the first schedule of the Civil P. C., he thought it was intended to be preliminary, and that, in the circumstances, time should be extended under S. 14 of the Limitation Act. He accordingly directed that the decree-holder should be given a final decree in the proper form. Against this order the judgment-debtors preferred a second appeal to this Court and it was held by the learned Judge in Chambers that the decree in question was intended to be preliminary and was preliminary and that time could not be extended under S. 14 of the Limitation Act. He accordingly accepted the appeal and restored the order of the first Court.

Against this decision the decree-holder has preferred this appeal under S. 10 of the Letters Patent through Mr. Jagan Nath Aggarwal who has contended, firstly, that the decree in question was a final one and capable of execution; secondly that having regard to the fact that the decree-holder had asked for the sale of the property in his application of the 4th January 1917 and notice had been issued to the judgment-detors calling upon them to attend the Court to settle the terms of the sale, it should be held that the intention of the decree-holder

was that the Court should, if necessary, make the decree a final one before directing a sale of the property. Finally, it was urged that inasmuch as the judgment-debtors had notice of the application for sale made by the 4th January 1917 and failed to appear they were now precluded from alleging that the decree was not capable of execution.

Mr. Sethi on behalf of the respondents urged that the view taken by the learned Judge in Chambers was correct, that the points now raised were not raised before the learned Judge in Chambers and could not, therefore, be brought before this Court and that the only question was whether the application to make the decree final was within time, a question on which there could be no two opinions. After an examination of the decree sought to be executed and a reference to form 4 in Appendix (D) to the First Schedule of the Civil P. C., I am of opinion that the decree is certainly capable of execution for it contains a clear direction that the judgment-debtors were to pay the sum mentioned therein and that in default of payment by them the money was recoverable by attachment and sale of certain property. It is prefectly clear that throughout the proceedings the position taken up by the decree-holder has been that this was the correct interpretation to be placed on the decree. No doubt it was possible for him to have preferred an appeal against the order of the executing Court dated the 12th of April 1922, Instead of doing this, however, he complied with the order passed by that Court and on the 1st May 1922 asked that the decree be made final. At the same time in the same application he clearly reiterated the fact that the decree was already capable of execution. In *Chandrabala Debi* v. *Prabodh Chandra Ray* (1), it was held by a Djvision Bench of the Calcutta Court that an appeal need not be preferred against every order in execution proceedings and that it was open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

In the present case, as in *Chandrabala Debi* v. *Prabodh Chandra Ray* (1), when an appeal was preferred against the final order, the previous interlocutory order was specifically attacked as being bad. The decree-holder has throughout challenged the correctness of the order passed oa the 12th April 1922 and having regard to the authority cited above, in my opinion it was open to him to challenge the said order in the manner that he has done. In my judgment the decree being capable of execution this appeal should be accepted and execution proceeded with. The appellant is entitled to his costs..

In view of my conclusion I do not think it necessary to discuss the other points raised.

Shadi Lal, C. J.—I concur.

D.D. *Appeal accepted.*

(1) [1909] 36 Cal. 422=2 I. C. 338=9 C. L. J. 251.

A. I. R. 1927 Lahore 234

ADDISON, J.

Honda Ram—Defendant—Petitioner.

v.

Chiman Lal-Dureja—Plaintiff—Respondent.

Civil Revision Petition No. 549 of 1926, Decided on 5th January 1927, from the decree of the 2nd Cl. Sub-J., Multan, D/- 10th May 1926.

Provincial Insolvency Act (5 *of* 1920), *S.* 28 (2) *—Adjudication order against a firm is against its individual partners—Suit against partners so adjudged insolvent is not maintainable without leave of Court.*

A firm is not a legal entity ; nor is it a person. A firm's name is merely a short-hand form for collectively designating all the partners in the firm. In law, therefore, the adjudication of a firm is an adjudication of each individual as insolvent. And it does not matter if such firm has applied that the firm and not the individual partners thereof should be declared insolvent. *A. I. R.* 1926 *Sind* 31, *Foll.*; *A. I. R.* 1924 *Cal.* 74, *Rel. on.* [P 235 C 1]

Hargopal for *S. K. Mukerji*—for Petitioner.

Amolak Ram—for Respondent.

Judgment.—The plaintiff firm obtained a decree in the Small Cause Court, Multan, for Rs. 72-7-5 against the defendant and against this decision the defendant Honda Ram has presented this revision petition.

It was objected in the Small Cause Court that as the firm of which the defendant was a partner had been adjudicated insolvent, this meant that the defendant personally was adjudicated insolvent and, therefore, the suit could

not proceed against him under the provisions of S. 28 (2) of the Provincial Insolvency Act without the leave of the Insolvency Court and on such terms as that Court might impose. The Small Cause Judge repelled this objection on the ground that before the defendant-firm was declared insolvent it specially asked that the firm should be adjudicated insolvent and not each partner.

The law in England is that where a firm is adjudicated insolvent each partner of that firm becomes an insolvent. It was held in *Sheodoyal Khemka* v. *Johar-mull Manmull* (1) that a firm is not a legal entity. Nor is it a person. It is merely a collective name for the individuals making up the partnership. Further it was held in *Official Receiver* v. *Naraindas Lota Ram* (2) that a firm name is merely a short-hand form for collectively designating all the partners in the firm and that, therefore, an order of adjudication passed against the firm is an order against the individual partners in that firm. This being the law, it does not matter that the defendant firm applied that the firm should be adjudicated insolvent, for in law the adjudication of their firm as being insolvent was an adjudication of each individual partner as insolvent.

I would also refer to S. 61 (4) of the Insolvency Act. This shows that the partnership property in the first instance is to be applied in payment of the partnership debts and the separate property of each partner is to be applied in the first instance in payment of his separate debts. This also clearly indicates that where a partnership firm is adjudicated insolvent each individual partner becomes an insolvent, and the necessary rule is laid down as to how the partnership and separate property has to be distributed.

It follows that the present suit could not proceed without the leave of the insolvency Court. I, therefore, accept this petition for revision and, setting aside the order of the Small Cause Court, dismiss the plaintiff's suit with costs throughout. The plaintiff firm can take such action in the insolvency Court as it cares.

J.V. *Petition accepted.*

(1) A. I. R. 1924 Cal. 74=50 Cal. 549.
(2) A. I. R. 1926 Sind 31.

A. I. R. 1927 Lahore 235

ZAFAR ALI, J.

Sant Singh and *another*—Judgment-debtors—Appellants.

v.

Hari Datt and *another*—Decree-holders—Respondents.

Misc. First Appeal No. 2266 of 1926, Decided on 9th December 1926, from the order of the Sr. Sub-J., Lyallpur, D/- 6th October 1926.

Civil P. C., O. 41, R. 5—Refusal of stay order is not appealable.

No appeal lies from an order refusing stay of execution : *A. I. R.* 1921 *Bom.* 208 ; *A. I. R.* 1924 *All.* 808 ; and 25 *C. W. N.* 555 ; *Rel. on.* [P. 235, C. 2]

Nihal Singh—for Appellants.

Abdul Rashid—for Respondents.

Judgment. — The appellants-judgment-debtors have filed a suit for a declaration that the decree against them was obtained by fraud and is null and void and they made two applications to the Court executing that decree one for stay of execution pending decision of that suit, and the other for stay on their furnishing security for satisfaction of the decree. Both applications having been refused the judgment-debtors have come up to this Court with an appeal.

In the first place, it may be observed that no appeal lies from an order refusing stay of execution as was held in *Janardan Trimbak* v *Martand Trimbak* (1), *Husain Bhai* v. *Beltie Shah Gilani* (2), and *Rajendra Kishore Choudhury* v. *Mothura Mohan Choudhury* (3). According to Mulla this is the correct view of S. 47 of the Civil P. C. from which the words "or to the stay of execution thereof" which occurred in S. 244 of the old Civil P. C., have been omitted. But even if the appeal lies there appears to be no sufficient reason for staying execution. I, therefore, order that if the judgment-debtors should deposit in Court the decretal amount within a fortnight from to-day, the money should be paid to the decree-holders on their furnishing security for restitution and not otherwise. The appeal is otherwise dismissed with costs and the ad interim order staying execution is discharged.

J.V. *Appeal dismissed.*

(1) A. I. R. 1921 Bom. 208=45 Bom. 241.
(2) A. I. R. 1924 All. 808=46 All. 733.
(3) [1921] 25 C. W. N. 555=55 I. C. 228.

A. I. R. 1927 Lahore 236

MARTINEAU, J.

Kanshi Ram—Plaintiff—Appellant.

v.

Taja—Defendant—Respondent.

Second Appeal No. 1462 of 1926, Decided on 8th November 1926, from a decree of the 1st Cl. Sub-J., Gujrat, D/- 23rd February 1926.

Limitation Act, Arts. 142 and 144—Where dispossession or discontinuance is not alleged by plaintiff, nor is it proved against him, Art. 144 applies.

Where the plaintiff alleges that he was dispossessed or discontinued possession or where it is proved that the plaintiff had been dispossessed or had discontinued his possession, Art. 142 applies. But in the absence of either allegation by the plaintiff or proof that he was dispossessed or discontinued possession, Art. 144 shall govern. [P. 236, C. 2]

Malik Ram Lal and *Shamair Chand*—for Appellant.

Abdul Ghani—for Respondent.

Judgment.—The plaintiff purchased the house in dispute at a Court sale in 1891 and obtained possession. He says that he leased the house to the defendant about eight years ago, and he now sues to recover possession.

The defendant said that the plaintiff after his purchase dispossessed some Mirasis, who had been living in the old house, but that afterwards the house fell down, and he (the defendant) built the present house 12 or 13 years ago.

The plaintiff produced some witnesses, who deposed to their having taken the house on rent from him, but their evidence has not been believed, and it has also been found that the plaintiff has not proved that he leased the house to the defendant. On that finding the suit has been dismissed, the Courts below holding that it was necessary for the plaintiff to prove that he was dispossessed within 12 years of the suit, and that he failed to do so.

The plaintiff has filed a second appeal, and it is contended on his behalf that as he did not allege dispossession or discontinuance of possession he is entitled to succeed on the strength of his title unless the defendant proves, that he has been in adverse possession for 12 years. *Santa Singh* v. *Narain Singh* (1), *Ismail* v. *Ibrahim* (2), *Jai Chand* v. *Girwar Singh* (3), *Ali Hammad* v. *Ghurpattar Singh* (4), and *Mahamad Saheb Ibrahim Sahab* v. *Tilokchand Abheerchand Marwadi* (5), are relied upon in support of this contention.

The rulings cited on the other side are nearly all cases in which the plaintiff had been dispossessed of the property for which he was suing. The only case in point was *Subappa Shenkareppa* v. *Venkappa Golappa* (6) and that was decided by the Bombay High Court which appears to have changed its view in *Mahamad Saheb Ibrahim Saheb* v. *Tilokchand Abheerchand Marwadi* (5) mentioned above.

If in the present case it were proved that the plaintiff had been dispossessed or had discontinued his possession Art. 142 of the First Schedule of the Limitation Act would, I think, apply even though he himself does not allege dispossession or discontinuance of possession but there is no evidence on this point at all, for the defendant's witnesses do not say that the plaintiff was ever dispossessed or discontinued his possession, but say that he was never in possession at all, and they make no mention of the original house having fallen down as alleged by the defendant. From the mere fact that the plaintiff has not proved that the defendant was his tenant it is not necessarily to be inferred that the defendant dispossessed him. The defendant might be a licensee or the tenancy might exist although the plaintiff failed to prove it.

I hold, therefore, that the case is not governed by Art. 142 in the absence of either an allegation by the plaintiff or proof that he was dispossessed or discontinued possession.

It is contended for the defendant that Art. 138 would apply if Art. 142 does not but I do agree with that contention as it is admitted that the plaintiff got possession of the property after purchase.

The Article applicable is, therefore, Art. 144 and the defendant in order to defeat the claim must prove his adverse possession for 12 years. The lower appellate Court thinks that that is proved by the statement of the plaintiff's witness Buta Mal, but it is wrong, as Buta

(1) A. I. R. 1927 Lah. 32.
(2) A. I. R. 1926 Lah. 13.
(3) [1919] 41 All. 669=52 I. C. 366=17 A. L. J. 814.
(4) A. I. R. 1925 All. 454=47 All. 389.
(5) A. I. R. 1922 Bom. 243=46 Bom. 920.
(6) [1915] 39 Bom. 335=28 I.C. 24=17 Bom. L. R. 141.

Mal only says that the defendant had been in possession for 10 or 12 years. The defendant's witnesses, no donbt, say that the Mirasis lived in the house under the defendant for 5 or 6 years, and that he himself has been living in it for the last 20 years or more, but this is entirely at variance with his own statement. In fact it can hardly be said that he definitely sets up a plea of 12 years' adverse possession when he says in a vague way that he built the existing house about 12 or 13 years ago.

I find that 12 years' adverse possession by the defendant has not been proved.

I accordingly accept the appeal, reverse the decrees of the Courts below, and give the plaintiff a decree for possession of the house with costs in all Courts.

J.V. *Appeal accepted.*

A I. R. 1927 Lahore 237

ADDISON, J.

Labhu Ram—Plaintiff—Appellant.

v.

Sazawar and *others* — Defendants—Respondents.

Second Appeal No. 1845 of 1926, Decided on 3rd January 1927, from the decree of the Addl. Dist. J., Amritsar, D/- 1st April 1926.

(a) *Evidence Act, S. 92—Endorsement extinguishing mortgage on mortgage deed, not registered—Other evidence is admissible to prove payment of mortgage money.*

Although an endorsement on a mortgage deed in extinguishment of the mortgage, if unregistered, is inadmissible in evidence, other evidence as to the redemption of the mortgaged property or payment of the full amount of the mortgage money can be given : 91 *P. L. R.* 1904, *Foll.*

[P 237 C 2]

(b) *Hindu Law—Widow is competent to collect debts, even mortgage debts, as a natural guardian of her minor son.*

A widowed mother of a Hindu minor as his de facto and natural guardian has full power to collect debts. The mere fact that there is a lien on property for the debt cannot make any difference. The mortgagors of the property mortgaged to her late husband can pay the mortgage amount to her in good faith in the ordinary course of busines [P 237 C 2; P 238 C 1]

Durga Das—for Appellant.

B. A. Cooper and *Maya Das*—for Respondents.

Judgment.—Respondents mortgaged land to plaintiff's father by three different mortgage-deeds. Plaintiff's father then died and during the minority of the plaintiff his mother acted as his natural and de facto guardian. In 1914 the respondents paid to the plaintiff's mother the full amount due on the three mortgages and receipts for the different sums were endorsed on the mortgage-deeds, Unfortunately it was also added at the end of the endorsements that the mortgages were extinguished. The land was at the same time mutated back into the names of the original owners without mortgage. After the plaintiff became a major he instituted the present suit for possession of the mortgaged land on the ground that the money had been paid to his mother, that she had no power to grant redemption of the land and that she did not spend the money for his benefit. The two Courts below have concurred in dismissing the plaintiff's suit and he has presented this second appeal.

The first point argued on his behalf was that as the endorsements on the mortgage-deeds were inadmissible in evidence on account of their want of registration no other evidence as to the redemption of the land or payment of the full amount of the mortgage-money could be given. I am unable to accept this contention. *Amir* v. *Diala Mal* (1) is a ruling on all fours with the present. There also the same mistake had been made of adding a sentence extinguishing the mortgage to the receipt proper and oral evidence was admitted in proof of the payment of the mortgage amount There is ample evidence that the money was paid to the widow bona fide as guardian of her minor son and that the land was then mutated in favour of the original owners.

The only other point argued was that it was the duty of the mortgagors to see that the money paid to the mother of the minor was applied for his benefit. I entirely disagree. The de facto and patural guardian of a Hindu minor has full power to collect debts. There is no evidence in the present case that the mother misapplied the money. No fraud or collusion between the mortgagor and the widow has been established. In fact there is a clear finding that all along she had been doing all the necessary acts to look after the interests of her minor son.

(1) [1904] 39 P. R, 1904=91 P. L. R. 1904.

She instituted suits and obtained decrees. Throughout she had been realizing rents and all this time she acted in good faith. She educated the plaintiff up to the F. A. standard and saw to all his interests and those of his sister. In my opinion the mere fact that there was a lien on land for the debt in question in the appeal before me cannot make any difference. The widow was entitled to collect that debt and the mortgagors were justified in paying the money to her in good faith in the ordinary course of business. There is no force in the appeal which I dismiss with costs.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 238

DALIP SINGH, J.

Kartar Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1206 of 1926, Decided on 24th January 1927, from the order of the 1st Cl. Mag., Amritsar, D/- 21st September 1926.

Criminal P. C., S. 350—Magistrate retrying whole case transferred to him—Using both his own record and that of his predecessor is illegal.

Although it is competent to a Magistrate on the transfer of a case to him, to rely on the evidence already recorded in that case prior to the transfer, still he cannot retry the whole case and then proceed to use both his own record and that of his predecessor. [P 238 C 2]

Dev Raj Sawhney—for the Crown.

Judgment.—These are three connected appeals. The appellants Kartar Singh alias Tara Singh aad Harnam Singh have been convicted under S. 392, Indian Penal Code, and sentenced to four years' rigorous imprisonment and Sohan Singh has been convicted under S.392/75, Indian Penal Code, and sentenced to seven years' rigorous imprisonment. The three appeals following these which are put up by the office as connected appeals are not connected with them at all and relate to different transactions and different accused.

The case has had a remarkable history. The accused were originally tried by Sardar Hardial Singh, Magistrate, First Class, who recorded almost all the prosecution evidence, and then finding that Sohan Singh had some previous convictions he referred the case to the District Magistrate for transfer to a S. 30 Magistrate. The District Magistrate referred the case to Malik Sahib Khan Nun for trial. The learned Magistrate proceeded to take the statements of the accused persons as to whether they wanted de novo proceedings. The accused all said that they did not want de novo proceedings. The Magistrate then, however, proceeded to re-call and re-examine the whole of the prosecution evidence. Evidently he exercised his opinion under S. 350 to re-commence the trial. Some of the prosecution evidence which had previously been taken by Sardar Hardial Singh was recorded again and then some of the prosecution evidence was found impossible to secure and the Magistrate proceeded to close the prosecution case. He then proceeded to use both his own record as well as Sardar Hardial Singh's record as evidence in the case.

Counsel for the Crown has referred me to S. 348 of the Criminal P. C. and to S. 350 (3). The combined effect of these sections might have entitled the Magistrate to rely on the evidence already recorded but he could not both proceed to re-commence the enquiry and then rely upon the previously recorded evidence. I should like to point out that the records both of Sardar Hardial Singh and of Malik Sahib Khan Nun are almost illegible and it is extremely difficult to make out all the evidence and a great deal of time has been wasted in trying to decipher their hieroglyphics. However, the evidence has been read. The Magistrate is totally wrong in saying that the knife and the small opium box identified by the complainant were recovered from the person of Harnam Singh. The evidence on the record shows that they were recovered from the person of Kartar Singh. There is absolutely no evidence against Harnam Singh on the record at all and I accept his appeal and acquit him.

Against Sohan Singh there is no evidence except that of the complainant who claims to have identified him both in Court in and an identification parade held by a Magistrate of the First Class Lala Amar Nath. The evidence of Rai Sahib Amar Nath was recorded by Sardar Hardial Singh and I do not think that it can be treated as evidence in the case. The

evidence against Kartar Singh consists of the identification by the complainant as before and of the recovery of certain property from his person. As it was illegal in my opinion, for the Magistrate to have used both the records I set aside the order passed by him and direct that Kartar Singh and Sohan Singh be retried. Their appeals are accepted accordingly to that extent.

J.V. *Appeal accepted in part.*

A. I. R. 1927 Lahore 239

TEK CHAND, J.

Firm Kura Ram-Neki Ram—Plaintiffs—Petitioners.

v.

Jaimal—Defendant—Respondent.

Civil Revision Petition No. 605 of 1926, Decided on 28th January 1927, from an order of the Jr. Sub. J., Hissar, D/- 1st December 1925.

Civil P. C., S. 115—Application for restoration rejected without going into record of case and without taking evidence—It is a material irregularity and rivision lies.

Where a Judge dismissed an application for restoration without hearing the plaintiff or taking any evidence and without carefully going into the matter as he was under an erroneous impression that the plaintiff could bring a fresh suit.

Held: that the Judge acted with material irregularity and a revision lay. [P. 239, C. 2]

Nanwa Mal—for Petitioner.

Judgment.—On the 13th of June 1925, the plaintiff firm Neki Ram-Kura Mal instituted a suit against Jaimal defendant-respondent for recovery of Rs. 800 alleged to be due on foot of a book account, for which a balance had been struck by the defendant in the plaintiff's bahi on the 10th of December 1921.

The first hearing of the case was fixed for the 8th of August 1925, on which date neither party was present. The suit was accordingly dismissed under O. 9, R. 3. On the 13th of August 1925, the plaintiff filed an application under O. 9, R. 4, stating that he was ill on the 8th of August 1925, and could not be personally present in Court. He further stated that he had appointed one Mat Ram as a special agent, who held a power-of-attorney from him and was present in Court, but as the power-of-attorney was not properly attested, his presence was not recognized and the suit was dismissed under O. 9, R. 3. He prayed that as his absence was unavoidable and unintentional and as a fresh suit for the amount would be time barred, the suit be restored and tried on the merits. This application was heard by the Sub-Judge on the 1st of December 1925, on which date without recording the statement of the plaintiff or taking any evidence, he rejected it with the following order :

> The applicant is present. There is no ground for the restoration of the case. Application is rejected. The applicant can bring a fresh suit, if he so likes.

On the 8th of December 1925, the plaintiff filed an application for review of the order rejecting the application for restoration dated the 1st of December 1925, and in this application he stated that the Court had dismissed his application for restoration on the 1st of December 1925 even though the record had not been received on that date and that it did not record the evidence, which the petitioner had brought on certain hearings in support of his application. He further pointed out that the claim had become time-barred and the Court was under a wrong impression, when on the 1st of December 1925, it remarked that the applicant could bring a fresh suit. This application for review was also rejected by the Sub-Judge on the 9th of June 1926. The plaintiff has come up to this Court on the revision side and has attacked the orders of the Sub-Judge refusing to restore the case.

I have examined the record and heard counsel and I am of opinion that the learned Sub-Judge has acted with material irregularity in not deciding on the merits the application on the 13th of August 1925, filed by the petitioner for restoration of the case. It seems to me that the petitioner did not have a proper hearing of this application. It appears that the Judge had neither the record of the case before him nor did he look carefully into the matter, as he was under the erroneous impression that the plaintiff could bring a fresh suit. But it is obvious that a suit brought in December 1925, on foot of a balance struck in December 1921 would be time barred

under the Repealing (Punjab Loans Limitation) Amendment Act of 1925.

I, therefore, accept the revision and setting aside the order of the Sub-Judge dated the 1st of December 1925, send back the case to him with a direction that the application dated the 13th of August 1925 made by the plaintiff under O. 9, R. 4 for restoration of his suit be tried on the merits and disposed of according to law. There will be no order as to costs in this Court.

J.V. *Case sent back.*

A. I. R. 1927 Lahore 240

DALIP SINGH, J.

Muhammad Hussain—Defendant—Petitioner.

v.

Municipal Committee, Gujranwala—Plaintiff—Respondent.

Civil Revision Petition No. 717 of 1926, Decided on 21st January 1927, from the decree of the Sub-J., Gujranwala, D/- 13th July 1926.

Contract Act, Ss. 13 *and* 10—*Parties under a mistake as to period for which agreement is entered into—Such agreement is not contract.*

Where a defendant entered into an agreement as for the 'ensuing year,' but the defendant took it as referring to the current financial year, which was to expire in about four months from the beginning of the agreement.

Held : that the words "ensuing year" must refer to a period of one full year and cannot refer to the financial year the period till the expiry of which was less than a year.

Held : further that there was no contract at all between the defendant and the plaintiff. [P. 240, C. 2]

Malik Ram Lal—for Petitioner.
Gobind Ram Khanna—for Respondent.

Judgment.—This is a Small Cause Court Revision in a suit by the Municipal Committee of Gujranwala for Rs. 100 being the balance of price of silt sold to defendant. The facts are that :

The defendant put in an application on 17th November 1925, as follows: I beg to offer Rs. 150 for the gab (silt) for the ensuing year. The Municipality passed a resolution saying that the silt might be given up to 31st March 1926, to Muhammad Hussain, the defendant, for Rs. 150 provided he arranged to remove it immediately. This resolution was never sent to the defendant, but a letter was sent by the Secretary in which it was stated that his offer was accepted with reference to the resolution mentioned above. This letter is dated the 16th December 1925. The defendant immediately began removing the silt on the 16th December 1925. After the 31st March 1926, he was not allowed to remove the silt, which was sold by auction. The learned Judge of the Small Cause Court has decreed the Municipality's suit holding that as the letter mentioned the resolution, the defendant could have obtained a copy or otherwise cleared up this matter. He held that the word 'ensuing' was not used in its proper significance, nor did the defendant intend to remove the silt from 1st April 1926, the ensuing financial year. He, therefore, decided the issue against the defendant. I am unable to follow the reasoning of the learned Judge. The words 'ensuing year' must refer to a period of one year. When that year was to begin is a matter to be determined with reference to the circumstances. The defendant claimed that it began from the date of the letter of acceptance, and prima facie this view seems to be correct. Be that as it may, it is certainly not possible to hold that 'ensuing year' meant from 16th December 1925 to the 31st March 1926, because that period is not equal to a year, and there is nothing to show that by the words 'ensuing year' the defendant meant up to the close of the current financial year. This being so, either there was no contract at all between the Municipality and the defendant or the Municipal Committee are bound by the letter of their accredited agent, the Secretary. In either case the suit fails and is dismissed with costs throughout.

J.V. *Application accepted.*

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* A. I. R. 1927 Lahore 241

FFORDE AND CAMPBELL, JJ.

Labh Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Mango and *another*—Defendants—Respondents.

First Appeal No. 738 of 1922, Decided on 4th January 1927, from the decree of the Sr. Sub-J., Lyallpur, D/- 26th January 1922.

(a) *Custom—Punjab — Handal Jats of Amritsar District—Daughters are excluded by agnate in the matter of succession to acquired or ancestral property.*

There is a special custom in the Amritsar District governing the tribe of Handal Jats, whereby agnates have the right to succeed to property, whether ancestral or acquired moveable or immovable, to the exclusion of the daughters of the deceased owner. [P. 241, C. 1 ; P. 245, C. 1]

* (b) *Riwaj-i-am—Entry as to custom is prima facie evidence unless rebutted.*

An entry in a Riwaj-i-am recording a special custom is prima facie proof of that custom and the onus is shifted to the other side to rebut it : 44 *Cal.* 749 (*P. C.*), *Foll.*; 84 *P. R.* 1917 ; 13 *P. R.* 1919 ; *A. I. R.* 1922 *Lah.* 320 ; *A. I. R.* 1923 *Lah.* 401 and *A. I. R.* 1925 *Lah.* 35, *Diss. from.* [P. 244, C. 1]

(c) *Riwaj-i-am—Riwaj-i-am of* 1865 *of Amritsar District is reliable and accurate.*

The riwaj-i-am of 1865 of the Amritsar District is an accurate and reliable record of custom stated therein. [P. 245, C. 1]

Dev Raj Sawhney—for Appellants.

Hargopal for *Kharak Singh*—for Respondents.

Fforde, J.—This appeal arises out of a suit brought by the collaterals of Gurpal Singh for a declaration that an alienation of certain self-acquired property of the latter made by his widow Mt. Santi in favour of her daughter Mt. Mango does not affect their reversionary interests in that property.

It is admitted that under the general custom governing agricultural tribes in the Punjab a daughter is entitled to succeed to the acquired property of her father to the exclusion of his agnatic relations, but the plaintiffs contend that there is a special custom in the Amritsar District governing the tribe of Handal Jats, to which the parties belong, whereby agnates have the right to succeed to property, whether ancestral or acquired to the exclusion of the daughters of the deceased owner.

The only question for determination in this appeal is whether or not such a special custom has been established. If it has been proved to have been established the plaintiffs must succeed ; if not, their suit fails. The learned trial Judge has held that the plaintiffs have not succeeded in establishing the custom upon which they rely and has dismissed their suit with costs. Seventeen witnesses for the plaintiffs have given general evidence to the effect that amongst Handal Jats daughters never succeeded to self-acquired property as against collaterals, but only four of these witnesses have given instances in support of their views. These instances have been discussed and criticized by the learned Senior Subordinate Judge who has refused to attach any value to them on the ground that they have not been supported by any documentary evidence. The remaining witnesses who have given their views as to the custom prevailing amongst this tribe but have not supported their opinions by proof of any actual cases, have been disregarded by the learned trial Judge without discussion. The only evidence given for the other side is that of Mt. Santi, one of the defendants who was put into the witness box by the plaintiffs. She has referred to two somewhat vague instances of succession by daughters one of which she says took place a hundred years ago and the other she does not even approximately date. Both these instances she admits are based on hearsay and she has not attempted to produce any of the persons who are alleged to have supplied her with information. At the conclusion of her examination-in-chief she stated that she knew of no instances of daughters succeeding in Amritsar.

If there had been no further evidence produced by either side I think it is clear that the plaintiffs must fail, but there is one important piece of documentary evidence upon which the plaintiff's case is mainly based, and that is the Riwaj-i-am of the Amritsar District of 1865 and the revised edition of that record drawn up by Mr. Craik in 1914. In Mr. Craik's volume under the answer to question 60 appears the following remarks :

According to the Riwaj-i-am of 1865 sons exclude daughters. But nothing is said as to agnates. Nearly all tribes state that daughters

are excluded by male lineal descendants through males and by the widow or widows of the deceased. Similarly nearly all of them say that agnates, however remote, exclude daughters ;

and then four exceptions are given to this rule, the exceptions referring to :

(1) Pathans of Tarn Tarn Taran and Muhammadan Kambohs of Amritsar Tahsil.
(2) Mughals of Amritsar Tahsil.
(3) Pathans of Kakkar and Talla in Ajnala Tahsil.
(4) Khatris and Brahmins of Ajnala Tahsil.

Under question 61, which asks whether there is any distinction as to the rights of daughters to inherit: (1) the immovable or ancestral property; and (2) the moveable or acquired property of their father: the answer is that all tribes state that no distinction is made and the answers to question 60 are applicable. The author then adds :

But in reality daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted for the reasons given under answer 60.

This qualification by the author of the 1914 edition is not, however, supported by anything contained in the original vernacular record. The author of the English edition of 1914 has remarked in his preface that

the present English volume is a condensed abstract of the present Riwaj-i-am . . . . . For relevant mutation cases and judicial decisions the vernacular copy must be consulted.

On consulting this vernacular copy we find that question No. 61 is as stated by Mr. Craik in his English version, but the answer is as follows :

Answer by all the tribes. In either case daughters get no share. There is no distinction as regards moveable or immovable property. The answer conforms to that of question No. 60

There are no instances either under question 60 or question 61 of collaterals succeeding to the exclusion of daughters or daughters succeeding to the exclusion of collaterals, but 15 instances are given of proprietors leaving only daughters and the daughters holding the land until marriage, and in regard to a number of tribes of this District daughters are not entitled to hold the land even to this extent.

It seems to me that on a careful consideration of the Riwaj-i-am of 1865, read in the light of the original revised edition of 1914 a special custom prohibiting daughters succeeding to the inheritance of their father, whether that inheritance consisted of moveable or immovable property or property acquired or ancestral, has been definitely and emphatically recorded.

Mr. Hargopal for the defendants-respondents however contends that a Riwaj-i-am unsupported by instances is not a sufficiently strong piece of evidence in support of custom to shift the onus of rebuttal to the other side. He says that this is more especially so when the special custom recorded is opposed to the general custom of agricultural tribes in this province. In support of this proposition he has cited a number of decisions of this Court which I shall presently discuss. These authorities undoubtedly support his view, but it appears to me that the matter is concluded by the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) in which this very point was the subject of an express decision. The Chief Court of the Punjab from whose judgment the appeal to the Privy Council had been brought, had held that an entry in a Riwaj-i-am recording a special custom but without giving instances in support of it was insufficient as evidence to cast the onus of rebuttal upon the side contesting such custom. Reid, J., who delivered the judgment of the Court, referring to certain decisions of the Chief Court observed:

Four Judges of this Court held that an entry in the Riwaj-i-am, unsupported by instances, does not justify modification of the ordinary custom and again, answers must be supported by instances to be of any value.

In dealing with this matter their Lordships expressed the opinion that the Chief Court was

in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged ;

and their Lordships concluded by saying that in their opinion

the statements contained in the Riwaj-i-am form a strong piece of evidence in support of the custom which it lay upon the plaintiffs to rebut.

Mr. Hargopal's argument that that case is distinguishable from the present one inasmuch as the special custom recorded by the Riwaj-i-am in that case was not opposed to general custom whereas in the present case it is, does not seem to me to be of any substance. In point of fact their Lordships of the Privy Council, in the case referred to assumed that there was a general custom

(1) [1917] 44 Cal. 749=38 I. C. 354=44 I. A. 89 (P. C.).

among the agricultural tribes of the Punjab which was opposed to the special custom recorded in the Riwaj-i-am, but it was in accordance with an express exception to the general rule. I do not, however, see that it makes any difference to the principle laid down by their Lordships as to the value to be attached to an entry contained in a public record of this nature, that the recorded entry is opposed to general custom. The very term "special custom" implies a departure from the ordinary custom of the Province. Mr. Hargopal's reasoning therefore comes back to this that wherever you have an entry in a Riwaj-i-am recording a special custom that entry must always be valueless as a piece of evidence, and it is only where it records a general custom of agricultural tribes that it can be of any value unless it happens to be supported by instances.

The first case which Mr. Hargopal relies upon in support of his proposition is *Wazira* v. *Mt. Maryan* (2) the headnote to which declares that

statements in a Riwaj-i-am, when opposed to general custom, can carry very little weight unless supported by instances and that consequently the entries in the Riwaj-i-am of Gujranwala District in favour of the special custom relied on by the plaintiffs-collaterals unsupported by instances were insufficient to establish that custom, such Riwaj-i-am having moreover been imperfectly compiled.

The key-note to that decision, however, is contained in the last sentence of the paragraph referred to which is based upon the penultimate paragraph of the judgment of Leslie-Jones, J., where, after discussing the judgment of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) the learned Judge concludes by saying :

But the matter is different when without citing any instances, a Riwaj-i-am which has been imperfectly compiled describes a special custom opposed to the general custom of the Province and the great mass of authorities.

The learned Judge discussed at length the reasons why the entries in the Riwaj-i-am in that particular case should not be accepted. He came to a conclusion on the face of the document itself that it was not a reliable record and that fact read with the rest of the evidence in the case led him to hold that the Riwaj-i-am as a piece of documentary evidence was in itself of insufficient evidential value to establish the custom in question. The principle upon which an entry in a Riwaj-i-am is admitted as a piece of evidence conclusive of the facts stated unless rebutted, is that it is an official record kept by a person upon whom there is a public duty to make entries in it only after satisfying himself of the truth of those entries, and accordingly the document itself is evidence of the truth of its contents unless and until its falsity can be demonstrated by any of the various methods by which any public book, register, or document may be attacked. The principle upon which their Lordships of the Privy Council relied upon the entry in the Riwaj-i-am in the case already referred to, is based upon well-established rules of the law of evidence in England which have been given statutory expression in S. 35 of the Indian Evidence Act,

The second series of cases in which this Court has departed from the principle laid down by the Privy Council in *Beg* v. *Allah Ditta* (1) is *Khuda Bakhsh* v. *Mt. Fateh Khatun* (3), where relying uoon the observations of Leslie Jones, J. in *Wazira* v. *Mt. Maryan* (2), it was held that the Riwaj-i-am of the Multan District "being a peculiar one and quite opposed to Customary Law" was not sufficient to shift the onus of rebuttal on to the other side. In *Manohar* v. *Mt. Nanhi* (4) the Court went a little further, in holding that

the mere entries in the Riwaj-i-am, unsupported by instances, that daughters can under no circumstances inherit their father's property is of very little weight, and it is quite insufficient to shift the onus on the daughters.

In *Budha* v. *Mt. Fatima Bibi* (5) a Division Bench of this Court laid down the definite proposition that

it is now a well established rule that a statement in a Riwaj-i-am opposed to general custom and unsupported by instances possesses very little evidential value.

And finally in *Gurdit Singh* v. *Mt. Malan* (6) the Court held that a Riwaj-i-am opposed to the general custom and unsupported by instances was not sufficient to shift the onus to the party attacking the custom recorded in that document which is a return to the proposition of Reid, J., quoted above, of

(2) [1917] 84 P. R. 1917=151 P. W. R. 1917=42 I. C. 358=3 P. L. R. 1918.

(3) [1919] 13 P. R. 1919=46 I. C. 679=140 P. W. R. 1918.

(4) A. I. R. 1922 Lah. 320=2 Lah. 366.

(5) A. I. R. 1923 Lah. 401=4 Lah. 99.

(6) A. I. R. 1925 Lah. 35=5 Lah. 331

which their Lordships of the Privy Council disapproved.

It seems to me that in these five decisions of this Court the Judges have by progressive stages returned to a proposition of law which has been exprssly dissented from by the Privy Council. It may be observed that in the last four out of these five cases, Scott-Smith, J., was a member of the Division Bench which decided this point, and in three out of the four cases it was he who wrote the considered judgment of the Court. I find myself unable to accept the view of this matter expressed by the learned Judges in the above-mentioned cases for the simple reason that a contrary view has been laid down in the clearest possible terms by an authority from which these Courts are not permitted to dissent. I must, thorefore, hold that an entry in a Riwaj-i-am recording a special custom is prima facie proof of that custom and the onus is shifted to the other side to rebut it.

Mr. Hargopal finally contends that the Raiwaj-i-am relied upon by the plaintiffs in the present case is not an accurate or reliable record of the custom in question. He says that this document has been condemned as unsatisfactory by a recent decision of this Court in *Gurdit Singh* v. *Mt. Ishar Kaur* (7) where the following observations appear:

Dr. Narang contended that an entry in the Riwaj-i-am was prima facie evidence of a custom and referred to *Beg* v. *Allah Ditta* (1). The value of the Riwaj-i-am of 1865 as a piece of evidence however is considerably minimized by the fact that in *Dial Singh* v. *Dewa Singh* (8) in referring to this very Riwaj-i-am it was said that it did not lay down what the custom was, but what the compilers thought it ought to be. Again, we find that in the Settlement of 1914 when a new Rawaj-i-am was compiled it is stated that a gift to a daughter can be made of ancestral or self-acquired property to a certain extent, vide answer to question 117.

It appears that the view of the learned Judges as to the unsatisfactory nature of the document in question was based upon a case reported in *Dial Singh* v. *Dewa Singh* (8). The attention of the learned Judges does not appear to have been directed to a series of subsequent authorities in which this Riwaj-i-am was cited with approval and relied upon. These cases are *Jiwan* v. *Hakam Khan* (9), *Khan* v. *Hira* (10), *Sardar Wasawa Singh* v. *Sardar Arur Singh* (11), *Sohna* v. *Sundar Singh* (12) and *Buta Singh* v. *Ram Singh* (13).

Finally in two recent cases in both of which the judgment of the Court was delivered by Scott-Smith, J., this Riwaj-i-am has been carefully considered and accepted as evidence of the very custom relied upon by the plaintiffs in the present case. One of these cases, *Naraini* v. *Jowahir Singh* (14) deals with Kambohs of the Amritsar District and the head-note to it is as follows :

Among Kambohs of the Amritsar District a daughter is not entitled to succeed to the non-ancestral property of her father in preference to his collaterals in the 4th degree.

The Riwaj-i-am is a public record prepared by a public officer in the discharge of his duties and is admissible in evidence to prove the facts therein entered. A statement in a Riwaj-i-am with regard to a custom is a strong piece of evidence in support of the custom.

In reference to the 1914 edition of this Riwaj-i-am the following remarks appear in the judgment :

We are not prepared to hold that the entries relied upon by the respondents in Mr. Craik's Riwaj-i-am of the Amritsar District can carry very little weight. There is no suggestion that that Riwaj-i-am was carelessly or imperfectly compiled and Mr. Craik's own note shows that the exclusion of a daughter is very strict in the Amritsar District.

The other case, viz. *Nadhan Singh* v. *Mt. Rajo* (15), a decision of the same Division Bench, deals with the very tribe we are concerned with here. The head-note reads :

By the custom prevailing among Sandhu Jats of the Amritsar District, daughters are ousted by collaterals of the last male owner in the matter of succession to the self-acquired property.

In the course of the judgment, after referring to the case of *Mt. Naraini* v. *Jowahir Singh* (14), the judgment proceeds :

In that case no doubt there was some slight evidence in addition in favour of the view that collaterals were preferred to a daughter even in the case of non-ancestral property. n the present case there is no instance produced by either party. We have found that in the case of the parties in the other case, who were Kambohs, the entry in the Riwaj-i-am should be relied upon and we see no reason to come to a different decision in the case of Sandhu Jats.

The finding in this case in favour of the special custom was based almost

(7) A. I. R. 1922 Lah. 392=3 Lah. 257.
(8) [1885] 5 P. R. 1885.
(9) [1894] 140 P. R. 1894.
(10) [1895] 98 P. R. 1895.
(11) [1900] 33 P. R. 1900.
(12) [1907] 85 P. R. 1907.
(13) [1907] 86 P. R. 1907.
(14) A. I. R. 1926 Lah. 142.
(15) A. I. R. 1926 Lah. 556.

entirely upon the entry in the Riwaj-i-am and the other side having failed to discharge the onus of rebutting that entry it was held to be conclusive.

In the case now before us no attempt has been made to show otherwise than by a reference to the reported decision I have mentioned, that either the Riwaj-i-am of 1865 or the new edition of 1914 is in any way imperfectly compiled or inaccurate. I am, therefore, of opinion that on the strength of the unrebutted evidence furnished by these public records the special custom relied upon by the plaintiffs has been established. I would acoordingly accept the appeal, set aside the decree of the learned trial Judge and enter judgment for the plaintiffs with costs.

Campbell, J.—The parties to this suit are Handal Jats of the Amritsar District settled in the Lyallpur District. The plaintiffs sued for a declaration that a gift by the widow of their collateral Gurpal Singh to Gurpal Singh's daughter should not affect their reversionary rights. The property gifted was a square, self-acquired by Gurpal Singh. The daughter pleaded that she was the next heir, and whether she was so or not became the main point in issue. The trial Court dismissed the suit, holding that the general rule of custom was against the plaintiffs and that they had failed to prove a special custom by which collaterals were preferred to daughters in succession to non-ancestral property. The plaintiffs have appealed.

The plaintiffs produced 17 witnesses, all Handal Jats of the Amritsar District, who declared that daughters had no right of succession to non-ancestral property, but none of the instances quoted by them was substantiated by documentary evidence although the trial Judge directed that this should be done and gave an opportunity for the production of the necessary documents. The witnesses were nearly all elderly men, and seven of them were lambardars. The plaintiffs also put the defendant donor into the box. She said that she knew of no instance of succession by daughters in the Amritsar District, and she mentioned two of which she had heard, one occurring 100 years ago.

The plaintiffs also produced extracts from the Riwaj-i-ams of 1865 and 1914 and referred to page 28 of Craik's Customary Law of the Amritsar District, where the rule of the 1914 Riwaj-i-am applicable to the matter in issue is described, not altogether accurately as will appear presently. The defendants produced no rebuttal evidence of any kind.

The learned Subordinate Judge held the oral evidence and the Riwaj-i-am entries to be of no avail to the plaintiffs in the absence of authenticated instances, relying upon what he conceived to be the rule laid down in *Wazira* v. *Mt. Maryan* (2) that statements in a Riwaj-i-am when not based on general custom can carry little weight unless supported by instances. He decided that the general rule stated in paragraph 23 of Rattigan's Digest of Customary Law must be followed that daughters have a right to succeed in preference to collaterals to their father's self-acquired property.

The plaintiffs in appeal rely partly upon the finding by their Lordships of the Privy Council in *I. L. R.* 6 *Lah.* 502 that evidence by a large body of witnesses in a position to know the rule of custom is entitled to weight even though no specific instances are quoted, but mainly upon their Lordships previous and well-known decision in *Beg* v. *Allah Ditta* (1) regarding the value to be attached to entries in the Riwaj-i-am unsupported by instances. The plaintiffs' learned counsel claims that on these authorities, in the total absence of any rebuttal by the defendants, the suit should have been decreed.

The defendants reply that a series of decisions by this Court and by the Chief Court subsequent to *Beg* v. *Allah Ditta* (1) plainly lay down the rule stated by the trial Judge that Riwaj-i-am entries without instances are of small evidentiary value. The cases cited in addition to *Wazira* v. *Mt. Maryan* (2) are *Khuda Bakhsh* v. *Mt. Fateh Khatun* (3), *Manohar* v. *Mt. Nanhi* (4), *Budha* v. *Mt. Fatima Bibi* (5) and *Gurdit Singh* v. *Mt. Malan* (6). I propose to examine these cases first setting forth what their Lordships of the Judicial Committee held in *Beg* v. *Allah Ditta* (1).

In *Beg* v. *Allah Ditta* (1) there was a contest for the inheritance to one Shahamad between (a) certain collaterals of Shahamad and (b) a son of his daughter by a husband who was proved to have the status of Khanadamad or resident

son-in-law. The Riwaj-i-am supported this son's claim but it was put aside by the Chief Court on the ground that the particular entry relevant was not supported by instances. Their Lordships of the Privy Council in reversing the Chief Court's decision laid it down that the Riwaj-i-am was a public document admissible in evidence to prove the facts entered in it subject to rebuttal, and that the statements recorded in it formed a strong piece of evidence which it lay upon the plaintiffs the collaterals to rebut.

Wazira v. *Mt. Maryan* (2) was a judgment by a Division Bench of the Chief Court disposing of a claim by collaterals in the 4th degree (Virk Jats of Gujranwala District) to succeed to non-ancestral land in preference to the daughter of the deceased proprietor. The plaintiffs relied upon entries in the Riwaj-i-am. The learned Judges examined the Riwaj-i-am of the Gujranwala District with great care citing several portions of it and came to the conclusion that the same value does not attach to every Riwaj-i-am, even though all such documents are public records prepared by a public officer in discharge of his duties and under Government rules. They then referred to *Beg* v. *Allah Ditta* (1) in the following words:

> That judgment must be read as a whole. The Privy Council were dealing with a case in which the Riwaj-i-am even though it cited no instances, was nevertheless in full accord with a well-known custom, which is nevertheless well established because it forms an exception to the general rule that male collaterals exclude daughters. In such a case it was doubtless for those who controverted the Riwaj-i-am and the weight of authority to rebut the case arrayed against them. But the matter is different when, without citing any instance, a Riwaj-i-am which has been imperfectly compiled describes a special custom opposed to the general custom of the Province and the great mass of authorities.

On this finding they refused to hold that the plaintiffs merely by producing the Riwaj-i-am on which they relied had succeeded in proving a custom by which they were preferential heirs to the daughter.

Khuda Bakhsh v. *Mt. Fateh Khatun* (3) is also a decision by a Division Bench of the Chief Court. The plaintiffs, Muhammadan Jats of the Multan District, sought to succeed as collaterals in preference to a sister of the last male holder, and relied upon an entry in the Riwaj-i-am unsupported by instances. The judgment, delivered by Scott-Smith, J., quoted in full the passage cited above from *Wazira* v. *Mt. Maryan* (2) and then held that for the reasons stated in that decision the ruling of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) did not apply to such cases as the one before them. That is to say the Judges found (if words have any meaning) that the Riwaj-i-am before them had been "imperfectly compiled" although there is no express mention of its defects elsewhere in the judgment.

In *Manohar* v. *Mt. Nanhi* (4) the judgment, also delivered by Scott-Smith, J., went a step further, and declared, without any finding as to the manner in which the Riwaj-i-am had been prepared, that a mere entry in it unsupported by instances that daughters can under no circumstances inherit their fathers' property was of very little weight and was quite insufficient to shift the onus on to the daughters, because, in the opinion of the learned Judges that entry was contrary to all the principles of Customary Law. *Beg* v. *Allah Ditta* (1) was referred to in unusual terms [also employed by the same learned Judge in *Khuda Bakhsh* v. *Mt. Fateh Khatun* (3)] as having been considered in a subsequent decision of the Chief Court: *Wazira* v. *Mt. Maryan* (2), *Khuda Bakhsh* v. *Mt. Fateh Khatun* (3) was also cited, and its decision and that in *Wazira* v. *Mt. Maryan* (2) were apparently taken to be authorities for the proposition laid down, which with all deference I suggest is the precise negative of what their Lordships of the Privy Council stated to be the law in *Beg* v. *Allah Ditta* (1).

The fourth case is *Budha* v. *Mt. Fatima Bibi* (5)(Scott-Smith and Zafar Ali, JJ.)The question for determination was whether among agricultural tribes of the Sialkot District collaterals exclude daughters from succession to self-acquired property. Counsel for the appellants argued that in the presence of the Riwaj-i-am which afforded presumptive evidence of the existence of the special custom it lay on the defendants to rebut the same. This argument was disposed of in the judgment as follows:

> No. 2 does not carry any weight in the face of the authorities cited above and relied upon by the learned District Judge. It is now a well-established rule that a statement in a Riwaj-i-am opposed to general custom and un-

supported by instances possesses very little evidential value.

The authorities in question were *Chuttan* v. *Hazari Lal* (16), *Wazira* v. *Mt. Maryan* (2) and *Khuda Bakhsh* v. *Mt. Fateh Khatun* (3). The first named was a decision anterior to that of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1). The other two, as shown above, do not lay down any such general rule (which with due respect I do not regard as well established), but relate only to Riwaj-i-ams which are found to be imperfectly compiled.

The last case is *Gurdit Singh* v. *Mt. Malan* (6) where, I venture to think, Scott-Smith, J., who delivered the judgment once more failed to give due recognition as a binding authority to *Beg* v. *Allah Ditta* (1). His words are :

Mr. Morton, however, contends that the entry in the Riwaj-i-am is a strong piece of evidence in support of the custom put forward by the plaintiffs having regard to the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1). This decision was considered by a Division Bench of this Court in *Wazira* v. *Mt. Maryan* (2) and others, in which it was held that statements in the Riwaj-i-am when opposed to general custom can carry very little weight unles supported by instances.

It does not appear, however, that the decision of the case proceeded entirely upon this observation, for the fact was also taken into consideration that the Riwaj-i-am itself recorded in an appendix numerous exceptions to what was stated in the body of the work to be a general rule.

If *Manohar* v. *Mt. Nanhi* (4) and *Budha* v. *Mt. Fatima Bibi* (5) were correctly decided, the argument of the defendants' learned counsel would prevail, but with all respect I consider that they cannot be followed so long as *Beg* v. *Allah Ditta* (1) stands as the Judicial Committee's exposition of the law. If there was no intention in *Khuda Bakhsh* v. *Fateh Khatun* (3) to hold that the Riwaj-i-am was, as a whole a defective public record, I would say the same about that decision.

The rule is put in *Beg* v. *Allah Ditta* perfectly plainly. Statements in a Riwaj-i-am which is a public record prepared by a public officer in discharge of his duties and under Government rules, are a strong piece of evidence that their contents are true, and that strong evidence must be believed unless rebutted by the party against whom it tells. Of the numerous methods of rebuttal one is that which succeeded in *Wazira* v. *Mt. Maryan* (2), namely, to convince the Court from an examination of other portions of the Riwaj-i-am that it had not been compiled in a properly careful manner, or that for other reasons it is not a reliable record. But the fact that a statement of custom in a Riwaj-i-am is not supported by instances does not in itself provide the necessary rebuttal, and, if on an issue regarding the existence of an exception to general rule of custom the sole evidence offered is a Riwaj-i-am entry without instances, the issue must be decided in accordance with that entry. (Then while examining the entries in the Riwaj-i-am his Lordship continued). An attempt has been made to impugn the reliability of this Riwaj-i-am by referring us to *Gurdit Singh* v. *Mt. Ishar Kaur* (7) where the following passage occurs :

There remains the question of custom. On this point Art. 23 of Rattigan's Digest lays down that, according to the general custom of the Province, a daughter excludes collaterals in succession to self-acquired property. It would, therefore, be incumbent on the collaterals to prove a custom opposed to this general custom. In order to do this they have referred to the Riwaj-i-am of the Settlement of 1865 in which it was stated that a proprietor could not make a gift of even his self-acquired property to his daughter. Our attention was also drawn to the evidence of a certain number of witnesses who have stated that in this village daughters do not succeed to self-acquired property, Dr. Narang contended that an entry in the Riwaj-i-am was prima facie evidence of a custom and referred to *Beg* v. *Allah Ditta* (1). The value of the Riwaj-i-am of 1865 as a piece of evidence, however, is considerably minimized by the fact that in *Dial Singh* v. *Dewa Singh* (8), in referring to this very Riwaj-i-am it was said that it did not lay down what the custom was, but what the compilers thought it ought to be. Again, we find that in the Settlement of 1914 when a new Riwaj-i-am was compiled, it is stated that a gift to a daughter can be made of ancestral or self-acquired property to a certain extent, vide answer to question 117. In these circumstances, we are of opinion that the collaterals have failed to prove a custom by which they exclude daughters from succeeding to the self-acquired property of a sonless proprietor.

Here it does not appear that the attention of the learned Judges was drawn to the above-quoted passages in the 1914 Riwaj-i-am which repeat what was stated in 1865. Furthermore it was not brought to their notice that the derogatory remarks in *Dial Singh* v.

(16) [1916] 7 P. R. (1916)=46 P. L. R. 1916=30 I. C. 22=129 P. W. R. 1915.

Dewa Singh (8), which were made about a statement of custom regarding adoption in the 1865 Riwaj-i-am were subsequently dissented from in several later rulings, e. g., *Ralla* v. *Budha* (17) *Rammal* v. *Miran* (18), and *Sardar Wasawa Singh* v. *Sardar Arur Singh* (11), and that there are numerous other later decisions which speak of the Amritsar 1865 Riwaj-i-am as a particularly reliable record.

In *Mt. Naraini* v. *Jowahir Singh* (14) it was held that among Amritsar Kambohs a daughter was excluded from self-acquired property by collaterals, and the decision was based very largely upon the answers to questions 60 and 61 in the 1914 Riwaj-i-am which was held to have been carefully compiled. In *Nadhan Singh* v. *Mt. Rajo* (15) the same decision was come to in regard to Sandhu Jats of the Amritsar District and was based entirely upon those answers there being no instance either way proved by either party. In both these cases one of the Judges on the Bench was Mr. Justice Scott-Smith, whose connexion with the earlier rulings has been emphasized above. Whatever may have been his views about the Riwaj-i-ams of other districts with which those rulings dealt it is clear from these two later cases that he was satisfied with the authoritativeness of the Amritsar Riwaj-i-am when it stated, without quoting instances, an exception to the general rule regarding the rights of daughters to succeed to self-acquired property.

I would accept this appeal holding that the defendants who produced no evidence, have failed to rebut the evidence supplied by the answer to question 61 of the 1914 Riwaj-i-am that among Jats of the Amritsar District collaterals succeed to the self-acquired estate of a deceased proprietor in preference to his daughter, and I would decree the plaintiffs' suit with costs throughout.

G.B. *Appeal accepted.*

(17) [1893] 50 P. R. 1893.
(18) [1896] 30 P. R. 1896.

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ZAFAR ALI AND JAI LAL, JJ.

In the matter of the Assessment of Ganesh Das of Amritsar.

Reference No. 24 of 1926, Decided on 3rd February 1927, made by the Comr., Income-Tax, Lahore, on 4th June 1926.

(a) *Income Tax Act* (9 *of* 1922), *Ss.* 33 *and* 35—*S.* 35 *prescribes limitation for review of* (*assessment*) *proceedings under S.* 33.

Income Tax Commissioner's powers of review under S. 33, in respect of an assessment proceeding are subject to the limitation imposed by S. 35. [P 248 C 2]

(b) *Income Tax Act* (9 *of* 1922), *S.* 34—*Income escaping assessment is not chargeable after limitation — Income assessed in the hands of wrong assessee — Income escapes assessment within the meaning of S.* 34.

Whatever may be the reason for which the Income Tax Officer fails to assess any income within the period prescribed by law, he is not competent to assess it after the period of limitation prescribed therefor has expired. [P 249 C 1]

The income assessed in the hands of an assessee to whom it is subsequently found not to belong, is an income which has escaped assessment within the meaning of S. 34. [P 249 C 1]

Fakir Chand for *Badri Das* — for Petitioner.

Jagan Nath Aggarwal—for Respondent.

Order.—This is a Reference under S. 66 (1) of the Income Tax Act. The learned Income Tax Commissioner has propounded the following questions of law:—

(1) Does the Indian Income Tax Act (11 of 1922) impose any period of limitation within which the Commissioner's powers of review under S. 33, in respect of an assessment proceeding must be exercised ?

(2) If so, is the Commissioner debarred from reviewing the present case ?

We have recently held in Reference No. 20 of 1926 that the Income Tax Commissioner's power under S. 33 are subject to the limitation imposed by S. 35, and the learned Commissioner has come to the same conclusion with regard to his question No. 1. In respect of question No. 2 he argues thus :

The second question on the other hand, I would answer in the negative as S. 34 applies only to income, profits or gains that, 'have escaped assessment' and in this case the income to be assessed did not escape assessment in the

year in question. All that has occurre is that it has been assessed in the hands of an assessee to whom it was subsequently found not to belong. It can hardly, I think, have been intended that income would escape assessment simply because an error of this kind was not established till after the period of limitation specified in S. 34 had expired.

This argument does not appear to us to be sound. Whatever may be the reason for which the Income Tax Officer should fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. So in the present case no action could be taken in 1926 either under Ss. 33 or 34 in respect of an income derived during the accounting period of 1921-22. After all, the Income Tax Department itself is responsible for this result. The income escaped assessment so far as the person who received it was concerned,

We, therefore, answer the second question in the negative.

J.V. *Reference Answered.*

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DALIP SINGH, J.

Dayal Chand and *others* — Defendants —Appellants.

v.

Ram Chand and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1538 of 1926, Decided on 1st February 1927, from the decree of the Addl. Dist. J., Lahore, D/- 17th March 1926.

Partnership—New partnership based on old one—Rendition of accounts of new one by going into the account of old one is permissible.

Where a new partnership based on the old partnership is revived or reconstituted by the consent of all the partners and their legal representatives, for the purpose of accounts, it is permissible to go into the accounts of the old partnership on the basis of which the new one is constituted : 25 *Mad.* 26, *Foll.* [P. 251, C. 2]

Badri Das and *Har Charan Das Kumar*—for Appellants.

Jagan Nath Aggarwal — for Respondents.

Dalip Singh, J.—The facts of the case are as follows : By a registered partnership deed, dated 9th May 1908, certain persons entered into a partnership to carry on a cotton factory. The names of the partners and their shares were as follows :

Chuhar Mal, Ganga Kesho Das	... ¼th share.
Banka Mal, Behari Mal Hazari Mal Budhu Mal.	... ¼th share.
Jiwan Mal Kesar Mal	... ¼th share.
Salamat Rai... ...	... ¼th share.

Chuhar Mal died about 15 or 16 years before suit and his grandson Bansi Lal, Defendant No. 3, was taken into partnership and the partnership continued. Similarly Jiwan Mal died about 14 years before suit and his sons Dial Chand, Natha Mal, Har Bhagwan and Khushi Ram, Defendant Nos. 11 to 14, were taken into the partnership and the partnership continued.

On 12th July 1919, Ganga Ram defendant, brought a suit for dissolution of partnership and for rendition of accounts against the other partners. During the pendency of that suit Kesar Mal, one of the partners died and his sons Ram Saran, Ram Rattan, Amar Nath and Dwarka Nath were brought on the record as his legal representatives. The defendants put in pleas in which they stated that they had no objection to have the partnership dissolved. On 28th November 1919, a preliminary decree for dissolution of partnership and rendition of accounts was passed and a commissioner was appointed to go into the accounts. On the 1st August 1921, Ganga Ram, plaintiff in that suit stated that Budhu Mal had died and applied to bring his representatives on the record. The Court held that the suit had abated, because the application was time-barred, and accordingly dismissed the suit on the 25th May 1922.

Thereafter, on the 16th October 1922, Natha Ram, defendant, put in an application for restoration of the status qua under S. 144 and S. 151, Civil P. C. On the 18th October 1922, Natha Ram and Dial Chand and Harbhagwan and Khushi Ram brought a suit for issue of a permanent injunction against certain partners defendants to restrain them from preventing the plaintiffs in that suit from inspecting the accounts and from taking part in the management of the joint factory. On 10th November the Court

ordered Ganga Ram to deliver possession to Natha Ram, etc., on his application for restitution. Joint possession was given on the 16th November 1922. On the 13th November the suit for injunction was withdrawn. On the 20th November 1922, Defendants Nos. 11 to 14, that is, Dial Chand, Natha Ram, Harbhagwan, and Khushi Ram, leased their 8th share in the factory for Rs. 545 for one year to the co-sharers Banka Mal and Behari Mal.

On the 22nd February 1924, the present plaintiffs, sons of Budhu Mal, brought the present suit for dissolution of partnership and rendition of accounts. The plaintiffs stated the facts as detailed above and went on to say that Defendants Nos. 11 to 14 had been excluded from the possession of the factory but that subsequently they had got joint possession and had leased their share to Banka Mal and Behari Lal. The partnership had then continued and the plaintiffs sued for dissolution and rendition of accounts. Defendants Nos. 11 to 14 alone contested the claim pleading that the partnership had already been dissolved, that there had been no fresh partnership, that the sult for accounts of the old partnership was barred by time, and that the present suit did not lie because of the abandonment of the suit brought by Ganga Ram.

The following issues were framed :

(1) Does partnership still exist between the plaintiffs and the defendants ?
(2) If so, is the suit time-barred ?
(3) Does the suit not lie because the previous suit by Ganga Ram had abated ?

The trial Court dismissed the suit holding that the partnership stood dissolved, that the parties might be joint owners of the factory but were not partners, and that the suit for rendition of accounts was time-barred. The appellate Court held that the partnership was continued after the abatement had taken place, and the factory worked for a year, and that, therefore, the suit was within time, and that the previous abatement had no effect on the present suit. It accordingly gave the plaintiffs a preliminary decree for dissolution of partnership and rendition of accounts.

The first point taken in second appeal is that the appeal before the learned District Judge had abated. In the memorandum of appeal the name of Salamat Rai, who had died during the pendency of the suit, was first put in, and later seems to have been crossed out, and the names of Fakir Chand and Manohar Lal, his sons, substituted.

Counsel contends that (from the fact that the talbana was put in for 15 people, whereas otherwise it ought to have been for 16, and that the summons issued to Salamat Rai on the 28th January 1926, and that a report was received that he was dead on the 9th of February 1926, and that the summons issued to Fakir Chand and Manohar Lal on the 18th February 1926, and that on the 6th February 1926, an application was made by the plaintiff-appllant Ram Chand that Salamat Rai was dead, and as one of his legal representatives was a minor, and a guardian ad litem should, therefore, be appointed, and from the fact that on the 5th February 1926 an application was put in by Natha Ram that the memo has been tempered with). it is obvious that the memo of appeal was tampered with after it had been put in Court by some persons interested. He contends that originally the name of Salamat Rai alone was in the memorandum, and the other names were substituted, after the appeal had been filed, when it was discovered that Salamat Rai was dead. Counsel for the respondents, however, shows that the register of institutions, which is regularly kept, shows the names of Fakir Chand and Manohar Lal, and does not show the name of Salamat Rai at all. The circumstances are certainly suspicious, and the issue of the summons to Salamat Rai is not explained satisfactorily. But the learned District Judge held that this appeal was duly presented, and had not been tempered with, and he was the best judge of this fact. I am, therefore, not prepared to hold to the contrary, and I repel this contention.

The next point taken is that Kesar Mal having died while the suit for dissolution was pending, there can be no continuation of the partnership especially when a decree was passed dissolving the partnership on the agreement of the parties. Counsel for the respondents, in reply to this, relies on a judgment of a single Judge of this Court on a revision from the order of the Court ordering restitution, in which the learned Judge held that the order of abatement had reversed the preliminary decree. Counsel

for the appellants contends, that this order really only refers to the receiver, and that further this decision is wrong because the abatement of the suit could not reverse the preliminary decree already passed and that, thirdly, at any rate, the agreement had dissolved the partnership and that the agreement still stands. Further he contends that the decision is not res judicata, because the parties were not the same as in the present suit, and the executing Court could not have tried the present suit.

I consider that there is force in the contention of the appellants that this decision is not res judicata between the parties, because the executing Court could not have tried the present suit. I also consider that it is difficult to see how the order of abatement could have reversed the preliminary decree already passed. It is also, therefore, difficult to hold how a partnership which had once been dissolved whether by unanimous consent of the partners or its embodiment in a decree of the Court could be subsequently said to have continued, because the suit for rendition of accounts failed on account of abatement. I am unable to hold, however, that the previous abatement is a bar to the present suit which may lie on the ground that a new partnership based on the old partnership was revived or reconstituted by the consent of all the partners and their legal representatives. The suit brought by the present contesting defendants for a permanent injunction certainly lends much support to this view. I find that they attached the partnership deed of 1923 to their plaint in that suit. The plaint, no doubt, is capable of the interpretation that it was brought by co-owners to recover their shares in certain joint property, but if the partnership stood dissolved, it seems to me that no partner had any particular right to any part of property, but was only entitled to a suit for rendition of accounts. Further in the judgment of this Court already referred to I find the following sentences.

The learned counsel for the respondents (that is the present contesting defendants) informs me that his clients have obtained joint possession of the factory with the other partners. This fact also shows that the present defendants-appellants considered themselves partners with the others. The present plaint on which stress has been laid by counsel for the appellants is certainly inartistically worded, and would lend support to the theory that the present defendants-appellants were excluded from the partnership, and subsequently by agreement were allowed to lease their $\frac{1}{8}$th share to the two co-sharers for a fixed sum for one year. Counsel for the appellants contends that this shows that they were not partners. But bearing in mind that the partnership consisted of running a joint factory in which the present appellant claimed $\frac{1}{8}$th share, I do not see that it necessarily follows that they ceased to be partners because they entered into some private arrangement with some of the partners only as to their respective rights inter se. Counsel for the respondents contends that in any event a decree for partition of the joint property should be passed. No such prayer was made before the Additional District Judge, and I do not think that the present suit can be held to have included a prayer for partition of the joint property.

On the whole on considering all the above facts, I am of opinion that the parties continued the partnership or rather reconstituted a partnership based on the old partnership. I take into consideration in arriving at this decision the following facts: (1) The death of Chuhar Mal and Jiwan Mal and the continuation of the partnership with their legal representatives. (2) The fact that when Kesar Mal died during the pendency of Ganga Ram's suit, no one seems to have contended that the death had ipso facto dissolved the partnership, but all parties asked for a decree dissolving the partnership. (3) The suit brought by the present defendants-appellants for a permanent injunction already referred to. (4) The order of abatement dismissing the suit in toto; the parties might well have considered that as a result of this the status qua had been restored. (5) The admission by the counsel in this Court as to the position of the parties.

The result is that the plaintiff is entitled to a decree for dissolution of the present partnership and for rendition of the accounts as explained in *Ahinsa Bibi* v. *Abdul Kader* (1): for the purpose of accounts, it is permissible to go into the accounts of the old partnership on the

(1) [1902] 25 Mad. 26.

basis of which the present one was constituted. The appeal, therefore, fails and is dismissed, but as the case presented considerable difficulty and the plaint was badly framed and caused a good deal of confusion, I make no order as to the costs of this appeal.

R.D. *Appeal dismissed.*

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SHADI LAL, C. J., AND AGHA HAIDAR, J.

Radha Kishan Kaul—Defendant—Appellant.

v.

Shankar Das—Plaintiff—Respondent.

First Appeal No. 1283 of 1922, Decided on 13th December 1926, from the decree of the 1st Cl. Sub-J., Amritsar, D/- 1st March 1922.

(a) *Husband and Wife—Contract in wife's favour—Husband can sue for specific performance.*

It is a common practice in India that people, while paying money from their own pockets, purchase property for various reasons in the name of the members of their families. Such transactions are well known as benami transactions and their validity has been recognized by the highest Courts of justice. A husband is therefore competent to sue for specific performance of a contract of sale in favour of his wife. [P. 253, C. 1]

(b) *Contract—Whether contract is complete depends upon intention of parties.*

The real test to see if a contract between the parties is complete or not, is the intention of the parties as to whether or not there is to be no binding contract till the document is executed or whether the document is merely to commemorate in the manner required by law the terms of a bargain already completed. A contract may be a completed and binding contract although a document in which its terms are to be embodied is to be executed and registered later on. [P. 253, C. 2]

(c) *Contract—Contract once complete does not become incomplete by subsequent negotiations.*

Once it is shown that there is a completed contract, further negotiations between the parties, cannot, without the consent of both, get rid of the contract already completed. Subsequent negotiations first commenced on new points after a completed contract had been arrived at and signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed: (*English Law Applied*). [P. 254, C. 1]

(d) *Contract Act, S. 73—Contract by one coparcener to sell property in which other coparceners are interested—Breach—Contracting coparcener is liable.*

A coparcener who has agreed to sell immovable property belonging to himself and other members of the family is personally liable under S. 73 for damages for failure to perform the contract when it was found that it was not binding on the other members: 40 *Mad.* 338 (*F. B.*), *Appl.* [P. 254, C. 2]

(e) *Contract Act, S. 73—Property contracted to be sold to plaintiff sold to another—Measure of damages is difference between actual price and contracted price.*

Where property contracted to be sold to plaintiff is sold by owner to another, the measure of damages in a suit for damages on breach of contract is the difference between actual price and contracted price: 38 *Cal.* 458, *Rel. on.* [P. 255, C. 1]

Sheo Narain and *Kishan Dial*—for Appellant.

Badri Das, Gobind Ram Khanna, Jamna Das for *Gobind Ram*—for Respondent.

Agha Haidar, J.—This appeal arises out a suit brought by the plaintiff-respondent for damages for the breach of contract to sell a certain house stituate in Amritsar. The plaintiff came into Court on the allegation that, as a result of correspondence that passed between the 19th July 1916, and the 23rd February 1917, between the parties the defendant had agreed to sell his house at Amritsar to the plaintiff for a sum of Rs. 9,000 and that in violation of the terms of that contract, the defendant eventually agreed to sell the house to one Gokal Chand on the 4th March 1917, for Rs. 15,500 and ultimately on the 21st March 1917, executed and registered a sale deed in Gokal Chand's favour. The plaintiff, therefore prays that a decree may be passed in his favour for damages for the breach of the contract for a sum of Rs. 6,500 being the difference between the price at which the defendant had agreed to sell the house to him and the price for which he ultimately sold the house to Gokal Chand. The defendant pleaded that the plaintiff had no right to bring the suit inasmuch as the sale had been negotiated by him for and on behalf of his wife. It was further pleaded that there was no completed agreement between the parties which could give rise to a suit for breach of contract, and finally that even if there was a completed contract it was broken by the plaintiff himself and not by the defendant. The learned Judge of the Court below decreed the plaintiff's suit in full, holding that the defendant had agreed to sell the house to the plaintiff and that there was a completed contract which is contained

in P-4 dated the 11th December 1916, and that it was the defendant who had been guilty of breach of contract. He also refers to P-5 and P-6 as further showing that the contract between the parties was complete.

The defendant has come up in appeal and his learned counsel argued his case at a very considerable length. He repeated the plea which had been raised on behalf of the defendant in the Court below that the plaintiff was not competent to bring the suit inasmuch as the real agreement, if any, was between the plaintiff's wife and the defendant. There is no force in this argument. It is a common practice in this country that people, while paying money from their own pockets, purchase property for various reasons in the name of the members of their families. Such transactions are well known as benami transactions and their validity has been recognized by the highest Courts of justice.

The learned counsel for the appellant has strongly argued that the letter P-4 dated the 11th December 1916, could not be treated as the acceptance by the defendant of the plaintiff's offer, in that this letter itself mentions that the defendant will have to consult the other members of his family in order to obtain their consent and that, furthermore, there is a reference to a draft of the sale-deed which was to be prepared later on by a certain vakil of Amritsar and that the document was to be registered at a later date. It is also argued that the plaintiff in a subsequent letter and draft which accompanied it referred to certain indemnity clauses which he wished to incorporate into the sale deed and that there was also a certain dispute as to who shall pay the costs of the stamp, etc. Now, as regards the argument that the consent of the other members of the defendant's family had not been obtained and that, therefore, there was no contract, we may point out that throughout the correspondence which passed between the parties the defendant never mentioned that any member of his family had any objection to the sale. As to the argument that the document had to be executed and registered at a subsequent date and that before this there was no binding contract we have the authority of *Bijoya Kanta Lahiri Chowdhury* v. *Kailash Chandra Bhowmik* (1), which lays down that the real test in such cases is the intention of the parties as to whether or not there is to be no binding contract till the document is executed or whether the document is merely to commemorate in the manner required by law the terms of a bargain already completed. A contract may be a completed and binding contract although a document in which its terms are to be embodied is to be executed and registered later on. On a perusal of the record we do not find any such intention on the part of the parties that the completion of the contract depended upon the execution and registration of the sale deed at a subsequent date. There is, therefore, no force in this contention..

But a more serious contention which was raised on behalf of the appellant was that the correspondence as a whole should be considered and that if, in spite of the fact that there were certain letters which can be pointed out as the repositories of the contract, there were subsequent communications which passed between the parties about other matters connected with it, the contract cannot be taken to have become a completed contract. There are observations in three English cases: *Thomas Hussey* v. *Horne-Payne* (2); *Bristol Aerated Bread Co.* v. *Maggs* (3) and *Rummens* v. *Robins* (4), which seem to support the contention of the appellant to a certain extent. The case reported in *Bristol Aerated Bread Co.* v. *Maggs* (3), explains the law as laid down in *Thomas Hussey* v. *Horne-Payne* (2). It says that although two letters standing alone might be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards is enough to show that the contract was not complete, and that the parties were really in the stage of negotiations. But we find that in *Bellamy* v. *Debenham* (5). North, J., has adversely criticized the law as laid

(1) [1919] 46 Cal. 771=52 I. C. 575=23 C. W. N. 563.
(2) [1879] 4 A. C. 311=41 L. T. 1=48 L. J. Ch. 846=27 W. R. 585.
(3) [1890] 44 Ch. D. 616=62 L. T. 416=59 L. J. Ch. 472=38 W. R. 393.
(4) [1865] 3 De. G. J. & S. 88=13 W. R. 979=11 Jur. (n. s.) 631=14 L. T. 717=46 E. R. 571.
(5) [1890] 45 Ch. D. 481=63 L. T. 220=60 L. J. Ch. 166=39 W. R. 257.

down in these earlier cases. The learned Judge considers that *Thomas Hussey* v. *Horne-Payne* (2), *Aerated Bread Co.* v. *Maggs* (3), went too far. He held that when during the course of a correspondence which passed between the parties a certain stage was reached when they were ad idem, there was a completed contract between them and the mere fact of there being subsequent nogotiations cannot be relied upon to defeat the claim for specific performance. In other words :

When once it is shown that there is a completel contract it is impossible that further negotiations between the parties can without the consent of both, get rid of what may be called the crystallised contract, already arrived at and contained in the letters.

It may be noted here that this case went up in appeal and the judgment of North, J., was affirmed, although on a different point. But a case came up before the Court of Appeal *Perry* v. *Suffields* (6). In this case which was an appeal from the judgment of Sargent, J., their Lordships of the Court of Appeal, accepted and approved of the statement of law enunciated by North, J. and they also agreed with him in his criticism of the two earlier cases, *Thomas Hussey* v. *Horne-Payne* (2) and *Bristol Aerated Bread Co.* v. *Maggs* (3). Their Lordships held that when once it is shown that there is a completed contract further negotiations between the parties cannot, without the consent of both, get rid of the contract already completed. Subsequent negotiations first commenced on new points after a completed contract had been arrived at and signed cannot be regarded as constituting part of the negotiations going on at the time when it was signed.

Applying the principles thus laid down by these later 'authorities we hold that there was a completed contract in the letter P-4 and subsequently repeated in P-5 and P-6. The fact that the defendant wanted to graft some other terms upon the original contract in order to secure his position would not have the effect of wiping out the contract itself. We also find that the defendant did not in so many words decline to accept these terms which were subsequently sought to be introduced by the plaintiff and furthermore that the plaintiff himself abandoned these terms and did not insist upon them.

A further argument was also put forward that the plaintiff was guilty of breach in that he was not in a position to perform his part of the contract and had not ready money to pay the price. There is no force in this argument. We have the evidence on behalf of the plaintiff that in order to pay the price of the sale of the house in dispute the plaintiff had shown his earnestness by selling some of his own property and depositing the proceeds in a bank in his floating account, so that the plaintiff had done all that he was expected to do in order to show his readiness to carry out on his part the terms of the contract.

It was argued on behalf of the defendant-appellant that there were other members of the joint family interested in this property and, therefore, the plaintiff could not ask the defendant to transfer the house to him and as the defendant could not convey the house to the plaintiff so the plaintiff cannot maintain this suit for damages. This argument has no force. It was the plaintiff's look-out if he was prepared to be satisfied with what may be characterized as a defective title. The sale deed had to be completed according to the terms of the contract by the defendant and it was not open to the defendant to commit the breach on the pretext that there were other persons interested in it. We have the authority of the Full Bench of the Madras High Court in *Adikesavan Naidu* v. *M. V. Gurunatha Chetti* (7) that a manager of a joint Hindu family, who had agreed to sell immovable property belonging to himself and the minor members of the family was personally liable under S. 73 of the Indian Contract Act for damages for failure to perform the contract when it was found that it was not binding on the minors. In this view the defendant cannot possibly seek the protection of the Hindu Law relating to a coparcenary body in order to defeat the plaintiff's claim.

We may here point out that as a matter of fact in the sale deed actually executed by the defendant in favour of Gokal Chand on the 21st March 1917, the solitary name of Pandit Radha Kishan Kaul, defendant, appears as the vendor.

(6) [1916] 2 Ch. 187=115 L. T. 4=85 L. J, Ch. 460=60 S. J. 494.

(7) [1917] 40 Mad. 338=32 M.L.J. 180=5 L. W. 425=39 I.C. 358=(1917) M. W. N. 171 (F.B.).

This is borne out by the evidence of Gokal Chand himself, the purchaser from the defendant.

Some argument was addressed to us assailing the principle on which the Court below assessed damages. We think that the principle laid down in *Nabinchandra Saha Paramanick* v. *Krishna Barana Dasi* (8) and several other cases is perfectly correct and the measure of damages in a case like the present is the difference between the price, Rs. 9,000 agreed upon between the parties (vide P-4) and the price at which the defendant actually sold the house to Gokal Chand on the 21st March 1917. On a perusal of the whole record we have come to the conclusion that it was the defendant who was guilty of the breach of contract. He received the offer of a larger sum of money from Gokal Chand and succumbed to the temptation with the result that he broke his contract with the plaintiff.

We, therefore, affirm the decree of the Court below and dismiss the defendant's appeal with costs.

D.D. *Appeal dismissed.*

(8) [1911] 38 Cal. 458=9 I.C. 525=15 C.W.N. 420.

A. I. R. 1927 Lahore 255

TEK CHAND, J.

Duni Chand—Defendant—Appellant.

v.

Lekhu—Plaintiff—Respondent.

Second Appeal No. 2640 of 1926, Decided on 3rd February 1927, from the decree of the Senior Sub-J., Ambala, D/- 31st July 1926.

(a) *Co-sharers — Proprietor dying without heirs—No community of interest between several land-holders is established—Property does not devolve on proprietary body but escheats to Crown.*

In the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body only if the village is a homogeneous one and complete community of interest is maintained. Where no general community of interest between the several landholders in the village has been preserved the estate of a heirless proprietor escheats to the Crown and does not devolve upon the proprietary body. [P 257 C 2]

(b) *Custom (Punjab)—Succession—Person belonging to same got as deceased—He is not entitled to succeed to his estate by reason of that fact alone.*

One person is not entitled to succeed to the land of another merely by reason of belonging to the same got: 68 *P. R.* 1892; 235 *P. L. R.* 1912; *A. I. R.* 1923 *Lah.* 530, *Foll.*; 1 *Lah.* 549 and 40 *P. W. R.* 1916, *Dist.* [P 257 C 2]

(c) *Custom (Punjab) — Succession — Sister is preferable to proprietory body.*

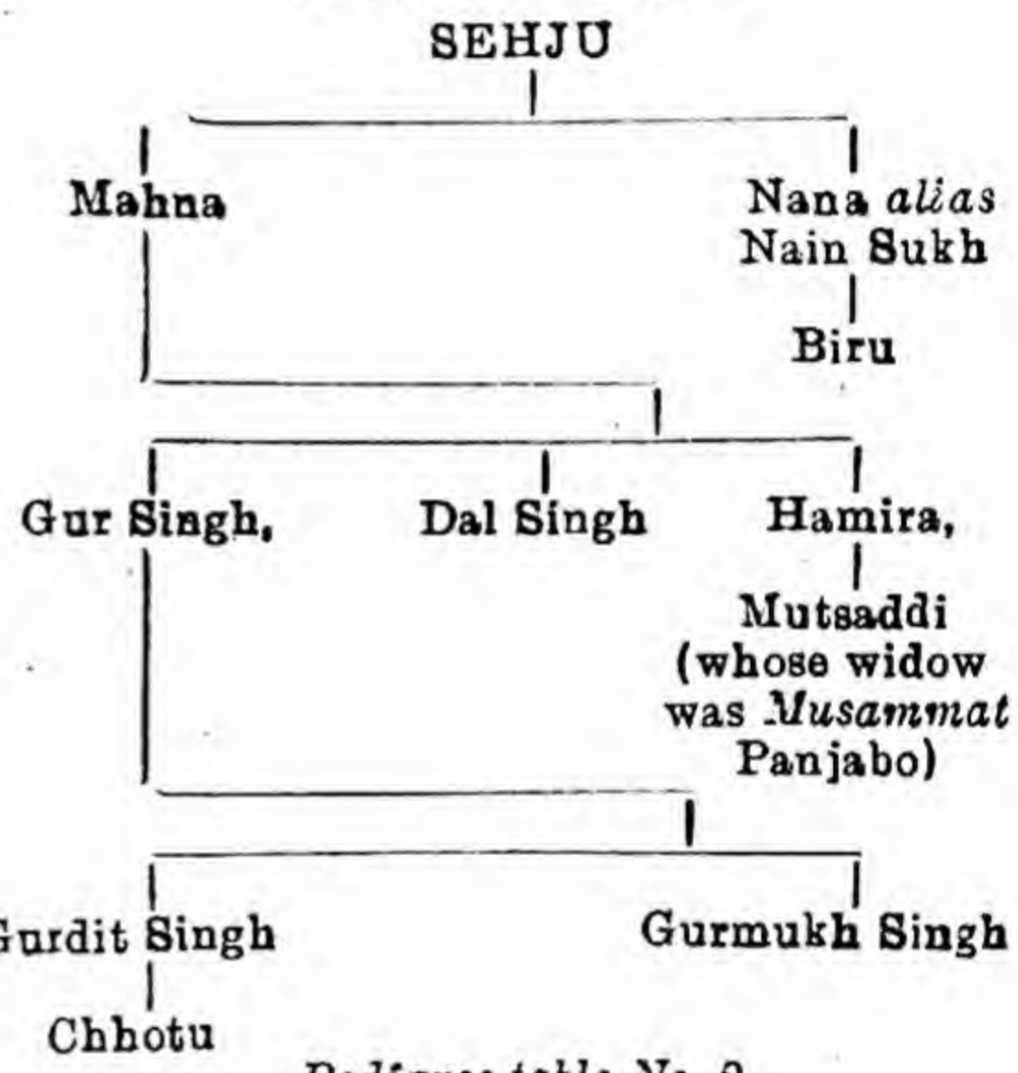
Both under custom as well as under Hindu Law the sister of a deceased proprietor would come in before the proprietary body. [P 258 C 1]

Badri Das, and *Balwant Rai*—for Appellant.

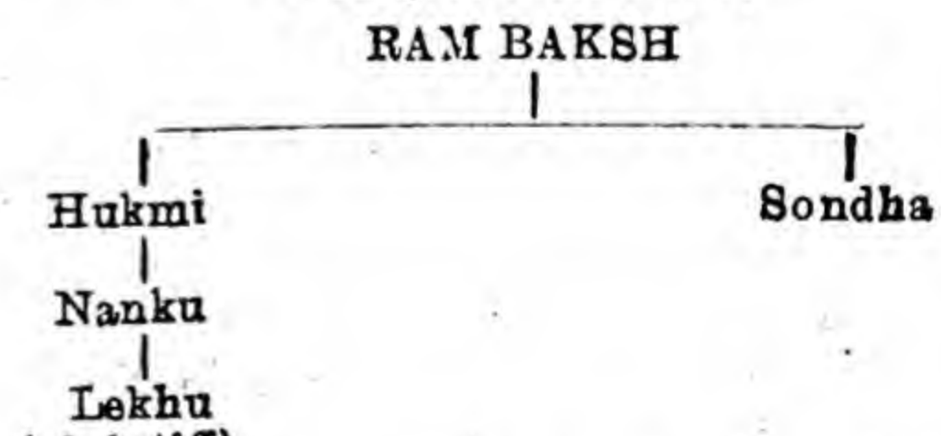
B. R. Puri for *S. C. Chatterjee*—for Respondent.

Judgment.—In order to understand the facts of this case it is necessary to give the following two pedigree-tables.

Pedigree-table No. 1,



Pedigree table No. 2.



The land in suit is part of a holding which was entered in the revenue papers of 1883-84 as owned by Mt. Panjabo, widow of Mutsaddi, 2/3rds, and Biru, son of Nana, 1/3rd (vide pedigree-table No. 1). Biru was shown as an absentee and Mt. Panjabo was entered as in possession of his share also. Mt. Panjabo mortgaged her own 2/3rds share in the holding to one Duni Chand Bhabra. Later on, on the 30th of August, 1883, she executed an unregistered mortgage-deed of Biru's 1/3rd share in the holding to Hari Singh and Mukha Singh as co-mortgagees for Rs. 98. It was stated in the mortgage-deed that Hari Singh had 2/9ths share in

the mortgage and Mukha Singh had 7/9ths share. On the 25th of November 1884, Mt. Panjabo sold 7/9ths of Biru's 1/3rd share in the holding to Mukha Singh who was, as stated above, one of the co-mortgagees under the mortgage-deed of the 30th of August, 1883. This sale-deed was effected for Rs. 200 out of which Rs. 98 was left with the vendee on account of the mortgage-money, Out of this Rs. 98 the vendee Mukha Singh was to appropriate 7/9ths to himself as his share of the mortgage-money and to pay the remaining 2/9ths to Hari Singh, the co-mortgagee.

Soon after the mortgage Mukha Singh vendee paid Hari Singh his share of the mortgage-money and having thus redeemed the mortgage took possession of the whole of Biru's share. Later on Mukha Singh purchased from Mt. Panjabo her own 2/3rds share in the holding and redeemed Duni Chand Bhabra who was a mortgagee from her of this share. Mukha Singh tried to have mutation effected of the whole land as a proprietor but as Biru was an absentee and the sale as to his share had been effected by Mt. Panjabo, the Revenue Authorities refused to enter him as proprietor of Biru's share. Qua this share Biru continued to be shown as mortgagor and Mukha Singh as mortgagee and in the cultivation column Mukha Singh was shown as the mortgagee in possession. As to Mt. Panjabo's own share 2/3rds share, Mukha Singh's name was substituted as owner in the proprietary column. Biru absentee seems to have died in some other village before 1907 and in the Revenue Records of that year Chhotu son of Gurdit Singh (vide pedigree-table No. 1) was entered in the proprietary column as mortgagor in place of Biru. In 1919 Mukha Singh's heirs transferred their rights in the whole holding to Duni Chand defendant-appellant who entered into possession of the entire holding including the land in suit. Chhotu died in 1923 and Lekhu son of Nanku plaintiff (vide pedigree-table No. 2) alleging himself to be a collateral of Chhotu got the land mutated in his favour on 9th June 1925. On 17th November, 1925, Lekhu instituted the present suit for redemption of 1/3rd share in the holding representing Biru's share, on payment of Rs. 98 as his heir and stating that mutation had been effected in his favour as such.

The defendant Duni Chand resisted the plaintiff's suit on the ground that the plaintiff was not related to Chhotu, that in any case Chhotu had left a sister Mt. Mangali who was a nearer heir than the plaintiff, and that Mukha Singh had become owner of Biru's 1/3rd share in the holding by virtue of the sale, dated 25th November, 1884, qua 7/9ths share and by reason of adverse possession qua the remaining 2/9ths.

The plaintiff was examined before the issues were framed and stated that he was related to Chhotu in the fourth or fifth degree and for this reason he was his heir. He could, not, however, definitely give the pedigree-table connecting his line with Chhotu's and stated that he belonged to the same got. He also denied the existence of the sister of Chhotu. Later on he put forward a pedigree-table which he had propounded during the mutation proceedings, by which he sought to connect his line (vide pedigree-table No. 2) with that of Biru and Chhotu (vide pedigree-table No. 1) in the following manner :

DEVI DAS

Des Raj	Mahna	Ghasi or Ubasi	Mawasi

Ram Bakhsh (*vide* pedigree-table No. 2).

Sehju (*vide* pedigree-table No. 1).

On these pleadings the trial Court framed the following issues :

(1) Whether the plaintiff is the collateral of Chhotu deceased, and, if so, of what degree ?

(2) If issue No. 1 be found in the positive, can the plaintiff not sue in presence of Chhotu's sister ?

(3) Were 3½ shares out of 4½ shares sold to Mukha Singh and no suit lies in respect of that land ?

(4) On payment of how much mortgage-money can the plaintiff obtain a decree ?

The plaintiff produced three witnesses who sought to prove the pedigree-table propounded by him and the defendant merely contended himself by going himself into the witness-box and producing certain revenue entries. The trial Court held that the plaintiff had failed to prove the pedigree-table propounded by him and that as he was not a collateral of the deceased he had no locus standi to maintain the present suit for

redemption. In view of this finding the first Court found it unnecessary to decide the second issue as to the existence of Chhotu's sister, and on the third issue it found the sale to Mukha Singh proved. In accordance with these findings it dismissed the plaintiff's suit.

On appeal by the plaintiff to Rai Sahib Shibbu Mall, Senior Sub-Judge, the plaintiff sought to prove his alleged relationship with Chhotu, but the learned Senior Subordinate Judge agreed with the finding of the first Court and held that Lekhu plaintiff had failed to establish a definite relationship with Chhotu or Biru. He also remarked that

> Chhotu and Biru were descended from a common ancestor Sehju and Lekhu is descended from Ram Bakhsh. But that there was no evidence to show that Sehju and Ram Bakhsh were own brothers, sons of Des Raj or that Des Raj, Mahna, Ubasi and Mawasi were the four sons of Davi Das who had come to this village 200 years prior to 1888 and who had acquired 1/4th share of the vlllage land.

Having thus found that the alleged relationship of the plaintiff with Chhotu was unproved and that he was not the collateral of the original mortgagor the learned Senior Sub-Judge, however, went on to hold that plaintiff had a locus standi to maintain the present suit because he belongs to the same *got* and is a proprietor in the patti in which the land in suit is situate. He says :

> There can be no manner of doubt that all the proprietors of this patti are descendants of Davi Das and plaintiff Chhotu and Biru are all descendants of Devi Das though the full and correct genealogical tree is not available.

The Senior Sub-Judge further held that the mortgage sued upon was still subsisting and that the plaintiff had a right to redeem on payment of Rs. 98. He accordingly decreed the plaintiff's suit for redemption on payment of this sum together with costs.

The defendant has come up in appeal to this Court and on his behalf Mr. Badri Das has assailed the judgment of the lower appellate Court on both the points decided against his client. He contends that on the findings of the Senior Subordinate Judge that the plaintiff had failed to prove the pedigree-table propounded by him the suit of the plaintiff should have been dismissed and the Court should not have set up an entirely new case on behalf of the plaintiff and passed a decree on the ground that the plaintiff belonged to the same *got* and was a proprietor in the same patti. He also argues that there is absolutely no evidence on the record to support the remark of the Senior Sub-Judge that the proprietors of the patti are descended from Devi Das or that the plaintiff Chhotu and Biru are all descendants of Devi Das.

I have carefully examined the arguments addressed to me by the learned counsel for both sides and am of opinion that the finding of the learned Senior Sub-Judge on this point cannot be maintained. Both in the mutation proceedings and during the trial the plaintiff Lekhu claimed the land in suit as a collateral of Chhotu in the fourth or fifth degree and he propounded a definite pedigree-table which showed that Sehju and Ram Bakhsh were real brothers, being sons of Des Raj. The oral evidence which he produced in support of this pedigree-table was obviously false and has not been accepted by either Court. The Senior Sub-Judge has himself found that Lekhu has failed to establish a definite relationship with Chhotu or Biru and that a full and correct genealogical tree of the descendants of Devi Das is not available. In view of this definite finding of the Senior Sub-Judge I fail to see how he could hold that the plaintiff had a locus standi to maintain the suit.

The plaintiff never claimed to redeem as a proprietor in the patti or as a person who belonged to the same got as Chhotu or Biru. There were not pleadings on this point nor was any issue framed with regard to this matter, nor yet was any evidence led relating thereto. Moreover, if the suit had been brought on the basis of escheat of Chhotu's land to the proprietors of the patti or the proprietors of the village, then all the pattidars or the entire proprietary body ought to have been impleaded as parties to the suit. Further, it is clear that in the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body only if the village is a homogeneous one and complete community of interest is maintained. It is firmly established that where no general community of interest between the several land-holders in the village has been preserved the estate of an heirless proprietor escheats to the Crown and does not devolve upon the proprietary body.

vide exception to para. 28 of Rattigan's Digest and also Remark No. 1 appended to the paragraph.

In this case the plaintiff made no effort whatever to prove that the village was a homogeneous one or that a complete community of interest was preserved. Under these circumstances the Senior Sub-Judge was not justified in appeal in allowing the plaintiff to redeem the land on this basis.

As to the other ground, namely, that the plaintiff has a locus standi as he belongs to the same got it is now well settled that one person is not entitled to succeed to the land of another merely by reason of belonging to the same *got*. It was held in *Muhammad Rafi* v. *Khazam Singh* (1), a case which is in several respects similar to the present one, that where a plaintiff fails to establish any definite relationship with the deceased, he should not be allowed to claim as an ultimate heir on the ground that he is a member of the same *got* and, therefore, presumably descended from a common ancestor. This ruling has been followed in various decisions of this Court and the learned counsel for the respondent has not been able to cite any authority in which it has been disapproved or dissented from. The Senior Sub-Judge before whom this ruling was cited sought to distinguish it on the ground that there the plaintiff was challenging an alienation as a reversioner and there the suit is one for redemption of a mortgage in his capacity as the successor of the mortgagor. I confess I am unable to appreciate the distinction that the learned Senior Sub-Judge has sought to emphasize. In *Jhindu* v. *Gopala* (2) a Division Bench of the Punjab Chief Court held that there was no presumption that all jats of one *got* living in a village were descended from one common ancestor. Similarly in *Kirpa* v. *Chinti* (3) Moti Sagar, J., held that the mere fact that the plaintiff is of the same caste and *got* as the alienor does not necessarily lead to the inference that he is descended from the same common ancestor and is his heir.

The lower appellate Court has relied on two rulings neither of which seems to me to support its conclusions. *Shah Nawaz* v. *Sheikh Ahmad* (4) is, if anything, in favour of the defendant. It was held there that by merely having an entry made in his favour in the Revenue Records a plaintiff cannot and does not acquire ownership of the equity of redemption. This clearly goes against the plaintiff. The other ruling, *Budhi Singh* v. *Mohan Singh* (5), proceeded upon its peculiar facts. There the suit had been brought by the members of the village proprietary body as such to redeem the land which had been mortgaged by a co-proprietor in the village who had died leaving no direct heirs. The village in that case was found to be homogeneous and on the evidence led in that case it was found that the property of an heirless proprietor in such a village devolved on the proprietary body before it escheated to the Crown. As has been pointed out above, there was no such alienation in the present case nor was any evidence led.

Under the circumstances I am of opinion that the plaintiff having failed to establish any locus standi to maintain the present suit for redemption was not entitled to any decree. It is not necessary to decide the other issues that arise in this case, but I may mention in passing that even if there is a custom in the village whereby the village proprietary body succeeds to the estate of an heirless proprietor it would be necessary to determine whether Chhotu's sister was alive. Both under custom as well as under Hindu Law the sister would come in before the proprietary body. The Senior Sub-Judge has given no finding on this point and without doing so he could not pass a decree in favour of plaintiff. The finding of the learned Judge on Issue No. 3 also seems to be open to grave doubt but in view of my decision on the first point I do not think it necessary to go into that matter.

The appeal is accordingly accepted and the plaintiff's suit dismissed with costs throughout.

R.D. *Appeal accepted.*

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(1) [1892] 68 P, R. 1892.
(2) [1912] 135 P. W. R. 1912=15 I. C. 266=235 P. L. R. 1912.
(3) A. I. R. 1923 Lah. 530.
(4) [1920] 1 Lah. 549=59 I. C. 478.
(5) [1916] 40 P. W. R. 1916=32 I. C. 768=2 L. L. J. 583.

A. I. R. 1927 Lahore 259

DALIP SINGH, J.

Dila Ram and *others* — Defendants—Appellants.

v.

P. Bidhya Dhar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1349 of 1926, Decided on 1st February 1927, from the decree of the Senior Sub-J., Hoshiarpur, D/- 27th December 1925.

(a) *Punjab Courts Act, S. 41 — Nature of dues.*

The question of the nature of the dues is not a question of fact. [P 260 C 2]

(b) *Practice—Precedents—Obiter defined.*

Decision though on a point not in issue but necessary for points in issue is not obiter. [P 260 C 1]

(c) *Civil P. C., S. 11—Addition of parties.*

Where some new parties are added to a subsequent suit in addition to all the parties to the prior suit, the decision in the previous suit is not res judicata. [P 261 C 1]

(d) *Punjab Tenancy Act* (1887), *S. 77 (j) and (p)—Suit for recovering dues payable by Rajputs of Pohlian Prohitan to the Brahmans is not cognizable by civil Courts.*

The produce, with respect to lands in cultivating possession of the Rajputs of village Pohlian Prohitan, recoverable by the Brahmans of the village is either a due recoverable by a superior land-owner from an inferior land-owner or it comes within the definition of "village cess." In either event the civil Courts are barred under S. 77 (p) or S. 77 (j) from taking cognizance of a suit to recover them. [P 261 C 1, 2]

Shamair Chand—for Appellants.

N. C. Pandit—for Respondents.

Judgment.—The facts of this case are as follows : The village Pohlian Prohitan was gifted by the then Raja to certain Brahmans who were his Prohits. The land revenue was also remitted in perpetuity to the Brahmans. Thereafter the ancestors of the present defendant who are Rajputs also settled in the village. In 1866 a suit was brought by the ancestors of the present plaintiffs against the ancestors of the present defendants for a declaration of title as to proprietorship. In that suit the Brahmans claimed that they were full and sole proprietors of the village and that the Rajputs were at first servants and later tenants of the Brahmans. The Rajputs, on the other hand, claimed that they were the proprietors of the whole village and the Brahmans were the muafidars with no proprietary rights. The matter was referred to arbitration and the arbitrators gave an award in which they declared each party to be the proprietors of the land in its cultivation. The Brahmans were styled as adna malikan and the Rajputs as ala malikan in respect of land other than the land in the cultivating possession of either party. Certain other decisions were given as to land which was in the occupation of the tenants and was in their cultivating possession at the time and we are not concerned with this part of the decision. It was also decided that the Rajputs were to pay $13\frac{1}{4}$ seers per maund of produce out of the land in the Rajputs' possession to the Brahmans as heretofore, and in the judgment it was stated that for this purpose the Rajputs were to be deemed tenants of the Brahmans. A decree followed the award, and the terms of the decree were incorporated in the wajib-ul-arz and were followed in the Settlement Records thereafter.

On the 15th March 1910, Rikhi Defendant No. 1 a Brahman proprietor mortgaged his rights in certain land in the possession of Dila Ram, Gopi and Shaman, present Defendants Nos. 2, 3 and 4, Rajputs, to the present plaintiffs and the present plaintiff brought a suit for possession of this land against Dila Ram, etc. They contested the suit and alleged that Rikhi was merely a jagirdhar or muafidar and had, therefore, no right to alienate his rights. Other pleas which had been raised were abandoned by the parties and finally the sole question to be decided by the Court was whether the right of Rikhi was alienable or inalienable. The trial Court held that these rights were alienable and gave a declaratory decree to the mortgagee that he was entitled to recover $13\frac{1}{4}$ seers per maund of produce from the defendants.

In appeal the then Divisional Judge, Mr. LeRossignol, confirmed the decree of the trial Court holding that the Brahmans were the owners as well as muafidars of the village and the defendants, the Rajputs, were only permanent tenants and the right claimed by the plaintiffs was a right to recover rent from a permanent tenant. The Rajputs appealed to the Chief Court, but the appeal was dismissed in limine, the Court holding that the decision of the Divisional Judge that these Rajputs were tenants was probably correct, but that in any event

the rights were alienable. The plaintiff then sought to secure a mutation of names on the basis of his mortgage and the Revenue Court first sanctioned the same, but later on they appeared to have refused the same or altered the entries back again.

The plaintiff next brought a suit for recovery of dues on the basis of 13¼ seers of each maund of produce against the Rajputs. The Financial Commissioner held that the decision as to the right being a tenant's right was an obiter dictum on the part of the Divisional Judge and presumably on the part of the Chief Court too and he held that the plaintiff possessed no proprietary right in the land in dispute and that he had not secured the sanction of the Collector to recover the equivalent of his dues under S. 48 of the Punjab Land Revenue Act. The plaintiff made another attempt to obtain a decree from the Revenue Court, but his claim seems to have been again dismissed. It seems to me that with due deference to the learned Financial Commissioner's ruling on the point the decision of the Divisional Judge upheld by the Chief Court was not obiter. The point in dispute was whether the right was alienable or not. To decide that question it was necessary to decide what the nature of the right was and rightly or wrongly the Divisional Judge decided that the right was one for recovery of rent from a permanent tenant and the Chief Court seems to have been inclined to agree with him. In any event the Rajputs failed to secure a counter-decision and the Brahmans in whose favour the decree stood could not appeal from the decree.

The plaintiff having failed in the Revenue Court brought the present suit for the recovery of Rs. 110 on cash value of the customary dues recoverable by him from Defendants Nos. 2 to 9 (Rajputs) for the past three years at the rate of 13¼ seers in each maund of defendants' produce of land in their possession. This particular land is situate in Taraf Rajputan, and admittedly this land was in the cultivating possession of the Rajputs in 1866. According to that decision, therefore, qua this land that Rajputs are proprietors of the land. The present suit was decreed by the trial Court which held that the civil Court had jurisdiction and that the nature of the rights was Prohit's rights due from the Rajputs to the Brahmans. In appeal the learned Senior Subordinate Judge upheld the decree of the trial Court holding that these rights were not jagir rights, and also were not Prohit's rights, but were a kind of customary dues recoverable by Brahman proprietors as such in accordance with an agreement embodied in the wajib-ul-arz. He also held that the plaintiff's suit was cognizable by the civil Court.

In second appeal counsel for the appellants has contended that if the judgment of Mr. LeRossignol upheld in the Chief Court is correct and the Rajputs are to be regarded as permanent tenants then the suit is not cognizable by a civil Court under S. 77, paras. (n), (i) or (o). Secondly, he contends that if these rights are to be taken as right dues from an inferior proprietor to a superior proprietor then they are barred from the cognizance of a civil Court under S. 77 (p) of the Punjab Tenancy Act. Thirdly, he contends that if they are taken to be customary dues other than the two mentioned above then they fall within the definition of "village cess" in S. 4 (12) of the Punjab Tenancy Act, and are, therefore, barred from the cognizance of a civil Court under S. 77 (j) of the Punjab Tenancy Act. He also contends that as the present plaintiff was a plaintiff in the previous suit decided by Mr. LeRossignol, that decision is res judicata between the parties who are practically the same as in that suit. In reply counsel for the respondents contends that the question of the nature of the dues is a question of fact. I am unable to see how the question of the nature of dues can be a question of fact, and I, therefore, overrule this contention.

Next counsel contends that the Rajputs are not tenants because in the award they were declared to be proprietors. He also contends that the decision of Mr. LeRossignol is not res judicata, because the parties are not the same in that there are two fresh defendants who were not parties to that case. He also contends that the Brahmans are the inferior land-owners and not the superior land-owners, because they are described as adna maliks both in the award and in the wajib-ul-arz, because they take only ⅓rd of the produce, whereas Rajputs take ⅔rds. The last argument seems to me to have no force whatsoever. A superior

land-owner would generally not take a much produce or have as many rights in the land as the inferior proprietors. No doubt, the Brahmans are described as the adna maliks and the Rajputs as the ala maliks, but the whole history of the village shows that, as a matter of fact, the rights of the Rajputs were carved out of the full proprietary rights once granted to the Brahmans, and it seems to me that in the circumstances it is a misnomer to speak of the Brahmans as adna maliks at all

The case is not free from difficulty. I do not consider that the judgment of Mr. LeRossignol can be considered to be res judicata, because the parties are not the same. It is difficult for me to hold that the Rajputs are permanent tenants in view of the terms of the award of 1866, which gave them full proprietary rights in the land cultivated by them. The incidents of tenancy and ownership are different though, no doubt, it might have been more convenient to describe the Rajputs as permanent tenants, had the arbitrators in the award of 1866 been aware of the possibilities of this definition. But the arbitrators described them as proprietors and not as tenants permanent or otherwise, and the Chief Court in that case gave no final decision as to the exact position of the parties. But the appeal must succeed on the contention either that this is a due recoverable by a superior land-owner from an inferior land-owner or that it comes within the definition of "village cess."

It seems to me that the Brahmans the original proprietors and jagirdars were really left with superior land-owners' rights in the land which were in the cultivating possession of the Rajputs. Lands which were not in the cultivating possession of the Rajputs were treated differently but I am concerned with the question of the nature of the 13¼ seers per maund of the produce which is now in dispute, and it seems to me clear that this was nothing more than a recognition of the original proprietary rights of the Brahmans in the entire village area. But even if I am wrong in this matter, it seems to me that this due falls within the definition of "village cess" because it is a due leviable by custom and is not for the use of the private property, nor for personal service, nor imposed by any enactment for the time being in force. In either event the civil Courts are barred under S. 77 (p) or S. 77 (j) of the Punjab Tenancy Act from taking cognizance of this suit and the appeal, therefore, succeeds, and the plaintiffs' suit is dismissed. Having regard to the difficulty of the case and the conflicting nature of the decisions by the civil and the revenue Courts I leave the parties to bear their own costs throughout.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 261

BROADWAY AND ZAFAR ALI, JJ.

Zakar Hussain and *another*—Plaintiffs Appellants.

v.

Mt. Ghulam Fatima and *others*—Defendants and Plaintiffs—Respondents.

Second Appeal No. 2798 of 1922, Decided on 9th November 1926, from the decree of the Dist. J., Jullundur, D/-11th August 1922.

(a) Custom (Punjab)—Sabzwari — Sayad of Maw in Phillaur Tahsil—Bequest to daughter is valid.

Among Sabzwari-Sayads of village Maw in the Phillaur tahsil of the Jullundur district a bequest of ancestral land to daughter is valid by a special custom. [P 262 C 1]

(b) Custom (Punjab) — Distinction between power of gift inter vivos and powers of testation is only a matter of form—Power of testation may be presumed when power of gift is shown.

Under the Punjab Customary Law the distinction between the power to gift inter vivos and the powers of testation is a matter of degree and form only, and when the power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation: 48 *P. R.* 1903 (*F. B.*), *Foll.* [P 262 C 2]

Badri Das—for Appellants.

Niaz Muhammad—for Respondents.

Zafar Ali, J.—On the 21st September 1917, one Sardar Ali, a sonless agricultural *Sabzwari-Sayad* of village Maw in the Phillaur tahsil of the Jullundur district, executed and registered a will by which he bequeathed half of his land to his wife and half to his two daughters, and made the further provision that on the death of his widow her share too should go to the daughters. About two years later, i. e., on the 11th November 1919, Sardar Ali died, and his widow and daughters succeeded to his estate in accordance with the will. His collaterals

in the fourth degree, who are according to general custom his next reversionary heirs, disputed his power to divert the inheritance by making a will in favour of daughters, and they sued for a declaration that the will was invalid, being contrary to custom. This claim was based on the assumption that the land was ancestral. The ladies pleaded that according to a special family custom obtaining among Sabzwari-Sayads a sonless proprietor was competent to bequeath his estate to his daughters, and they further pleaded that the land was not ancestral qua the plaintiff. The collaterals did not succeed in either of the Courts below which concurred in finding that the custom pleaded by the defendants did exist, and that out of the 309 kanals 8 marlas of land left by the testator only 80 kanals 8 marlas was ancestral. The District Judge, however, granted a certificate for second appeal on the ground that the evidence with regard to the custom was "rather" conflicting.

There can be no manner of doubt that agricultural Sayads of the Jullundur district follow custom and not their personal law, and that daughters have no right of inheritance among them. The question is, can a father give ancestral land to a daughter by will or gift? According to the Riwaj-i-am a Sayad proprietor possesses no power to dispose of ancestral property by gift or will. Questions 79 and 90 (A) of the latest Riwaj-i-am of the district and the answers thereto run thus :

Q. 79.—Can a proprietor make by word of mouth, or in writing, a disposition of his property to take effect after his death ?

A. All the tribes of the Nakodar and Phillaur tahsils state that a man can dispose of his self-acquired property by a written will but he cannot dispose of his ancestral property. The Sayads, Sheikhs, Mughals, Pathans and miscellaneous Muhammadans of the Nawanshahr tahsil also say so. * * * The Pathans, Sayads and Sheikhs of the Jullundur tahsil state that a man with full rights may dispose of his property by a written deed, while the other tribes of this tahsil say that they have no right to make a written or oral will.

Q. 90 (*A*).—Can a father make a gift of the whole or any specific share of his property, moveable or immovable, ancestral or acquired, to his daughter, otherwise than as her dowry, to his daughter's son, to his sister or her sons, or to his son-in-law ? Is his power in this respect altered if he has (1) sons ; (2) near kindred and no sons ? If the consent of the near kindred is essential to such gifts, state the degree of kindred towards him, in which the persons must stand by whom such gifts can be prohibited ?

A.—All tribes in the Phillaur, Jullundur and Nakodar tahsils except Jat Muhammadans of the Nakodar tahsil admit that a father can make a gift of any part of his self-acquired property, moveable or immovable, to his daughter, otherwise than as her dowry, to his daughter's sons, to his sister or her sons, or to his son-in-law, even in the presence of sons or near kindred. He, however, cannot make a gift of his ancestral property without the consent of sons or near kindred. * * *

As against the above the defendants set up a special family custom and we have to determine whether they have succeeded in establishing it. As already stated the parties belong to a particular sub-caste of Sayads known as Sabzwari as distinguised from Hussaini and other sub-castes. No less than three gifts by sonless proprietors have already gone unchallenged in their family. The first of these was a gift of land made by Taqi Shah (see the pedigree table of the parties given in the judgment of the trial Court) to his son-in-law Hussain Shah (grandfather of Sardar Ali, testator). The second and third are gifts of land by Chanan Shah and Muhammad Bakhsh, respectively, to Kale Shah, father of the said Sardar Ali. These were gifts inter vivos but :

> under the Punjab Customary Law the distinction between the power to gift inter vivos and the powers of testation is a matter of degree and form only, and when the power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation. *Mt. Bano* v. *Fateh Khan* (1).

Along with these unchallenged gifts we have to take into consideration the following instances of inheritance by or gifts to daughters amongst agricultural Sayads of the district :

1. Four instances of gifts to daughters or sons-in-law are cited in the pedigree-table of the Sabzwari-Sayads of village Shahpur in the Nawanshahr tahsil of the Jullundur district.

2. In "*Faiz Khatum* v. *Qazi Mahbub Alam*" where the parties were Sayads of Jullundur City the following occurs in the judgment of the learned District Judge : (Exhibit D-2, dated 30th January 1906) :

> The parties and other Sayads own plenty of land in Jullundur City. Some of them appear to be true Sayads, others not. But in both classes of cases even in nearly related cases to the family of parties there are a series of instances

(1) [1903] 48 P. R. 1903=111 P. L. R. 1903 (F.B.).

as given by the Patwari in which the daughter has succeeded her father to the exclusion of her uncle. There are instances too of a daughter succeeding a daughter and of a husband succeeding a wife to to the exclusion of a near collateral. All this show that daughter does succeed in preferen be even to a near collateral and if she succeeds to her father much more must she succeed to her mother. * * *

3. In *Saraj-ud-Din* v. *M. Hassan Bibi* where also the parties were agricultural *Sayads* of Jullundur City it was held by the Chief Court that a nephew of the last male owner was not entitled by custom to exclude his daughter from succession. The case was decided by Lal Chand, J., and the following is an excerpt from his judgment (Exhibit D. 1, dated 22nd November 1906) :

But it is contended that by custom plaintiff as a nephew is entitled to exclude Saddar Din's daughter from succession. No such custom is definitely proved on the record, the result of the enquiry conducted by the first Court being that daughters have succeeded in the majority of instances.

4. In *Shah Nawaz* v. *Muhammad Shah* the District Judge (old style) found that Sayads of village Hajipur in the Nakodar tahsil of the Jullundur district were not governed by custom and that a gift of land in favour of daughters was valid as against the plaintiff who was an agnate of the donor (see judgment Exhibit D. 8, dated 9th April 1906).

5. In *Nizam Din* v. *Game Shah*, the parties were Sayads of Jullundur and the plaintiff contested a gift to a daughter's sons. The District Judge agreeing with the trial Court arrived at the conclusion that the gift was valid by the custom. His judgment (Exhibit D. 3, dated the 13th August 1907) runs thus :

The parties have been held to follow custom and the burden of proof is on defendants to prove that the gift was valid by custom. The burden is not so heavy in this case as it would be amongst agriculturists pure and simple. There was a recent case from this district (Chief Court Civil Appeal No. 64 of 1906, Exhibit P. 3) in which the question was whether daughters succeeded to the exclusion of the collaterals amongst sayads. It was held they did not but the entry in the *Riwaj-i-am* was in favour oi the daughters. The *wajib-ul-arz* prepared at the first settlement is in favour of the gift. The of the latter Settlement says the parties follow the *Riwaji-i-am* which under the heading miscellaneons tribes says that such gifts have not been made. I think these facts greatly minimise the onus placed on defendants. Turning to the evidence produced by defendants we find no less than 13 cases of these gifts quoted by the Patwar from his register of mutations with no objections from any collaterals. No instance has been adduced where the collaterals succeessfully contested such a gift and there is practically no evidence against the very strong evidence produced by defendants in favour of the gift.

As against the above instances the plaintiffs cited the following :

(1) *Akbar Shah* v. *Chanan Shah* (Exhibit P. 8). The gift in this case was in favour of a sister and so the instance is of little value in the present case.

(2) *Amir Shah* v. *Hussain Ali* (Exhibit P. 6). This related to a gift by a widow and is not in point.

(3) *Mt. Ghulam Janat* v. *Muhammad Anwar* (Exhibit P. 3). In this case which went up to the Chief Court it was decided that among Sayads of village Dakoha in the Jullundur district daughters were not entitled to succeed in the presence of their father's uncle. This is distinguishable because there was no will or gift in favour of daughters.

(4) In *Ali Muhammad* v. *Mt. Gauhar Sultan* (Exhibit P. 4) the parties were Sayadas of Jullundur City and the District Judge (old style) found that a will in favour of daughters and widow was valid by custom and was inoperative as against the brother of the testator. This is the only instance in support of plaintiffs' case.

(5) *Mt. Nur Begam* v. *Sultan Ali* (Exhibit P. 5). In this case the parties were *Hussaini Sayads* of village Lootera Kalan in the Jullundur tahsil. The Munsif who decided the case came to the conclusion that daughters could not succeed in the presence of nephews.

(6) *Ali Sher* v. *Shah Begam* (Exhibit P. 7). This was a case of gift of ancestral land by a widow. The parties were Sayads of village Kotla in the Jullundur tahsil. It was held that the widow was not competent to make the gift.

(7) *Sardar Ali* v. *Malak Shah* (Exhibit P. 9). The plaintiff in this case was the testator Sardar Ali and he brought the suit to contest a sale of ancestral land by a near collateral. It was found that the parties were governed by custom and that the sale was without necessity and devoid of consideration. This can be of no assistance to the plaintiffs.

The above instances with the exception of No. 4 have very little bearing on the question of custom that arises in this case. On the other hand the instances cited by the defendants show that gifts to daughters are very common among Sayads of the Jullundur district and that

in case of contest they have generally been held valid. There is observable a general tendency among sonless sayads to leave their property to daughters instead of collaterals, and as daughters are excluded from succession by custom, sonless proprietors make wills or gifts in their favour. We therefore are of opinion that the concurrent finding of the Courts below on the question of custom is correct and we dismiss the appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 264

ADDISON, J.

Harnam Singh and *another*—Defendants—Appellants.

v.

Ram Ditta and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 795 of 1926, Decided on 12th October 1926, from the decree of the Dist. J., Ferozepore, D/- 23rd December 1925.

(a) *Custom (Punjab)—Alienation by father —Suit by minor son to declare it without legal necessity—Minor and his mother living with father—Suit is not collusive.*

In a suit by a minor to have a sale by his father declared without legal necessity, the mere fact that the minor plaintiff and his mother are living with the father does not necessarily mean that the suit is collusive.

[P. 264, C. 2]

(b) *Custom (Punjab) — Alienation — Legal necessity.*

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor does not expect to be sonless: 144 *P. L. R.* 1915, *Foll*; 1 *Lah.* 472, *Dist.* [P. 265, C. 2]

(c) *Custom (Punjab)—Alienation.*

Interest on a just debt is also a necessity: 144 *P. L. R.* 1915, *Foll.* [P. 266, C. 1]

J. N. Bhandari—for Appellants.

Gullu Ram—for Respondents.

Judgment.—Hazara Singh sold 100 kanals of land on the 5th September 1923, for Rs. 5,500 to Kabul Singh and Harnam Singh of the same village. At that time his wife was pregnant and a son was born to the vendor two months later. This son is the present plaintiff and he instituted a suit under the guardianship of his mother for the usual declaration that the sale was without consideration and legal necessity and should be held not to affect his reversionary rights. In the plaint and pleadings there was no allegation that Hazara Singh, the vendor was immoral, or was recklesssly extravagant or that he was wantonly contracting debts in order to destroy the interests of the reversioners. The two principal issues framed were (1) Was the sale effected for consideration and legal necessity? (2) Is the present suit collusive? The trial Court held that consideration and legal necessity had been established and without purporting to decide the second issue as to the suit being collusive, dismissed the suit; when, however, it was discussing the first issue the trial Court made some remarks in order to lead up to the discussion as to necessity. These remarks practically amounted to a finding that the suit was in reality instituted by the vendor as he was living with his wife and son.

The plaintiff appealed to the District Judge and before him the question of collusion was not taken by either party. He held that consideration had been established for the whole sum but that there was no necessity for more than half the amount. He, accordingly, decreed the claim except to the extent of items (a) and (b) and Rs. 80 under item (h). The sum which he held to be for necessity was Rs. 2,510. Against this decision the defendant-vendees have instituted this second appeal.

It was first argued that on the finding that the father had instituted the suit it must be held to be collusive and that it should have been dismissed on the authority of *Dad* v. *Lal* (1) and *Ajab Singh* v. *Sham Singh* (2). There is, however, nothing to show that the suit is collusive except the fact that the minor and his mother are living with the father. That does not necessarily mean that the suit has been instituted by the father. In these circumstances as the minor has, undoubtedly, the right to sue I am not prepared to hold that the suit is collusive.

As regards the question of legal necessity the District Judge held that the father has been borrowing the items

(1) A. I. R. 1925 Lah. 24=5 Lah. 389.
(2) A. I. R. 1925 Lah 127.

he disallowed mostly at 24 per cent from 1915 to 1920, all the loans being contracted for household expenses. As all the money was borrowed from persons resident in the village and one sum was borrowed from the vendees themselves and as the vendor held 100 kanals of land and had only one wife and a son the District Judge held that all must have known that he did not require the money and that he was recklessly contracting debts. He, therefore, decreed the claim as regards those items though he found that they had been paid.

Items (a) and (b) were Rs. 2,280 and Rs. 150 for previous mortgages on 76 kanals of his total holding of 100 kanals. The second small mortgage appears to have been recent but the mortgage for the large sum appears to have been prior to any of the subsequent loans which have been disallowed. This means that the vendor had before they were incurred only 24 kanals of land, i. e., 3 ghamaons, the produce of which was not more than 24 maunds of wheat. The District Judge did not notice this but considered that at the time these loans were contracted the vendor held 100 kanals of land.

The items disallowed are (c) Rs. 820, (d) Rs. 710, (e) Rs. 628, (f) Rs. 80, (g) Rs. 670 and half of (h) Rs. 162.

As regards item (c) Rs. 820 this was due on a bond of 1920 for Rs. 460 and at the time of the sale the sum due had risen to Rs. 820 on account of interest. The 1920 bond of Rs. 460 was executed in lieu of two previous bonds of the year 1916 for Rs. 60 and 84. The sum due on them came to Rs. 460 by the time the new bond of 1920 was executed; of the total amount, therefore, of this item only the sum of Rs. 144 was originally borrowed in 1916 from Jairam and Bishan Das. The vendor was never able to pay this amount and the sum due on this account rose to Rs. 820. The item (d) Rs. 710 was due on a bahi account to Hazara Singh. The dealings were also of 1916. Rs. 200 were borrowed then and subsequent interest raised this amount to Rs. 710 in eight years' time.

The item (f) Rs. 80 was also borrowed from a third party and is a small amount. The item (g) Rs. 670 consists of Rs. 400 borrowed from Arjan Singh in 1921 along with interest. He also is a third party. The item (h) consists of the sale and registration expenses and usually is allowed.

The only other item is (e) Rs. 628. This sum consists of Rs. 160 borrowed from Kabul Singh one of the vendees in 1915 together with interest. Nothing was borrowed after 1921, but the small sums borrowed from 1915 had swelled to a large amount on account of interest up to 1923 when the sale was effected. The initial borrowings as regards the items disallowed amount to about Rs. 900 spread over a long period and in the beginning they were not large. Apart from the question of interest, therefore, it cannot be said that the vendees should have been put on their guard by the reckless borrowing of the vendor. It must also be remembered that his income was extremely small and the land which he held was only a small area. It was not even alleged in the plaint that he was immoral or was wantonly contracting debts and the oral evidence does not establish this to have been the case. The only material from which any conclusion can be drawn concerning this question is the fact that he borrowed Rs. 900 from 1915 onwards.

In my opinion it cannot be said that he was either immoral, or recklessly extravagant, or that he was wantonly contracting debts in order to waste his property and thus injure his reversioners. Further, it has been held in *Chanda Singh* v. *Makand Singh* (3) that in the absence of any proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property strict proof of necessity for ordinary debts is not required particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor does not expect to be so unless. It was also held there that interest on a just debt is also a necessity. In these circumstances *Jhandu* v. *Niamat Khan* (4) does not apply. It laid down that an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debts or acts in bad faith or where he and the antecedent creditor are in effect one and the same person. I have no hesitation in holding, therefore, that

(3) [1915] 144 P. L. R. 1915=29 I. C. 761=61 P. W. R. 1915

(4) [1920] 1 Lah. 472=54 I. C. 842.

the items disallowed with the possible exception of item (e) were for legal necessity.

Item (e) is made up of the sum of Rs. 160 borrowed from one of the vendees in 1915 plus compound interest at 24 per cent. This sum was advanced for household necessities. In the circumstances described this is not a large amount to have borrowed. Of the items in dispute, it was the first to be advanced. Owing to the fact that most of his property was mortgaged the interest accumulated and that explains why the alienor became heavily indebted. In my opinion this item was also for legal necessity.

I accordingly accept this appeal and dismiss the suit. The appellants will get their costs in this Court.

R.D, *Appeal accepted.*

A. I. R. 1927 Lahore 266

TEK CHAND, J.

Amir Khan—Appellant.

v.

Taleh Muhammad and *another*—Respondents.

Misc. First Appeal No. 2220 of 1926, Decided on 2nd February 1927, from an order of the Senior Sub-J., Rawalpindi, D/- 22nd May 1926.

(a) *Guardians and Wards Act* (1890), *S.* 25—*Guardian being too weak to keep minors is wholly insufficient reason to refuse relief under S.* 25.

The reason that the guardian is too weak to keep the minors is wholly insufficient to refuse relief under S. 25. It is the duty of the Courts to protect the weak against the highhanded acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself, and the victims are minors under its charge. [P 268 C 1]

(b) *Guardians and Wards Act, S.* 39—*If guardian is incompetent, proceedings must be taken under S.* 39—*Until this is done, all assistance must be rendered to guardian to discharge his duties.*

If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under S. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. [P 268 C 1]

(c) *Guardiaas and Wards Act, S.* 25—*Action under.*

In order to take action under S. 25 it is immaterial whether the minors are removed forcibly or whether they left the guardian's custody of their own accord. [P 268 C 2

Chiman Lal Galati—for Appellant.

M. M. Tufail—for Respondents.

Judgment.—As the order of the lower Court under appeal is a very brief one it is necessary to give in detail the relevant facts leading up to it. On the 21st October 1922, one Amir Khan filed an application under S. 7 of the Guardians and Wards Act in the Court of L. Chuni Lal, Senior Sub-Judge, Rawalpindi, for appointment as guardian of the person of his minor daughter Mt. Begam Jan and his minor son Ghulam Mustafa, who were then stated to be 11 and 8 years of age respectively. It was alleged in the application that during the absence of Amir Khan at Baghdad his wife Mt. Aishan, who was a woman of bad character, had been enticed away by one Taleh Muhammad, retired Sub-Inspector, Police, and that it was not in the interest of the minors that they should remain with her. After enquiry L. Chuni Lal passed the following order on the 5th January 1923:

This is an application for the appointment of guardian of the person of a Muhammadan minor boy and girl. The applicant is the father of the minors, who are at present with their mother. It appears that the applicant proceeded to Baghdad and in his absence his wife left his house and began to live with one Taleh Muhammad, Sub-Inspector. It is said on her behalf now that she has married Taleh Muhammad. This Taleh Muhammad is an utter stranger and it is clear that the mother under S. 108 of Wilson's Digest of Muhammadan Law, by being married to a stranger is disqualified to keep them. This position is not contested by the counsel for the mother. As the applicant is otherwise not disqualified and is entitled to be a guardian I appoint him as such. The mother shall be called upon to hand over the minors to the applicant on the 19th January 1923.

On the 19th January, 1923, it was represented on behalf of Mt. Aishan that she was ill and was consequently unable to produce the minors. On this the Court directed that if Mt. Aishan was unable to come to Court, Taleh Muhammad should produce the minors at the next hearing and that if he had any objection to raise he should do so on that day, otherwise warrants would issue against him. On the 1st February 1923, neither Taleh Muhammad nor Mt.

Aishan appeared. The Court accordingly ordered that notice be served upon Mt. Aishan under O. 5, R. 20 that she would be arrested under S. 45 of Act 8 of 1890 if she did not produce the wards on the 12th February 1923. Notice was accordingly served on Mt. Aishan and on the 12th February both she and Amir Khan appeared. On the 14th February the Sub-Judge passed the following order :

Amir Khan was appointed guardian of her minor son and daughter per my order dated 6th January 1923. The application was granted as above stated and 19th January was fixed for the minors being handed over to the guardian by the mother. An order was sent to that effect, but nobody appeared on the 19th and the order was sent back with the endorsement by Taleh Muhammad, that the minors had gone with their aunt and that he could not, therefore, produce them. A further notice was thereupon issued that as the minors were with Mt. Aishan when the order of appointment was made she should produce them on the 1st of February. This notice was not taken and service was evaded. A further notice was again issued that if the orders are not carried out action will be taken under S. 45, Act 8 of 1890. Taleh Muhammad put in appearance, but had no power-of attorney and did not bring the minors. As orders have been contumaciously disregarded in this case, I fine Mt. Aishan Bibi Rs. 20 and to further fine of Rs. 2 for each day that the default continues. I further order that a warrant of arrest shall issue against her and that she shall be detained in the civil jail till she produces the minors or causes them to be produced or compels their return.

Soon after this order was passed Taleh Muhammad appeared in Court and stated that he would produce the children on behalf of Mt. Aishan if time was granted to him. The Court accordingly deferred the enforcing of the order till the 21st February 1923, and directed that order would come into force on the 22nd. Thereupon on the 21st the minors were made over to Amir Khan, guardian, in the presence of the Court.

On the 27th August 1925, Amir Khan, guardian, filed another application stating that the respondents, Mt. Aishan and Taleh Muhammad, had again forcibly taken away the minors from his custody and he prayed that steps be taken to restore the minors to him. Notice was ordered to issue to the respondents, but the application was dismissed in default on the 12th December 1925. On the 16th February 1926, Amir Khan presented a fresh application under S. 25 repeating his previous allegation as to the forcible removal of the two minors from his custody by Mt. Aishan and Taleh Muhammad and praying for necessary action. Notice of this application was duly served upon the respondents who appeared on the 8th May 1926, before the Sub-Judge and handed over the minors to Amir Khan, the guardian. Amir Khan executed a document admitting receipt of the minors. A little later on the same day Amir Khan appeared again in Court and stated that Taleh Muhammad had brought a motor car and 15 or 16 persons in the Court compound and was going to forcibly remove the minors from his custody. He appealed to the Court for police assistance and the Court directed the police to assist the guardian in taking away the children to his house. This was accordingly done.

On the 18th May 1926, the guardian again filed an application stating that after he had taken away the children with him to his house on the 8th May the respondents re-appeared the next day (9th May) and with the help of 10 persons took away the said minors from his house. He further stated that since then he had several times tried to get back the minors but without success. This application came up for hearing before Mr. Ahmad Yar Khan, Senior Sub-Judge, on 22nd May 1926, when he passed the following order :

The minors were sent with father and guardian under police escort. The next day, it is alleged, they were taken away by Taleh Muhammad and others. The guardian is too weak to keep the minors. It is useless to restore the minors to him. The application is rejected.

Against this order Amir Khan the guardian has preferred an appeal to this Court and I have heard Mr. Gulati on his behalf and Mr. Muhammad Tufail has addressed me for the respondents, Mt. Aishan and Taleh Muhammad. I am of opinion that the order of the lower Court cannot be sustained and the appeal must succeed. The whole conduct of Mt. Aishan and Taleh Muhammad has been most contumacious throughout. From the very beginning they have on one pretext or another tried to disobey the orders that the Senior Sub-Judge has from time to time passed and have on more than one occasion taken the law into their own hands and forcibly removed the minors from the custody of the guardian duly appointed by the

Court. Under these circumstances it was the duty of Court which appointed Amir Khan a guardian to see that this authority was maintained and that he was enabled to discharge his duties as guardian properly. The reason given by the lower Court that the guardian is too weak to keep the minors is wholly insufficient to refuse relief to him under S. 25.

It is the duty of the Courts to protect the weak against the high-handed acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. Indeed Mr. Muhammad Tufail has candidly admitted that he is unable to support the order of the lower Court on the ground on which it proceeds. He, however, contends that the guardian is an incompetent person and is unfit to remain in charge of the minors. On the materials on the record I am unable to say if this is so. If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under S. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remains in his custody.

Mr. Muhammad Tufail further contends that under S. 25 the Court may refuse to restore the minors to the guardian, if it thinks that such a course is conducive to their welfare. He argues that the lower Court should be held to have rejected the guardian's application, because it thought that it was not to the interest of the minors to be restored to him. This contention is without any force whatever. The lower Court does not give this as a reason for dismissal of the application and I see no warrant for making such an assumption. Indeed after having handed over the minors to the guardian on the 8th May, the lower Court could not have on the 22nd held that it was not to the welfare of the minors that they should live with the guardian.

As a last resort the learned counsel has argued that if the order of the lower Court is to be set aside the proper procedure would be to remand the case with a view to allow the respondents to prove that they did not remove the minors but that the minors came back to their mother and Taleb Muhammad of their own accord. After giving due weight to the arguments of the learned counsel I am of opinion that it is not necessary to remand the case for proof of this allegation. Mr. Muhammad Tufail admits that the minors have been living with the respondents since the 9th May and are still with them. In order to take action under S. 25 it is immaterial whether the respondents removed the minors forcibly or whether they left the guardian's custody of their own accord. It is competent to the Court to take action in either case. In view of all that has happened it seems to me to be highly improper to allow the minors to remain any longer with Mt. Aishan and Taleb Muhammad, who is her paramour (or her second husband as she alleges). Such a course would be contrary to the provisions of the Muhammadan Law and opposed to the express orders of the Court.

For the foregoing reasons I set aside the order of the lower Court and grant the appellant's application under S. 25. The lower Court is directed to order the respondents to surrender the minors to the appellant forthwith. The Deputy Registrar should see that a copy of this order together with the records is sent back to the Senior Subordinate Judge not later than the 4th February. The lower Court should fix a date for the appearance of parties and the production of the minors not later than a week from the date on which a copy of this order is received by it. Any further disobedience of the orders of the Court by the respondents should be dealt with in accordance with law. Respondents must pay the costs of this appeal.

R.D. *Order set aside.*

A. I. R. 1927 Lahore 268

ZAFAR ALI, J.

Kale Khan and *others*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Case No. 1793 of 1926, Decided on 20th December 1926, reported by the S. J., Lahore, on 3rd December 1926.

Criminal P. C., S. 342—S. 342 does not apply to summons cases.

Section 342 is not applicable to summons cases and where the accused files a written statement after the close of the case for the prosecution and before entering on his defence, it is not essential for the Magistrate to question him generally on the case.

Zafar Ali, J.—This being a summons case, S. 342, Criminal P. C., was not applicable.

The accused filed a written statement after the close of the case for the prosecution and before entering on his defence. It was, therefore, not essential for the Magistrate to question him generally on the case.

It is, therefore, not a fit case for interference,

R.D. *Petition dismissed.*

A. I. R. 1927 Lahore 269

ADDISON, J.

Sundar Singh-Jit Singh—Plaintiff—Appellant.

v.

Gulab Singh-Kalyan Singh — Defendant—Respondent.

First Appeal No. 2468 of 1926, Decided on 24th January 1927, from the decree of the Sub-J., 4th Cl., Amritsar, D/- 6th February 1926.

(a) *Contract Act, S. 86—Goods sent through Railway—Railway receipt addressed to self by consignor to be delivered to purchaser only on payment of money—Property in the goods passes to buyer only on payment.*

Where goods are sent through Railway, the Railway receipt being addressed to self to be delivered to the purchaser only on the receipt of the price for the goods, the property in the goods does not pass to the purchaser till the price is paid : *A. I. R.* 1924 *Lah.* 239, *Foll.* [P 271 C 1]

(b) *Contract Act, S. 107—Right of re-sale cannot be exercised until property in goods has passed to buyer.*

It is settled law that goods cannot be re-sold at the risk of the purchaser under S. 107 until the property in them has passed to him. [P 271 C 1]

(c) *Contract Act, S. 107—Vendor electing to exercise right of re sale is bound to wait for reasonable time after notice and is also bound to exercise the right within reasonable time of the breach.*

If a vendor on a breach of contract by non-payment of the purchase-money elects to exercise the right of re-sale given to him by S. 107 not only is the vendor bound to wait for a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach : 19 *All.* 535 ; *A. I. R.* 1924 *Lah.* 319, *Foll.* [P 271 C 1,2]

J. G. Sethi—for Appellant.

Fakir Chand—for Respondent.

Judgment.—The firm Gulab Singh-Kalyan Singh (hereafter to be styled firm *A*) agree to supply sugar to the firm Sundar Singh-Jit Singh (hereafter to be styled firm *B*) and an indent was written by the former firm on the 12th March 1924, in the following terms :

Firm *A* has received Rs. 550 as earnest money on account of 55 bags of No. 1 Partalpore sugar which firm *A* has agreed to sell to firm *B* at Rs. 20-8-0 per maund mill delivery. Firm *A* has agreed to make delivery in the month of March. It will hand over the Railway receipt when it receives it on payment of the balance money by firm *B*. Firm *B* will be liable for interest if it fails to accept the Railway receipt within one day. Firm *A* will allow interest on the earnest money of Rs. 550 from the date of the indent.

On the 24th June, 1924, firm *A* sued firm *B* in the Small Cause Court, Amritsar, for Rs. 92-1-6 on the allegation that firm *B* had refused to take the goods and pay the money though notice was given to it on the 22nd April, and on the 30th April, the last notice also stating that the goods would be re-sold at the risk of firm *B* if it did not complete the contract. Accordingly on the 3rd May the goods were re-sold, the loss amounting to Rs. 92-1-6 after setting off the earnest money of Rs. 550.

On the 1st July, 1924, firm *B* sued firm *A* in the Court of the Sub-Judge, Fourth Class, Amritsar, for refund of the earnest money of Rs. 550 together with Rs. 20 incidental expenses, on the ground that firm *A* committed a breach of the contract. According to this plaint the agreement was that the Railway receipt would be given to firm *A* by firm *B* when firm *B* paid the balance to firm *A* and that after the Railway receipt was offered then firm *A* could charge interest provided the money was not paid. Firm *A*, however, never informed firm *B* of the arrival of the goods or asked for the balance and refused to complete the contract when firm *B* gave notice to it on the 16th June 1924.

Both suits were sent to the Sub-Judge, Fourth Class, for trial. The plaint in the one suit was taken as the pleadings in the other suit. The Sub-Judge, Fourth Class, has decreed the suit of firm

A for Rs. 92-1-6 with costs and dismissed the suit of firm *B* with costs. Against the decree awarding firm *A* Rs. 92-1-6 firm *B* presented a revision petition in this Court and it was admitted to a hearing. Later the appeal by firm *B* in the Court of the District Judge against the dismissal of their suit for Rs. 570 was transferred to this Court, to be heard with the revision petition. This judgment will dispose of both the appeal and the revision.

It has been proved that it was not till the 28th March, 1924, that firm *B* informed firm *A* where they wanted the sugar to be sent to. Firm *A* had contracted in January with Begg Sutherland & Co. to get this particular sugar from them. Immediately after the 28th March when firm *B* told firm *A* that it wanted the sugar sent to Amritsar, steps were taken to have it consigned there and notice came from Begg Sutherland & Co., on the 22nd April 1924, that the Railway receipt was available. Though, therefore, the terms of the indent were for March delivery it must be held that the goods arrived in time, as they were sent immediately after firm *B* told firm *A* on the 28th March that the goods should be consigned to Amritsar.

There is some evidence to the effect, that firm *B* was told on or about the 22nd April that the Railway receipt had reached the Office of Begg Sutherland & Co. in Lahore. The broker, P. W. No. 1, has said that firm *B* promised to get the Railway receipt from Lahore. It was argued, however, that firm *B* could not have so promised as the indent is clearly to the effect that firm *A* agreed to hand over the Railway receipt to firm *B* on payment to firm *A* of the balance money. There is, no doubt, that that was the contract, and unless very good evidence was given that the parties later agreed to modify it, it must be held that it was the duty of the firm *A* to offer the Railway receipt to firm *B* in Amritsar on payment of the balance money. The evidence is not good enough to establish this. Admittedly the Railway receipt was never offered to firm *B* at Amritsar. It would, therefore, follow that firm *A* committed the breach of the contract.

One witness, P. W. No. 10 has stated that when he purchased goods from Begg Sutherland & Co., he paid money to them at Lahore. This does not establish any custom. Besides, it is not clear from the statement of this witness whether he dealt direct with Begg Sutherland & Co., or through someone else. His evidence, therefore, proves nothing.

P. W. No. 12 is the agent at Amritsar of Begg Sutherland & Co. He is closely connected with firm *A* which contracted to supply firm *B* with the sugar in question. According to him the usual practice was that the money for goods was paid to the Company at Lahore. His statement is not sufficient to establish any custom. Besides, though that might be the custom when the agent contracted to supply persons direct, it does not follow that it was the custom when any other person than the agent contracted to supply the goods. On the evidence, therefore, no such custom as was alleged, namely, that firm *B* should have gone to Lahore to Begg Sutherland & Co. and obtained the Railway receipt there has been established and further the contract itself is quite clear that it was the duty of firm *A* to get the Railway receipt and offer it to firm *B* on payment of the balance. As this was not done by firm *A* it must be held to have committed the breach.

Firm *B* had to pay in all Rs. 2,818-12 from which had to be deducted Rs. 550 the earnest money. It had thus to pay Rs. 2,268-12 when the Railway receipt was offered to it by firm *A*. Now firm *A* had only to pay Begg Sutherland & Co. Rs. 2,612-8 of which it had already paid Rs. 660 as earnest money. Firm *A* could, therefore, get the receipt from Begg Sutherland & Co. at Lahore on payment of Rs. 1,952-8-0 whereas firm *B* had still to pay firm *A* Rs. 2,268-12. It is impossible to believe in these circumstances that it was meant that firm *B* should go to Lahore and obtain the Railway receipt on paying the balance due to Begg Sutherland & Co. Counsel for firm *A* has been unable to show me in what manner such an arrangement could have been carried out.

On the finding above that the breach was committed by firm *A* in not obtaining the receipt according to the indent and offering it to firm *B* both the revision petition and the appeal must be accepted. There are, however, certain other matters in connexion with these cases which must be mentioned. It has been proved that firm *B* was given notice on the 30th April that, if it did not take the goods

and pay the money, firm *A* would re-sell them at their risk. Firm *A* then proceeded to Lahore on the 2nd May and got from Begg Sutherland & Co., the Railway receipt probably on the morning of the 3rd May. Its representative returned to Amritsar on the 3rd May and that very day, that is the day when the Railway receipt was obtained by it, firm *A* sold the goods. The suit as brought was under S. 107 of the Contract Act for the loss incurred by the re-sale. In *Ram Prasad Babu* v. *Paul Brothers* (1) it was held that where goods were sent through Railway, the Railway receipt being addressed to self to be delivered through a Bank to the purchaser only on the receipt of the price for the goods, the property in the goods, did not pass to the purchaser till the price was paid. In the present case the Railway receipt was addressed by the consignor to himself. Until, therefore, the price was paid by firm *B* the property in the goods did not pass to it. A similar view was taken in *Gulab Rai Sagar Mal* v. *Nirbhe Ram Nager Mal* (2). It is settled law that goods cannot be re-sold at the risk of the purchaser under S. 107 of the Contract Act until the property in them has passed to him. It, therefore, follows that even there had been a breach the suit should only have been for damages to be measured by the difference of the rate between the contract price and the rate on the date of the breach and the present suit was incompetent. There is evidence about the rates of Java and other kinds of sugar but none of Partalpore sugar. For this reason also the suit by firm *A* should have failed.

Again it was held in *Prag Narain* v. *Mul Chand* (3) which has been followed in *Firm Abdul Hakim-Muhammad Sadik* v. *Joho Jautzen* (4) that if a vendor on a breach of contract by non-payment of the purchase-money elects to exercise the right of re-sale given to him by S. 107 of the Indian Contract Act, not only is the vendor bound to wait for a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach. In the present case notice of re-sale was given on the 30th April before the Railway receipt was with firm *A* and on the 3rd May, that is the very day, firm *A* obtained the Railway receipt the goods were re-sold. There could thus have been no proper steps to advertise the goods and to see that the best possible price was obtained. In these circumstances firm *A*, even if the breach had been committed by firm *B*, would only have been able to claim damages on the difference of rates and not on the loss on re-sale.

I accordingly accept the revision and dismiss the suit of Gulab Singh-Kalyan Singh with costs throughout. I also accept the appeal and grant the firm Sundar Singh-Jit Singh a decree for Rs. 550 with costs throughout.

R.D. *Revision and appeal accepted.*

(1) A. I. R. 1926 Oudh 46.
(2) A. I. R. Lah. 239=4 Lah. 423.
(3) [1897] 19 All. 535=(1897) A.W.N. 150.
(4) A. I. R. 1924 Lah. 319.

A. I. R. 1927 Lahore 271

SHADI LAL, C. J.

Gurdit Singh and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Case No. 204 of 1926, Decided on 25th February 1927.

Criminal P. C., S. 526—Accused residing in one district—Complainant resident of that district—Incident leading to defamation taking place in that district—Complaint in another district was held for harassing accused.

Where the accused were residents of one district and the complainant himself originally resided in that district and the incident which has led to the prosecution of the accused for defamation, also took place in that district.

Held: that the case has been instituted in another district in order to harass the accused and should be transferred to the former.

[P. 271 C 2; P 272 C 1]

Shamair Chand—for Petitioners.

Anant Ram—for Respondent.

Shadi Lal, C. J.—Considering that the accused who are thirteen in number are residents of the Jullundur District, that the complainant himself originally resided in that district, and that the incident which has led to the prosecution of the accused for defamation, also took place in that district, I am of opinion that the case has been instituted in the

Mortgomery District in order to harass the accused.

I accordingly transfer the case from the Court of the Magistrate at Montgomery to a Magistrate of the 1st Class at Jullundur.

Order accordingly.

R.D.

A. I. R. 1927 Lahore 272

BROADWAY AND ZAFAR ALI, JJ.

Muhammad Bakhsh-Karam Elahi—Plaintiffs—Appellants.

v.

Shadi Muhammad-Muhammad Bakhsh—Defendants—Respondents.

Second Appeal No. 1397 of 1923, Decided on 3rd November 1926, from the decree of the Addl. J., Lahore, D/- 5th March 1923.

(a) *Evidence Act, Ss. 101 and 103—Unregistered document, containing admission of payment of consideration proved—Party executing document must prove that he did not receive consideration.*

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration: A. I. R. 1925 *Lah.* 471, (*F. B.*), *Foll.*

[P. 272, C. 2]

(b) *Civil P. C., O. 41, R. 25—Defendant losing sight of his having to discharge onus of rebutting plaintiff's evidence—It is not a sufficient ground for remand.*

Where the issues were correctly settled, parties throughout were fully aware of what they had to prove but the defendant lost sight of the fact that the onus of rebutting the plaintiff's evidence was on him,

Held: that that is not a sufficient ground to remand the case in order that he might have a second opportunity of rebutting the plaintiff's evidence. [P. 273, C. 1]

Tirath Ram and *Muhammad Amin for Abdul Qadir*—for Appellants.

Shuja-ud-Din—for Respondents.

Broadway, J.—The firm Muhammad Bakhsh-Karam Ilahi sued the firm of Shadi Muhammad-Muhammad Baksh for a sum of Rs. 3,259-0-3, claiming that that amount was due as a result of certain transactions between the two firms as evidenced by the account books. Subsequent to the filing of the suit a sum of Rs. 314 was said to have been paid by the defendant firm to the plaintiff firm and consequently the actual amount claimed was Rs. 2,945-3-0. The parties are Khojas of Kasur in the district of Lahore and are related to each other. One of the defendants is an uncle of one of the plaintiffs. The entries in the account books of the plaintiffs are mainly in the handwriting of the defendant Muhammad Bakhsh who is the uncle. There are two or three balances struck, some signed by both the defendants, the last one being written by Mnhammad Bakhsh and signed by Shadi Muhammad. The Courts below dismissed the plaintiffs' suit on the ground that the onus of proving the correctness of the accounts had not been discharged by the plaintiffs.

With regard to the first balance of Rs, 1,841-6-0, while it was admitted that the defendants had struck this balance, the Courts below held that it was necessary for the plaintiff firm to prove each and every item of that account before the striking of the balance. In doing so the Courts have lost sight of the principle laid down by a Full Bench of this Court in *Ram Chand* v. *Chhunnu Mal* (1), where it was held that

> where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration.

In this case all the former decisions of this Court as well as authorities from other High Courts were considered and carefully weighed. Admittedly this balance of Rs. 1,841-6-0 was struck by the defendants and signed by both of them. In it that amount is acknowledged as due to the plaintiff firm. All that the plaintiff firm was called upon to do was to prove that this balance had as a matter of fact been struck by the defendants. This they have admittedly done. It was then for the defendants to prove the circumstances in which they came to execute that balance and to establish the fact that it had been induced by fraud or without a proper comprehension of the accounts, etc.

The next item for consideration is one of Rs. 1,857-1-9. This is signed by both the defendants and they acknowledged the fact that this amount is due on

(1) A. I. R. 1925 Lah. 471=6 Lah. 470 (F.B.)

account of losses in connexion with certain cotton transactions. This item has been disallowed by the Courts below on the ground that there was no proof of the actual delivery of the cotton. Here again the principle referred to above has been entirely lost sight of. Both the defendants having admitted in writing that this amount was due on account of losses incurred in connexion with dealings in cotton it was for them to establish that the transaction was a badni one or one which could not be enforced in a Court of law and that, therefore, they were not liable to pay that amount, their admission notwithstanding. It has been urged by Dr. Shuja-ud-Din for the respondent firm that the suit was one on a balance and that it was not maintainable. An examination of the plaint shows beyond question that the suit is not one on a balance. It is clearly a suit for the payment of money due as a balance resulting out of certain dealings which had extended over a definite and stated period. The balances struck have been referred to merely as pieces of evidence in the case. This view is supported by the authorities cited by Dr. Shuja-ud-Din which need no discussion. He then asked that the case should be remanded in order that the defendants-respondents should be given an opportunity to produce evidence rebutting the presumptions arising out of their admissions. It appears that issues have been correctly settled, parties have throughout been fully aware of what they had to prove, and if the defendant firm lost sight of the fact that the onus of rebutting the plaintiffs' evidence was on them, that is not, in my opinion, a sufficient ground to remand the case in order that they might have a second oppportunity of rebutting the plaintiffs' evidence. In my judgment the decisions of the Courts below is erroneous owing to the fact that they have taken a wrong view on the question of the onus in this case.

I would, therefore, accept the appeal and grant the plaintiffs a decree for the amount claimed with costs throughout.

Zafar Ali, J.—I concur.

R.D. *Appeal accepted.*

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A. I. R. 1927 Lahore 273

ADDISON, J.

Devi Ditta—Plaintiff—Petitioner.

v.

Babu Ram—Defendant—Respondent.

Civil Revision Petition No. 686 of 1926, Decided on 18th January 1927, against the decree of the Addl. Sub-J., 4th Class, Unao, Dist. Hoshiarpur, D/- 12th May 1926.

(a) *Limitation Act, S.* 5 *and Art.* 158—*Scope.*

Section 5 does not apply to applications under Art. 158. [P 273, C 2]

(b) *Limitation Act, Art.* 158—*Time cannot be extended by Court.*

Objections to the award must be taken within ten days and this time cannot be extended by the Court : 18 *C. W. N.* 626, *Foll.* [P 274, C 1]

Duni Chand—for Petitioner.

I. C. Chopra—for Respondent.

Judgment.—During the pendency of a suit the parties referred the subject-matter of the suit to the arbitration of Pandit Narain Chand who on the 12th of April 1926, in the presence of the parties filed his award in Court. The Court fixed the 26th of April 1926, as the date up to which parties could file objections to the award. On the 26th of April 1926, objections were filed, but the Court has held that these objections were time-barred under Art. 158 of the First Schedule to the Indian Limitation Act as they were not filed within ten days after the award was presented to the Court by the arbitrator in the presence of the plaintiff. As the Court held that the objections were barred it proceeded to pass a decree in accordance with the award. Against the order of the Court refusing to entertain the objections the plaintiff has applied here on the revision side.

Article 158 of tha First Schedule of the Indian Limitation Act is quite clear. Ten days is the time within which the plaintiff should have presented his objections to the award after it was filed in Court in his presence. The objection should, therefore, have been presented by the 23rd of April and not on the 26th of April. The words of S. 5 of the Indian Limitation Act show that this section does not apply to such applications. There is a direct authority in the case of *Surya Narain Jha* v.

Bhanwari Jha (1) a decision of the Calcutta High Court in a case very similar to the present in which it was held that no application having been made within the time prescribed by Art. 158 it was not competent to the Court to extend the time prescribed by that article.

It was argued, however, that the petitioner was deceived by the order of the Court; this appears to me to be of no consequence. The law is quite clear. Ten days was the proper period. That time could not be extended by the Court and it was for the plaintiff if he desired to present objection to do so within the period prescribed by law. The result is that this revision must fail and I dismiss the petition, but leave the parties to bear their own costs here as the point raised is a novel one.

R.D. *Petition dismissed.*

(1) [1912] 18 C. W. N. 626=17 I. C. 7=18 C. L. J. 35.

A. I. R. 1927 Lahore 274

AGHA HAIDAR, J.

Muhammadi and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1295 of 1926, Decided on 10th February 1927, from an order of the Magistrate, 1st Class, Muzaffargarh, D/- 13th November 1926.

(a) *Criminal P. C., S. 239 (d)—Same transaction—Common purpose must be seen—Unity of time and place are not always safe guides.*

Before different offences can be said to have been committed "in the course of the same transaction" by the various persons charged with the same, the Court must see whether such persons had a common purpose, resulting in actions which constituted a concatena of events ultimately leading to the commission of such offences. The tests of unity of time and unity of place as regards the offences with which the various accused persons may be charged, are not always safe criteria for the purpose of determining whether or not these offences were committed" in the course of the same transaction." Each case must depend on its own facts and circumstances. [P 275, C 1, 2]

(b) *Criminal P. C., S. 239 (d)—Joint trial of persons for acts not committed in the course of same transaction vitiates the whole trial and is not an irregularity curable by Criminal P. C., S. 537.*

A case of joint trial of several persons of acts not committed in the course of the same transaction is not a mere case of irregularity which can be cured by the provisions of S. 537, but on the other hand, it is a case of illegality and vitiates the whole trial: 25 *Mad.* 61 (*P. C.*), *Foll.* [P 276, C 1]

S. A. Nasir—for Appellants.

Sleem—for the Crown.

Judgment.—The four appellants, Muhammadi, Imam Bakhsh alias Imaman, Kariman and Habib, have been convicted and sentenced to various terms of imprisonment by a learned Magistrate, exercising powers under S. 30 of the Criminal P. C. Along with these four persons a lad named Kala was also convicted and ordered to be whipped. The sentence of whipping has not been carried out, I understand, on the ground of physical unfitness. Mnhammadi was charged under Ss. 379, 225, 148 and 325 and the remaining three appellants under Ss. 225, 147, 149 and 325 of the I. P. C. They have all been convicted under the various sections under which they were charged. It may be noted here that Muhammadi alone was charged under S. 379 of the I. P. C. The four convicted persons had filed one appeal from jail, but at the time of the hearing they were presented by Counsel Mr. S. A. Nasir. He has raised a nice preliminary point as to the legality of the trial in the Court below. He says that it was a case of misjoinder of charges which was not saved by S. 239, Cl. (d) of the Criminal P. C. The point arises in the following manner.

One Imaman, deceased, was watching the mango crop of a certain grove in a village on the 7th of June 1926. A relation of his, namely, Khuda Bakhsh, brought him his midday meal and they both ate it and lay down under the shade of one of the trees to enjoy their afternoon siesta. They woke up by the noise caused by the fall of a mango and when Imaman deceased went to pick it up, he saw Muhammadi accused perched on the higher branches of the tree. Muhammadi was apparently plucking mangoes while Imaman and his companion were resting. On seeing Imaman approaching, Muhammadi climbed down from the tree and tried to escape. He was, however, pursued by Imaman and Khuda Bakhsh and was soon overtaken and secured with the help of a third man, named Ghulam Ali,

and was tied with his own turban. At this moment Muhammadi saw Dina, his nephew, tending his sheep near the mango grove. Muhammadi hailed him and asked him to go to his (Muhammadi's) brothers who were not very far off and inform them of his plight. Shortly afterwards the other accused, that is to say, Imam Bakhsh, Kariman and Habib along with Kala, came on the spot duly armed with lathis and demanded the release of Muhammadi. His captors having refused the Accused Nos. 2 to 5 attacked them and succeeded in rescuing Muhammadi. Muhammadi too, on being thus released, joined his brothers in the attack. Ghulam Ali and Khuda Bakhsh received minor injuries, but Imaman's injuries proved to be more serious so much so that he succumbed to them. This is the story on behalf of the prosecution.

Now, in order to hold that the joint trial of all these five persons under the various charges was legal, it must be proved that it came within the provisions of S. 239, Cl. (d) of the Criminal P. C. In other words, it must be shown that the different offences with which these accused persons are charged were committed in the course of the same transaction. The phrase 'same transaction' has, for obvious reasons, not been defined by the Legislature, but it has been interpreted by the various High Courts in India, so that its meaning and intendment are well-understood. The difficulty occasionally arises only in applying the principles deducible from the volume of case-law on the subject, to the particular facts of a case. Before different offences can be said to have been committed "in the course of the same transaction" by the various persons charged with the same, we must see whether such persons had a common purpose, resulting in actions which constituted a concatena of events ultimately leading to the commission of such offences. The tests of unity of time and unity of place as regards the offences with which the various accused persons may be charged, are not always safe criteria for the purpose of determining whether or not these offences were committed "in the course of the same transactions." Cases might occur when such tests may be of very great help, but, on the other hand, there may be cases in which a Court of justice cannot treat such tests as a proper guide in arriving at the right conclusion. Each case must depend on its own facts and circumstances. The learned counsel for the appellants has invited my attention to two cases: *Muhammad Shah* v. *Emperor* (1) and *Tilakdhari Mahton* v. *Lali Singh* (2). The Public Prosecutor has referred to *Emperor* v. *Datto Hanmant Shahapurkar* (3). These cases have undoubtedly a bearing upon the case before me. To these cases may usefully be added *Pahlad* v. *Emperor* (4) and *Gobind Koeri* v. *Emperor* (5),

Now, let us turn to the facts of the present case. Muhammadi, according to the prosecution, was caught red-handed while stealing mangoes. There is no suggestion that Muhammadi's act of stealing mangoes was the result of a conspiracy or that the other accused persons even knew of it. In fact it appears that they did not know anything at all about Muhammadi's movement at this time. They came up only when the lad, Dina, informed them that Muhammadi had been captured by the complainant's party, so that Muhammadi's act of stealing mangoes was absolutely separate from the subsequent acts of the rescuing party, the remaining four accused. Therefore, the offence of theft under S. 379 was one which Muhammadi alone is alleged to have committed and with which the other accused had nothing whatsoever to do. There was no intention of committing the theft on the part of the other accused persons who had no knowledge whatsoever as to what Muhammadi had been doing at that particular time. Hence it cannot be said that the theft committed by Muhammadi was part of the transaction which began with the assault by the other accused persons and subsequently by Muhammadi himself, on the complainant party. It need hardly be said that, in view of the law laid down by their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v.

(1) [1921] 23 Cr. L. J. 268=66 I. C. 332.
(2) [1909] 13 C. W. N. 804=1 I. C. 69=9 Cr. L. J. 147.
(3) [1906] 30 Bom. 49=7 Bom. L. R. 633.
(4) [1920] 1 Lah. 562=57 I. C. 450=7 P. L. R. 1921.
(5) [1902] 29 Cal. 385=6 C. W. N. 468.

King-Emperor (6), it is not a mere case of irregularity which can be cured by the provisions of S. 537, of the Criminal P. C.; but, on the other hand, it is a case of illegality and vitiates the whole trial. It is unfortunate that the point which was so obvious did not strike either the Public Prosecutor or the learned Magistrate who is apparently a senior officer with S. 30 powers.

The result is that I quash the conviction of all the five accused and order a re-trial. Muhammadi must be tried separataly on a charge under S. 379 of the I. P. C. He should also be tried along with the other accused under the other sections.

On the merits of the case, it may be noted, I express no opinion whatsoever.

R.D. *Re-trial ordered.*

(6) [1902] 25 Mad. 61=28 I. A. 257=11 M. L. J. 233=8 Sar. 160 (P. C.).

A. I. R. 1927 Lahore 276

TEK CHAND, J.

Municipal Committee, Multan—Defendant—Appellant.

v.

Bhai Kishan Chand — Plaintiff—Respondent.

Second Appeal No. 2418 of 1926, Decided on 15th February 1927, from the decree of the Dist. J., Multan, D/- 25th May 1926.

(a) *Punjab Municipal Act, S. 172 — Section applies only to newly built structures.*

Section 172 must be restricted to newly built structures and has no applicability to cases in which an old projection has been demolished, and substituted by new one. [P 276 C 2]

(b) *Interpretation of statutes—Courts should not supply the deficiencies of Legislature.*

It is not the function of a Court to read into an enactment words that are not there. The Courts are to construe its provisions according to their plain meaning and not to supply the deficiencies of the Legislature : *Crawford* v. *Spooner* (6 *Moore P, C.* 9), *Foll.* [P 277 C 2]

(c) *Interpretation of statutes — Penal enactment must be strictly construed—Cases not falling strictly within the words should not be included.*

Strict construction must be placed upon a penal enactment. In construing such an enactment no case must be held to fall within it, which does not come both within the reasonable meaning of its terms as well as within its spirit and scope. [P 277 C 2]

If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a Court to extend them : 25 *Cal.* 160; 21 *Mad.* 4 ; 6 *N. L. R.* 53 and 56 *P. R.* 1911, *Rel. on.* [P 278 C 1]

Obedullah—for Appellant.

Mehr Chand Mahajan — for Respondent.

Tek Chand, J.—The plaintiff respondent is the owner of a house situate in Multan City, which has a latrine built on the second floor at a height of 35 feet above the ground level, in such a manner that a triangular portion of it, 5 feet by 1 foot) projects over the Municipal road. The findings of the learned District Judge relating to this projection are that a similar structure had existed on the spot for over 50 years, that the wooden beam, which supported it, having got decayed required to be replaced and this necessitated a reconstruction of the projection. The plaintiff accordingly rebuilt a new projection of the same style and dimensions as the old one but before doing so he did not obtain the written permission of the Municipal Committee. Soon after, a notice under S. 172 of the Punjab Municipal Act was served upon him, requiring him to demolish the structure. On receipt of this notice the plaintiff instituted a suit for a permanent injunction against the Municipal Committee praying that the defendant be directed not to demolish the projection. The suit was dismissed by the Subordinate Judge but on appeal has been decreed by the learned District Judge.

The Municipal Committee has preferred a second appeal to this Court and on its behalf Mr. Obedullah has contended that the learned District Judge was in error in taking too narrow a view of S. 172 of the Municipal Act and in holding that that section applied only to new structures and did not cover cases of reconstruction of pre-existing structures. Both counsel have addressed me at considerable length and after giving full consideration to their arguments, I am of opinion that the interpretation put on the section by the learned District Judge is correct and that his judgment must stand.

Section 172 as worded must be restricted to newly built structures and has no applicability to cases in which an old projection has been demolished, and sub-

stituted by a new one. Before examining the arguments of the learned counsel it seems to me necessary to reproduce S. 172 of the Municipal Act. The section is divided into two clauses. Cl. (1) reads as follows :

Whoever, without the written permission of the Committee, builds or erects any immovable encroachment upon the ground level of any street or over any sewer, drain or water-course, or builds or makes any immovable overhanging structure projecting into a street at any point above the said ground level, shall be punishable with a fine which may extend to fifty rupees,

Cl. (2) authorizes the Municipal Committee to issue notice to the owner or occupier of any building requiring him to remove or alter such immovable encroachment or overhanging structure as aforesaid.

It will be seen that Cl. (2) specifically refers to encroachments or overhanging structures as described in Cl. (1), and in that clause the penalty is limited to building or erecting and does not extend to rebuilding or re-erecting an existing encroachment or overhanging structure. Mr. Obedullah contends that the words "erect" and "re-erect" have been used indiscriminately in the Act but there seems to be no warrant, for this assertion. As pointed out by the learned District Judge, a comparison of the provisions of S. 172 with those of S. 189 shows that in the latter section the penalty is provided both for erecting as well as for re-erecting a building of the kind specified therein, without the permission of the Committee ; but in the former section the word 're-erect' is not used. It is, therefore clear that wherever the Legislature intended to penalize the rebuilding or re-erecting of an existing structure, it has specifically said so and in the absence of express words, it does not seem to be permissible to include in the section a transaction which is not mentionod in it.

Mr. Obedullah further drew my attention to S. 8 (5) of the Act, which states that the expression "erect or re-erect any building" includes alterations, conversions and constructions of buildings in the manner specified in that clause and from this he argued that the words "erect" and "re-erect" must be considered to be synonymous. In my opinion this argument also is devoid of all force. The clause merely lays down that the words "erect" or "re-erect" wherever used in the Act would include certain specific structures, which it is conceded, do not cover the projection in question. From the definition of the expression "erect" or "re-erect" as given in this clause which is not exhaustive, but is merely inclusive of certain things, it cannot be argued that the words "erect" and "re-erect" are synonymous. On the other hand the sequence of the two words in that clause leads me to infer the contrary.

As a last resort Mr. Obedullah contended that the omission of the word "re-erect" in S. 172 is a *casus omissus* and as there seems to be no good reason why the legislature while penalizing the first erection of an encroachment or structure of the kind described, should have omitted to bring within its purview, re-erection of a similar kind and under similar circumstances, he suggests that the omission must be considered to have been unintentional and that in interpreting the section the Court must take note of this fact. This is an argument, which I cannot for one moment accept. It is well settled that it is not the function of a Court to read into an enactment words that are not there. The Courts are to construe its provisions according to their plain meaning and not to supply the deficiences of the legislature. As laid down by their Lordships of the Judicial Committee in the well-known case of *Crawford* v. *Spooner* (1).

we cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and by construction make up deficiencies which are left there.

Whether the omission flowed from forgetfulness of the draftsman or was intentional, is no concern of the Courts, and a *casus omissus* cannot be supplied by a Court of law "for that would be to make laws."

It would also be borne in mind that S. 172 is a penal provision of the law, and a strict construction must be placed upon it. It is well settled that in constructing such an enactment no case must be held to fall within it, which does not come both within the reasonable meaning of its terms as well as within its spirit and scope. As remarked by Wright, J., in *London County Council* v. *Aylesbury Co.* (2).

(1) [1847] 4 M.I.A. 179=6 Moo. P.C. 1 (P.C.).
(2) [1898] 1 Q.B. 106=67 L.J. Q.B. 724=61 J. P. 759=77 L.T. 440.

where enactment may entail penal consequences no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language. To determine that a case is within the intention of a statute its language must authorize the Court to say so: but it is not admissible to carry the principle that a case, which is within the mischief of a statute, is within its provisions so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated.

If the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a Court to extend them.

I am fortified in the above conclusion not only by an examination of the wording of the section but also by decisions given by different Courts in India under the analogous provisions of other Municipal Acts, most of which are referred to in the judgment of the learned District Judge. In *Eshan Chunder* v. *Banku Behari* (3) which was a case under S. 204 of the Bengal Municipal Act 3 of 1884, the terms of which are substantially similar to those of S. 172 of the Punjab Act, it was held that that section did not apply to the case of a projection forming part of a building which was constructed in substitution for an old building which had existed on the same site for a long time. It was held that it would be too narrow a construction of the section to hold that it applied to the case of a new building substituted for an old building. The same view was taken by the Bombay High Court under the corresponding S. 48 of the Bombay District Municipal Act, 6 of 1873. The Madras Court also in *Municipal Council, Tanjore* v. *Vishvanatha Rau* (4) has similarly interpreted the provisions of the Madras District Municipalities Act 4 of 1884. The whole question is elaborately and exhaustively discussed in a judgment of the Judicial Commissioner of Nagpur reported as *Ram Dulari* v. *Chindwara Municipality* (5) where after an examination of the relevant provisions of the various provincial Acts it was held that S. 48 of the Central Provinces Municipal Act 1908 applied to the erection of a structure for the first time and not to the simple re-erection of an old structure which had been taken down for a temporary purpose only. There are observations in *Mahomed Yasin* v. *Municipal Committee* (6) and *Sukh Raj* v. *Kanhaiya Lal* (7) (criminal) which also lend support to the same view, though the facts of those cases are not wholly similar.

I, therefore, hold that the learned District Judge had rightly held that S. 172 was inapplicable to the facts of this case and that the plaintiff-respondent was entitled to the injunction prayed for. The appeal fails and is dismissed with costs.

G.B. *Appeal dismissed.*

(3) [1888] 25 Cal. 160=1 C.W.N. 660.
(4) [1897] 21 Mad. 4=7 M.L.J. 273.
(5) [1910] 6 N.L.R. 53=6 I.C. 431.
(6) [1911] 56 P.R. 1911=130 P.L.R. 1911=9 I.C. 889=91 P.W.R. 1911.
(7) [1915] 2 P.R. 1915=28 I.C. 113=194 P.L.R. 1915.

A. I. R. 1927 Lahore 278

ADDISON, J.

Devi Das and *another*—Defendants—Appellants.

v.

Nizam Din and *others*—Plaintiffs—Respondents.

Second Appeal No. 2437 of 1926, Decided on 27th January 1927, from the decree of the Dist. J., Jhelum, D/- 31st May 1926.

(a) *Custom Punjab—Kashmiris.*

Kashmiris residing in the City of Jhelum are governed by custom: 17 *P. R.* 1923, *Foll.* [P 278 C 2; P 279 C 1]

(b) *Will—Bequest to two or more legatees take as tenants-in-common.*

The legatees, under a bequest to two or more persons jointly, take the property bequeathed as tenants-in-common and not as joint tenants: *A. I. R.* 1921 *All.* 50, *Foll.* [P 279 C 2]

(c) *Will—Extinction of a legatee's line—Testator's heir cannot be deprived of the consequent reversion on the ground of his having been originally deprived.*

On the extinction of a legatee's line when the property reverts to the testator, an heir of the testator cannot be deprived of the reversion on the ground that he was originally deprived of any share in the property. [P 279 C 2]

Ram Lal Anand—for Appellants.

Azimullah—for Respondents.

Judgment.—The following pedigree-table is necessary:

(For pedigree see next page.)

The family is a Kashmiri one residing in the City of Jhelum, and its members

are governed by custom as laid down in *Mehtab Bibi* v. *Hussain Bibi* (1). Ilahi Bakhsh on the 3rd May, 1910, mortgaged half of a property to Devi Das and Kundan Lal. On the 19th April 1922, these two persons sued on their mortgage and obtained a decree for sale of the mortgaged property. Before the sale took place the two husbands of two deceased sisters of Ilahi Bakhsh, and the children of a third sister of Ilahi Bakhsh instituted the present suit for a declaration that the half of the property which had been mortgaged by Ilahi Bakhsh, belonged to them. The whole property had belonged first of all to Karim Bakhsh who had given it to his wife Mt. Hussain Bibi in lieu of dower and she had bequeathed one-half to Fazal Karim and one half to her three daughters excluding Ilahi Bakhsh. Devi Das and Kundan Lal challenged both the gift to Mt. Hussain Bibi in lieu of dower and the Will made by her.

The trial Court dismissed the suit on the ground that the gift in favour of Mt. Hussain Bibi in lieu of dower had not been established. The lower appellate Court found that this gift in her favour had been established and that the Will made by her giving the property half to Fazal Karim and half to her three daughters, had also been established and that both the gift to Mt. Hussain Bibi and the Will by her were valid by custom. It further held that the two husbands of two of the deceased daughters had no right in the half share gifted to the three daughters as they had failed to establish under custom their right to succeed to their wives. The lower appellate Court, however, did not go on to determine what was the effect of these two husbands having no right in the half share of the property but was content to say that Ilahi Bakhsh in any case had no right in it as he had been originally specifically deprived of his share in the property. The lower appellate Court accordingly granted a decree to the plaintiffs to the effect that their half share in the property, that is the half share mortgaged by Ilahi Bakhsh was not liable to sale under the mortgage decree in question. Against this decision the contesting defendants have preferred this appeal.

This appeal is for the most part concluded by the findings of fact and custom to the effect that both the gift to Mt. Hussain Bibi and the Will by her were proved and were valid by custom and also by the finding that Ilahi Bakhsh only lived in the property in question with the permission of his brother Fazal Karim who was a co-sharer in the property. On the District Judge's own finding, however, two-thirds of one-half, namely, the shares of the two deceased wives did not belong to their husbands.

KARIM BAKHSH=Mt. HUSSAIN BIBI

Ilahi Bakhsh, deft. No. 3.	Fazal Karim, deft. No. 4.	Mt. Bevi= Nizam Din [husband] pltff. No. 1.	Ilahi=	Mt. Rahmat Aziz [husband] pltff.	Mt. Fazal Begam Ibrahim

Abdul Rashid, pltff. No. 3.	Mt. Zinat Bibi, pltff. No. 4.	Mt. Fazilat Begam, pltff. No. 5.

He has not decided what would happen under custom to those shares. It is certainly wrong in holding that Ilahi Bakhsh had no right to succeed to these shares as he was originally deprived of any share in the property. Ordinarily speaking, as the half share of the property was willed to the three daughters jointly they would be tenants-in-common: see *Rampiari* v. *Krishna Piari* (2). Further, ordinarily speaking, under custom the two shares of the deceased daughters, namely, two-thirds of one-half would revert to the original donor's line.

It is not clear whether the other plaintiffs who are the descendants of the third daughter would get any share of their two deceased aunts' shares. So

(1) [1912] 17 P. R. 1913=249 P. L. R. 1913=15 I. C. 556=124 P. W. R. 1912.

(2) A. I. R. 1921 All. 50=43 All. 600.

far as the decision of the District Judge goes, Plaintiffs Nos. 3, 4 and 5, i. e., the children of Mt. Fazal Begam, are certainly entitled to a declaration that they are owners of one-sixth of the whole property that is one-third of the mortgaged half share. This second appeal must be accepted and the matter remanded to the District Judge to decide whether these particular three plaintiffs are entitled to any portions of the shares of Mt. Bevi and Mt. Rahmat Ilahi deceased. If they are, then the share to which they are entitled from these two deceased persons should be added to the one-sixth share of the whole property to which they are certainly entitled and a decree given to the extent to which these three plaintiffs are found entitled. It is impossible for me to decide this point here and it must be remanded for this purpose. The remand is under O. 41, R. 23, Civil Procedure Code. The parties will bear their own costs here. Court-fee on this appeal will be refunded.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 280

CAMPBELL AND TEK CHAND, JJ.

Bhagwan Singh and *others*—Defendants—Appellants.

v.

Mt. Kawal Kaur and *others*—Plaintiffs—Respondents.

First Appeal No. 2122 of 1922, Decided on 7th February 1927, from the decree of the 1st Cl. Sub-J., Jhang, D/- 22nd May 1922.

Hindu Law — Maintenance — Manager is bound to maintain widow and children of deceased male member.

A grandfather may be under no personal obligation to maintain his grandchildren, but the manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children, and on the death of one of the male members he is bound to maintain his widow and his children.

[P. 280, C. 2]

Nanak Chand and *Mehr Chand Mahajan*—for Appellants.

Mukand Lal Puri—for Respondents.

Campbell, J.—One Bahagwan Singh had a son Sulakhan Singh, who was employed in the Kangra District as a Forest Ranger and died in November 1918. Sulakhan Singh left a vidow Mt. Kewal Kaur and an infant son and a daughter. Bhagwan Singh had a second wife by whom he had two sons, Sardar Singh and Shikar Singh. The present suit is by Mt. Kewal Kaur on behalf of herself and her children against Bhagwan Singh and Sardar Singh and Shikar Singh for maintenance. She claimed Rs. 55 a month for maintenance and residence and asked this amount should be made a charge upon what she alleged to be the joint family property.

The main pleas by the defendants were, firstly, that Sulakhan Singh had separated and was not at the time of his death a member of a joint Hindu family; secondly, that under Hindu Law the grandchildren of Bhagwan Singh had no right of maintenance; and thirdly that the family property was of very small value not amounting to more than Rs. 600 per annum.

The trial Court gave the plaintiffs a decree for Rs. 20 per mensem for maintenance and Rs. 3 as allowance for residence and declared that the amount of Rs. 23 should be a charge upon the joint family property. The defendants have appealed.

The learned counsel for the appellants has been unable to contest the finding that there was a joint Hindu family in which Sulakhan Singh was a co-parcener and that no separation had been proved. The second point in the defence that the grandchildren have no right to maintain has no force. A grandfather may be under no personal obligation to maintain his grandchildren, but the manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children, and on the death of one of the male members he is bound to maintain his widow and his children.

It is contended that the decree should not have been made a charge on the family property, but the Court below had full power to make such a decree, and in the circumstances it was justified in my opinion.

The only question which has been argued with any great vehemence is the appropriate amount of the monthly allowance. In regard to this the trial Judge has considered carefully the evidence about the value of the family

property and the status of the family, and in my opinion he has come to a just conclusion which I would not disturb.

I would dismiss the appeal with costs.

Tek Chand, J.—I agree.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 281

ADDISON, J.

Munshi and *others*—Plaintiffs—Appellents.

v.

Mt. Karmon—Defendant—Respondent.

Second Appeal No. 2615 of 1926, Decided on 27th January 1927, from the decree of the Sr. Sub-J., Ambala, D/- 2nd August 1926.

(a) *Custom—Punjab—Alienation by widow—Cleaning of dry well.*

The cleaning of a dry well for public use is not a necessary purpose under Customary Law. [P. 281, C. I, 2]

(b) *Civil P. C. O., 16, R. 1—Party can summon witnesses even after the time fixed by Court, but if witnesses are not served, Court should refuse adjournment.*

A party is even entitled to summon witnesses long after the time fixed by the Court for this purpose, and, though the application is a belated one still the summons should issue. But if the witnesses are not served for the hearing the Court should refuse to adjourn further for their attendance: *A. I. R.* 1926 *Cal.* 364, *Foll.* [P. 281, C. 2]

Shamair Chand—for Appellants.

Parkash Chandar—for Respondent.

Addison, J.—The plaintiffs sued alleging themselves to be the collaterals of Karmon, a Jat widow, for a declaration that the sale of a house by her in favour of Atma Ram for Rs. 175 should not affect their reversionary rights upon her death. The trial Court dismissed the suit holding that the plaintiffs had not established that they were collaterals with a right to sue, and that there was consideration and necessity. On appeal the Senior Subordinate Judge held also that relationship had not been established and that the money was needed for a charitable purpose. There is no definite finding by him to the effect that the purpose proved, namely, the cleaning of a dry well for public use was a necessary purpose under Customary Law and in another suit brought against the same widow about the same alienation the same Senior Subordinate Judge, held that this was not a necessary purpose under customary law, see *Civil Appeal No.* 171 *of* 1927. Against this decision this second appeal has been admitted.

It is scarcely disputed that a necessary purpose has not been made out and I hold that the sale was not for necessity.

On the qnestion of relationship all that was pressed in this appeal was that the trial Court was wrong in refusing to summon a particular Panda, whom the plaintiffs desired to examine as a witness in order to establish their relationship with the widow's husband. The circumstances were as follows:

On the 8th of August 1925, issues were framed. The hearing was adjourned till the 10th of August for parties to put in list of their witnesses. The plaintiffs summoned two witnesses but not the Panda in question. The 30th of November was the date for hearing. On that date the plaintiffs' two witnesses had been served but were absent. An adjournment had accordingiy to be granted and the hearing was postponed to the 12th of May 1926. As the hearing had to be adjourned in any case, the plaintiffs asked on the 30th of November 1925, that the Panda should also be summoned. Their application to this effect was rejected on the ground that he had not been summoned for the hearing of the 30th of November. This order was clearly wrong. Another long adjournment to the 17th of May 1926 had been given and the plaintiffs were entitled to have this Panda summoned, though, had he been not present on the 12th of May 1926. It would then have been a question for the Court whether it would have waited for him; but the opportunity to summon him should not have been refused. A party is even entitled to summon witnesses long after the time fixed by the Court for this purpose, and though the application is a belated one, still the summonses should issue. But if the witnesses are not served for the hearing, the Court should refuse to adjourn further for their attendance: vide *A. I. R.* 1926 *Cal.* page 364.

I must, therefore, accept the present appeal and, setting aside the order of the Court below remand the suit to the trial Court under O. 41, R. 23 of the Civil P. C. to summon the Panda in question and thereafter to decide the ques-

tion of relationship in accordance with law.

The Court-fee on this appeal will be refunded and the other costs of this appeal will abide the event.

Suit remanded.

G. B.

A. I. R. 1927 Lahore 282

ZAFAR ALI, J.

Charan Das and *others*—Appellants.

v.

Amritsar National Bank, Lahore—Respondents.

Misc. First Appeal No. 2935 of 1926, Decided on 15th February 1927, from the order of the Dist. J., Lahore, D/- 22nd October 1926.

Companies Act* (1913), *S.* 202—*Order of District Judge dismissing objections to attachment is not appealable.

An order of the District Judge as a Liquidation Officer, dismissing certain objections to the attachment of property is not appealable under S. 202 : 38 *All.* 537, *Foll.* [P. 282, C. 2]

Durga Das—for Appellants.

Madan Gopal—for Respondents.

Zafar Ali, J.—This is an appeal under S. 202 of the Indian Companies Act. The facts are as below :

A contributory, Manak Chand by name having failed to pay Rs. 8,000 in compliance with the order of the Liquidation Judge (District Judge, Lahore) that officer attached certain property which it was said belonged to him. Certain persons who are the appellants in this Court, objected to the attachment stating that they and Manak Chand were partners and were joint owners of the property and that Manak Chand's share alone and not the whole of the property could be attached. The official liquidator denied the alleged partnership. Thereupon the objector's counsel stated before the District Judge that the objectors were prepared to deposit Rs. 2,000 in Court which amount it was said corresponded to the value of Manak Chand's share in the property. The District Judge accepted the offer and ordered the objectors to deposit Rs. 2,000 by the 12th October 1925. They however, failed to do so and the property was consequently ordered to be sold. The objectors then filed a regular suit to establish that the property was not liable to attachment and sale but the suit was dismissed on a technical ground.

With regard to their appeal to this Court against the order of sale the Official Liquidator contends that no appeal lies. He argues that the order of the District Judge disallowing the objections should be treated as one under O. 21, R. 58, Civil P. C., and, that as in the case of an order of this kind made by an executing Court, the objectors's remedy is by way of a regular suit. The relevent portions of S. 202 of the Companies Act, under which the appeal has been preferred run thus :

> 202 * * * appeals from any order * * * made * * * in the matter of the winding up a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order * * * of the same Court in cases within its ordinary jurisdiction.

Tne language of S. 202 supports the official liquidator's contention as was held in *Santi Lal* v. *Indian Exchange Bank* (1) upon which he relies. The head-note to that case runs thus:

> The right of appeal under the provisions of S. 169 of Act No. 6 of 1882 (S. 202 of Act No. 7 of 1913) is co-extensive with the right of appeal conferred by the Code of Civil Procedure.
>
> In the liquidation proceeding of the Indian Exchange Bank a certain person described as the proprietor of the firm was directed by the Additional Judge of Lahore to pay a certain sum as contributory. The order was sent to the District Judge of Agra for execution when another person put in an objection to the effect that he was the sole proprietor of the firm. The District Judge declined to consider this objection :
>
> Held, that no appeal lay from the Judge's order inasmuch as it was under O. 21, R. 36, the objection being under O. 21, R. 58.

I am of opinion that the view taken by the Allahabad High Court is correct and that the present appeal does not lie. Further it may be observed that the objectors having once made an offer to deposit Rs. 2,000 are not competent to withdraw it. The allegation that they made it under coercion is preposterous.

There can be no manner of doubt that a property which belongs to the objectors cannot be attached, but it was upon them to prove that they had a share in the property in question. There is nothing on the record to prove this.

The result is that I dismiss this appeal holding that it is not competent. The appellants will pay the costs of the official liquidator in this Court.

Appeal dismissed.

R.D.

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(1) [1916] 38 All. 537=35 I.C. 6=14 A.L.J.722.

A. I. R. 1927 Lahore 283

ADDISON, J.

Buta Singh—Defendant—Appellant.

v.

Rahim Bakhsh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1027 of 1926, Decided on 1st February 1927, from the decree of the Addl. Dist. J., Lahore, D/- 9th January 1926.

(a) *Punjab Pre-emption Act, S. 6—Sale of house in village abadi site of which belongs to proprietary body is pre-emptible.*

Even where the site of a house in village abadi belongs to the proprietary body the sale of the house is one of immovable property and is pre-emptible. In such a case no question of consent by proprietors arises : 10 *P. R.* 1909, *Foll.* [P. 283, C. 2]

(b) *Landlord and tenant—Abadi—Sale.*

Where the sale was to one of the village proprietors it must be presumed to be valid and with consent. [P. 283, C. 2]

(c) *Pre-emption—Suit for—Sale by major on behalf of himself and his minor brother—Necessary parties are pre-emptor and vendee—Question of major's right to sell minor's share does not arise.*

Where in a pre-emption suit, the sale is by a major on behalf of his minor brother and on behalf of himself, the necessary parties are the pre-emptor and the vendee and in such a suit the question of the major's right to sell minor's share does not arise. [P. 283, C. 2]

Badri Nath for *Mehr Chand*—for Appellants.

Gulam Mohi-ud-din—for Respondent.

Judgment.—Siraj Din, defendant No. 1 on his own behalf and on behalf of his minor brother Miraj Din, sold half a house in village Lullianai to Buta Singh, Defendant No. 3, one of the Jat landlords of the village. Siraj Din and Miraj Din were owners of the superstructure with a right of residence, being kamins in the village. They only owned a half interest in the house in question, the other half being owned by the plaintiffs who sued for possession by pre-emption making the vendee and the vendors parties to the suit, though, in my opinion, it would have been sufficient to make the vendee the sole party. The trial Court dismissed the suit, holding that the major brother could not alienate the share of his minor brother and that it had not been proved that the sale was for the benefit of the minor brother and also that as the site belonged to the village proprietors of whom the vendee was one and the sale was of the materials and the right of residence, the latter of which could not be sold, such a sale was void and not liable to pre-emption. On appeal, however, the learned District Judge decreed the suit on payment of a sum of Rs. 90, this amount not being disputed before him.

In this second appeal it was first argued that the major brother had no right to sell his minor brother's share and that, therefore, the sale was invalid and could not be pre-empted. The District Judge, however, has held that under custom the elder brother was the guardian of his minor brother and had the right to mortgage and sell his share. He further held that in this suit it was not necessary to consider whether the sale was for the benefit of the minor. This is correct law for the only necessary party is the vendee who admits the sale and no question arises in this suit as regards the validity of the sale. In any case the District Judge has found that by custom the elder brother had a right to sell as guardian of the minor brother and that finding cannot be challenged here except upon a certificate obtained under S. 41 of the Punjab Courts Act.

The next point taken was that Defendants Nos. 1 and 2 had no right to sell the malba and the right of residence in half the house in question without consent of the village proprietors. Here, however, the sale was to one of the village proprietors and it must be presumed to be valid and with consent. Besides in this suit to which the vendee and the pre-emptors only are necessary parties this question does not arise.

There is also no force in the argument that the sale of the superstructure with the right of residence is not a sale which can be pre-empted under the Punjab Pre-emption Act. Immovable property is defined in S. 3 (25) of Act 10 of 1897 where it is said that 'immovable property' shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to earth. What was sold in the present case obviously comes within the definition and it was held in *Banarsi Das* v. *Haji Abdul Ghani* (1) that a standing building was immovable

(1) [1909] 10 P. R. 1909=24 P. L. R. 1909 =1 I. C. 397=13 P. W. R. 1909.

property under the General Clauses Act there being no definition of the term in the Pre-emption Act. The plaintiffs are co-sharers in the building that was sold and obviously under the Pre-emption Act they are entitled to pre-empt the sale, as ownership of the site under that Act confers no right of pre-emption.

There is also no force in the contention that the learned District Judge should have remanded the suit to the trial Court to decide the issues other than Nos. 1, 2, 4 and 6. He was perfectly entitled to decide the other issue himself. The only other point to be decided of any importance so far as evidence was concerned was for what sum the pre-emption should be allowed and this was admitted before him to be Rs. 90.

The appeal fails and is dismissed with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 284

ADDISON, J.

Fateh Ali and *others*—Plaintiffs—Appellants.

v.

Ahmad Din—Defendant—Respondent.

Second Appeal No. 2290 of 1926, Decided on 13th January 1927, from the decree of the Dist. J., Gujranwala, D/- 30th April 1926.

(a) *Evidence Act, S.* 108—*Person not heard of for seven years—That he died on any particular date cannot be presumed.*

It is the law that there is a presumption of a person's death if he has not been heard of for a period of not less than 7 years, yet there is no presumption that he died at the end of the first 7 years or on any particular date : *A. I. R.* 1926 *P. C.* 9, *Foll.* [P 285, C 1]

(b) *Punjab Limitation (Custom) Act* (1 *of* 1920) *Art.* 2 (b)—*Death of vendor giving cause of action—Plaintiff must prove that his suit is within* 3 *years of the death.*

Where in a suit for possession by the collateral of a vendor on the ground that sale was invalid the plaintiff alleges the death of the vendor giving him cause of action it is for him to show that his suit is within 3 years of the vendor's death ; it is not enough to prove that the vendor is dead ; 40 *Bom.* 239, *Rel. on.* [P 285, C 1]

(c) *Evidence Act, S.* 18—*Admission by counsel.*

An admission by counsel on a question of law e. g., period of limitation cannot bind his clients. [P 285, C 2]

B. A. Copper and *Parkash Chandar*—for Appellants.

Iftikhar Ali—for Respondent.

Judgment.—One Ahmad Din sold the land in dispute to another Ahmad Din on the 14th September 1907. The vendor's collateral Sarbland obtained a decree in 1914, declaring that the sale would not affect his reversionary rights except to the extent of Rs. 281-13 upon payment of which Sarbland would be entitled to get the land upon the death of the vendor. The vendor joined the army during the late war and has not been heard of since. The present suit was brought by the three sons and four grandsons of a fourth son of Sarbland for possession of the land on payment of Rs. 281-13 on the ground that Ahmad Din, the vendor, had died about a year prior to the institution of the suit. The trial Court held that the plaintiffs had failed to prove that the vendor had died within three years of the suit and dismissed the whole suit as time-barred for that reason.

On appeal the learned District Judge held that all that the plaintiffs had succeeded in proving was that Ahmad Din had not been heard of for more than seven years. There was thus a presumption that he was dead, but there was no presumption as to when he died. As the onus was on the plaintiffs to show that the suit was within time the District Judge held that the suit of the major sons of Sarbland must fail as they had only three years according to Act 1 of 1920 within which they could sue, while they had not established whether Ahmad Din had died within the last three years or before that. As regards the share of the four grandsons of Sarbland the District Judge has recorded that so far as their share of the land was concerned the suit was admittedly within time. It was further conceded that they were entitled to get one-fourth of the land on payment of one-fourth of Rs. 281-13. The appeal was, therefore, accepted and the four minor grandsons got a decree for possession of one-fourth of the land in suit on payment of Rs. 70-7. Against this decision two appeals have been presented here.

I shall first take the appeal of the sons. It was urged that the burden should have been upon the defendants to prove that Ahmad Din had died more than

three years before suit. It is the law that there is a presumption of a person's death if he has not been heard of for a period of not less than seven years, yet there is no presumption that he died at the end of the first seven years or on any particular date [*Lal Chand Marwari* v. *Ramrup Gir* (1).] It is for the plaintiffs to establish that their suit is within time, i. e., that they are entitled to a decree. In a somewhat analogous case [*Jayawant Jivanrao* v. *Ramchandra Narayan Joshi* (2)] it was held that it lay on the plaintiff to show affirmatively that he had brought his suit within 12 years from the actual death of the mortgagor. Similarly in the present case I would hold that it was for the plaintiffs to show that they had brought their suit within three years of the vendor's death, whereas all that they have been able to establish is the presumption that he is dead. The suit of the major sons was, therefore, properly dismissed. They have not established that their suit was within time and the declaratory decree did not effect a charge on the land. I dismiss that appeal with costs.

The vendee has also appealed against the decision of the District Judge that the suit, so far as the share of the four minor grandsons is concerned is within time. It was urged that this was admitted before the District Judge, but it is clear from the context that the learned counsel, who admitted that the suit for their share was within time, was only making an admission in law and not of facts. It was urged in this appeal that it was also for the plaintiffs in order to bring their suit within time to establish that the cause of action had not arisen in favour of the father of the minors before he died, for, if it had so arisen, time having once commenced to run, would continue to do so. In my opinion, this contention is sound. It is the case that no attempt was made to prove that the cause of action had not arisen in favour of the father of the minors in his lifetime and perhaps this was incapable of proof as the plaintiffs could not even establish the exact date of death of the vendor. It is stated that the minors' father only died two months before the institution of the suit. An admission by counsel on a question of law cannot bind his clients. For these reasons I accept the appeal of the vendee, and setting aside the order of the lower appellate Court dismiss the suit in toto. The vendee will have his costs in the trial Court and in the Court of the District Judge but not in his own appeal here.

R.D. *Order accordingly.*

(1) A. I. R. 1926 P. C. 9=5 Pat. 312=53 I. A. 24 (P.C.).
(2) [1916] 40 Bom. 239=33 I. C. 484=18 Bom. L. R. 14.

A. I. R. 1927 Lahore 285

HARRISON AND AGHA HAIDAR, JJ.

Nawab and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1051 of 1926, Decided on 17th January 1927, from an order of the S. J., Sialkot, D/- 1st September 1925.

(a) *Criminal P. C., S. 364—Omission to record questions put to accused not prejudicing accused—Confession is not inadmissible.*

If the prisoner is not prejudiced in any way by the omission to record questions put to him the absence of the questions does not make the confession inadmissible : 12 *C. L. R.* 129, *Foll* ; *A. I. R.* 1922 *Lah.* 237, *Dist.* [P 286, C 2]

(b) *Criminal P. C., S. 164—Scope.*

Omission to record confession in the languaga used by the accused may be overlooked if it has not injured the accused in his defence : 7 *P. R* 1899 *Cr. Foll.* [P 286, C 2]

Pindi Das Sabherwal and *Anant Ram Khosla*—for Appellants.

C. H. Carden Noad—for Opposite Party.

Judgment.—Seven men were committed to Sessions on a charge of murdering Phagan Singh on the 24th March 1926. Of these five were acquitted ; one, Nawab, was convicted of having been one of the murderers and was sentenced to transportation for life ; while Sundar Singh was acquitted on a charge of murder but convicted under S. 201 and sentenced to seven years' imprisonment.

The main evidence against Nawab consists of his own confession which was recorded by Risaldar Muhammad Sarwar Khan on the 29th of March 1926. Except for this confession the evidence is purely circumstantial. It is proved that Phagan Singh was murdered at the time stated in the charge and his corpse was subsequently recovered from Kala Dum

near Wazirabad and that both the accused were undoubtedly seen near the place where he was murdered about this time. The motive for the murder consisting of previous enmity is established and the points to be considered in this Court, as they were considered by the learned Sessions Judge, are stated at page 13 of his judgment.

Whether the retracted confession by Nawab is admissible in evidence, of course, against him only; whether the pointing out by Sundar Singh of the place where the dead body was drowned and the recovery of the dead body in pursuance thereof is legally sufficient to connect Sundar Singh with the murder, and if not sufficient together with the circumstantial evidence to establish his guilt as a murderer, is it sufficient to justify his conviction under S. 201, Indian Penal Code.

Whether the evidence of the tracker is admissible and what is the value of the circumstantial evidence.

So far as Nawab's appeal is concerned it is quite clear that without his confession there is not sufficient evidence to warrant his conviction. If the confession be admissible against him, there is ample corroboration and his guilt is established. There are many peculiar features in his confession and indeed many irregularities were committed, and the question is whether in spite of those irregularities the confession can be taken into account. The Magistrate arrived on the 29th at Wazirabad. He questioned the accused and he went with him to the scene of murder, the police following at some distance. The handcuffs of the accused having been removed it is obvious that natural precautions had to be taken and the Magistrate and the accused had to be watched. The accused pointed out various places as scenes of various stages in the commission of the crime and made a statement chiefly consisting of answers to questions put and the Magistrate recorded the questions and answers at the time. When the statement had been concluded the Magistrate returned to Sialkot and came back the following day. He transcribed the present record of the confession from his notes, leaving out the actual questions. He then read it over and explained it to the accused. The whole thing was done in English. As laid down in S. 364 Criminal Procedure Code, the questione and answers should be recorded; the language should be that used by the accused; and the record should be prepared at once and the precautions detailed in S. 164, criminal Procedure Code must be observed.

So far, as the failure to record the questions is concerned, it has been laid down in *Empress* v. *Sagambur* (1), that if the prisoner is not prejudiced in any way by the omission, the absence of the questions does not make the confession inadmissible. We find, therefore, that this defect is not vital. As regards the taking down of the record in a language other than that in which it was made we have the authority of the Punjab Chief Court in *Ratti Ram* v. *Queen-Empress* (2), that that this defect may be overlooked if it has not injured the accused in his defence. We are of opinion that he has not been injured in any way, for it is clear from the Magistrate's statement that he explained the various portions of the confession and put them to the accused before signing it. Counsel for the accused has laid great stress on the absence of the questions put and answers given under S. 164 and he stated that no such questions were put. It is true that they were not recorded. Counsel urges that *Farid* v. *Emperor* (3) lays down the law on the subject and that in accordance with that authority this confession is inadmissible. The great difference between this case and *Farid* v. *Emperor* (3), is that here the questions were put and the Magistrate has told us so and if the Magistrate's statement on the subject be read as a whole it is quite clear that he questioned the accused more than once and that it was from the answers received to his questions that he satisfied himself, as he did, that the confession was voluntary and although it would have been better had the record been fuller, the requirements of S. 164 have been fulfilled.

The only point remaining is whether the confession is hopelessly vitiated by the fact that the original notes were destroyed and that we have nothing but a transcript made the following day. We are satisfied that the accused has been in no way prejudiced, that the transcript is correct, that it was explained portion by portion to the accused and, in our opinion, all the irregularities which

(1) 12 C. L.R. 120.
(2) [1899] 7 P. R. 1899 Cr.
(3) A. I. R. 1922 Lah. 237=2 Lah.335.

have been committed may be overlooked and the confession may be taken into consideration against the accused. This confession together with the circumstantial evidence which corroborates it amply proves that he was one of the murderers.

So far as Sundar Singh is concerned it is contended that the mere discovery of the corpse by him which corpse was fully identified as being that of Phagan Singh, does not prove his guilt under S. 201, Indian Penal Code. It is, however, not a question of mere discovery for there is ample corroboration in the remaining evidence against Sundar Singh which when read with the evidence regarding the discovery establishes his guilt under this section.

We dismiss the appeal of both the appellants and confirm the sentences.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 287

FFORDE AND CAMPBELL, JJ.

Kirpal Singh—Defendant—Appellant.

v.

Jiwan Mal—Plaintiff—Respondent.

Second Appeal No. 2846 of 1925, Decided on 27th January 1927, from the decree of the Addl. Dist. J., Amritsar, D/- 10th August 1925.

(a) *Interest—Interest cannot be allowed in the absence of an express or implied contract to pay.*

Neither under the common law nor under the Indian Contract Act can interest be claimed under a debt unless there has been either an express promise to pay interest or such promise is to be implied from the usage of trade or other circumstances. [P 287 C 2]

(b) *Interest Act, S. 1—Debt payable on demand up to two years—Time of payment is not certain.*

Where a contract of loan provided "the agreement is that the sum will be paid on demand up to two years."

Held: the instrument did not provide a certain time for the payment of the debt and so the plaintiff was not entitled to any interest. [P 288 C 1]

Shamair Chand—for Appellant.

Fakir Chand—for Respondent.

Fforde, J.—The suit out of which this appeal has arisen was brought for the recovery of Rs. 1,332, being Rs. 900 principal and the balance interest, the principal sum having been advanced by the plaintiff to the defendant on the 11th February 1915. The trial Court held that both the principal and interest were due on foot of an agreement whereas the lower appellate Court has held that the principal sum was undoubtedly due but that the agreement to pay interest could not be proved to have been expressed in the contract. The lower appellate Court, however, has held that interest at 6% per annum may be awarded under the Interest Act 32 of 1839. The only question that arises for determination in this second appeal is whether the terms of the Interest Act can be held to apply to the debt sued upon. It is clear that neither under the common law nor under the Indian Contract Act can interest be claimed upon a debt unless there has been either an express promise to pay interest or such promise is to be implied from the usage of trade or other circumstances. In the present case the lower appellate Court has held that no express promise to pay interest can be proved, and it may be added here that no implication to pay interest from the usage of trade or other circumstances can be drawn from the facts of this case. The question therefore is, as I have already observed, whether interest upon the principal sum may be allowed under the terms of the Interest Act.

The Indian Interest Act 32 of 1839, is a repetition of Lord Tenterden's Act 3 and 4 Will. 4, c. 42, S. 28 and provides that

> Upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment.

In the present case no demand was made in writing giving notice to the debtor that interest would be claimed, and accordingly interest can only be awarded under the provisions of this Act if the debt in question was under the instrument constituting it, payable at a certain time. The material part of the written instrument which the plaintiff relies upon is as follows:

"The agreement is that the sum will be paid on demand up to two years."

Mr. Shamair Chand who appears for the

defendant contends that these words do not express the debt to be payable at "a certain time" but expressed it to be payable only upon demand being made. Neither Mr. Shamair Chand, nor Mr. Fakir Chand who appears for the respondent, gave us any clear idea of what the words "the sum will be paid on demand up to two years", really mean. In the *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1) in construing the same words in Lord Tenterden's Act, Lord Herschell, L. C., observed in a case where the demand of payment was expressed to be as soon after the "1st of June as possible and not later than the 15th of June" that "it is a little difficult to say that that is a time "certain even as regards the 15th June." In the present case the instrument itself is so ambiguous that it seems to me impossible to hold that it provides a certain time for the payment of the debt. That being so, the plaintiff is not entitled to succeed in his claim to interest under the provisions of the Interest Act.

I would accordingly accept the appeal to the extent of reducing the decretal amount from Rs. 1,224 to Rs. 900 with interest at 6 per cent per annum from the date of suit till realisation. As the appellant has succeeded upon the only question argued before us I would allow him the costs of the appeal.

Campbell, J.—I agree.

G.B. *Appeal partly allowed.*

(1) [1893] 1 A. C. 429=63 L. J. Ch. 93=58 J. P. 36=69 L. T. 637.

A. I. R. 1927 Lahore 288

ZAFAR ALI AND JAI LAL, JJ.

Khushi Ram-Karam Chand—Petitioner.

v.

Commissioner of Income-Tax, Punjab—Respondent.

Misc. Petition No. 549 of 1926, Decided on 3rd February 1927.

Income-Tax Act, Ss. 30 and 66—Whether assessment under S. 23 (4) is legal is a question of law—Income-Tax Act, S. 66 and S. 23 (4).

The question whether the Income-Tax Officer legally proceeded to assess the assessee under S. 23 (4) is one of law and therefore no appeal lies to the Assistant Commissioner under S, 30. Reference to High Court under S. 66 was ordered. [P 288 C 2]

Mehr Chand Mahajan—for Petitioner.

D. C. Ralli—for Respondent.

Order.—These are two petitions under S. 66 (3) of the Indian Income-tax Act, praying that the Commissioner of Income Tax be required to refer the question whether the assessment of the petitioner was under S. 23 (4) or one under S. 23 (3) and whether the Income-Tax Officer was under the circumstances justified in proceeding under S. 23 (4). The petitioner was called upon to submit a return of his income. He complied with this order and submitted a return but according to the Income-Tax Officer he failed to show the income received by him from the Firm of Banarsi Das-Dina Nath which it has been held is owned by the assessee. The latter denied that the firm existed or that it had been carrying on business during the period in respect of which the assessment was made. No accounts relating to the income of the firm were, therefore, produced by him.

Thereupon the Income-Tax Officer proceeded to assess the firm under S. 23 (4). An appeal to the Assistant Commissioner was dismissed on the ground that no appeal lay in the case of an assessment made under S. 23 (4). An application to the Commissioner under Ss. 33 and 66 of the Income-tax Act was rejected. At this stage it is unnecessary for us to decide whether under the circumstances the Income-Tax Officer was justified in proceeding under S. 23 (4) of the Act. In order to decide that question it will probably be necessary to have fuller facts before us. We are distinctly of opinion that there is a question of law involved in this case and that is whether the Income-Tax Officer legally proceeded to assess the petitioner under S. 23 (4) and therefore, no appeal lay to the Assistant Commissioner. We direct the learned Commissioner of Income-Tax to refer the case for the opinion of the High Court under S. 66 of the Indian Income-Tax Act. There will be no order as to costs of these proceedings.

R.D. *Reference directed.*

* * A. I. R. 1927 Lahore 289
Full Bench

CAMPBELL, ADDISON, TEK CHAND, DALIP SINGH AND AGHA HAIDAR, JJ.

Mt. Lachhmi—Plaintiff—Appellant.

v.

Mt. Bhulli—Defendant—Respondent.

First Appeal No. 80 of 1922, Decided on 12th April 1927, from decree of Senior Sub-J., Lyallpur, D/- 7th October 1922.

* * (a) *Civil P. C., S. 11—(Per Full Bench, Dalip Singh, J., dissenting) Two cross-suits about the same subject-matter filed simultaneously between the same parties—Suits consolidated and one judgment delivered in both the suits, but two decrees framed—Appeal from one of the decrees only—No appeal from the other decree—Appeal is not barred by* res judicata—*(Per Tek Chand, J., contra., Dalip Singh, J.) Principle of* res judicata *applies only to judgments and not decrees—Principles of* res judicata *fully discussed* : **1 Lah. 83=53 I. C. 137 ; 4 L. L. J. 344 and 3 Lah. 215=77 I. C. 541=A. I. R. 1922 Lah. 390 ; Overruled.**

Two widows A and B were jointly in possession of certain land. Each sued the other for declaration that she (the plaintiff) was the exclusive owner of that land and that the other (defendant) had no right in it of any kind. Both suits were disposed of by a single judgment which decided that A was the owner, but that B was entitled to hold possession of half the land in lieu of maintenance. A separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision. B appealed against one of these decrees only, namely the decree given in the suit in which she was the plaintiff.

Held : (*Per Full Bench, Dalip Singh, J., dissenting*) that the fact that no appeal had been preferred by B against the decree in the other suit of A could not prevent B's appeal from proceeding.

Held, further, that there could be no bar to the hearing of cross-objection filed by A pressing her claim to exclusive possession: (Principles of *res judicata* and case-law thereon fully discussed : 85 *P. R.* 1905 (*F. B.*); *A. I. R.* 1926 *Lah.* 458 :) 33 *Cal.* 1001 (*F. B.*); 29 *Mad.* 333 (*F. B.*); and *A. I. R.* 1923 *All.* 490 (*F. B.*), *Appr.* : 33 *All.* 51, *Disappr.* : **1 Lah. 83=53 I. C. 137 ; 4 L. L. J. 344 ; and 3 Lah. 215=77 I. C. 541=A. I. R. 1922 Lah. 390 ; Overruled.** : [P 295 C 1]

Tek Chand, J.—S. 11 applies to suits and not to appeals. But the general principles of *res judicata* will apply to appeals ; and, in applying these general principles, the Courts are not hampered by any technical rules of interpretation such as govern the applicability of a statute. [P 294 C 1, 2]

Courts should ascertain the *ratson d'etre* of the doctrine and then apply it to the facts of a particular case unfettered by technicalities. It is the spirit of the law, and not its letter, which is to be the governing factor, the soul of the rule rather than its outward form. [P 294 C 2]

The essence of the rule is that the two proceedings should be so independent of each other that the trial of one cannot be confused with the trial of the other. Where two suits, having a common issue are, by consent of parties or by order of the Court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, it cannot be said that there have been two distinct and independent trials. [P 295 C 1]

The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice, or whether there has been in reality but one trial, one finding and one decision. [P 295 C 2]

Res judicata is either estoppel by verdict or estoppel by judgment (or record) and there is no such thing as estoppel by decree. The determining factor is not the decree but the decision of the matter in controversy. [P 297 C 1]

Where the same property is the subject-matter of two contemporaneous suits between the same parties, in which common issues are involved, and the two suits are tried together and disposed of by a single judgment but two decrees are prepared and an appeal is preferred against one decree only, the Court must be presumed to have consolidated the two suits and passed one judgment and the fact that there is an unappealed decree will not create an estoppel against the hearing of the appeal. The estoppel in such a case would not be created by the decree. It could only be created by the judgment. [P 297 C 2]

Further, no anomaly or embarrassment in execution proceedings is likely to arise by there being two conflicting decrees on the records of the Court, for it is well settled that, if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the last one which will prevail. [P 298 C 2]

Dalip Singh, J.—In applying the principle of *res judicata* by record there is no difference between "a decision" (judgment) and "an adjudication" (decree). Courts should be reluctant to presume an order of consolidation where none has actually been passed. The point is not whether the Court should have consolidated the two suits, but whether the appellate Court, looking at the actions of the Court below, can presume that the Court intended that there should be an order of consolidation. [P 318 C 1]

* (b) *Practice—Reference to Full Bench for opinion on question of law—Full Bench is not entitled to examine correctness of the question.*

Per Tek Chand, J.—When a question of law is referred to a Full Bench for opinion, the Full Bench does not constitute a Court of appeal so as to examine whether the question has been correctly framed. [P 295 C 2]

Fakir Chand & Cooper—for Appellant.

G. S. Salaryia and *Iqbal Chand Chopra*—for Respondent.

Order of Reference.—On the death of one Dewa Singh, his landed property was mutated, half in the name of one Mt. Bhulli who claimed to be his widow, and half in the name of Mt. Lachhmi, the widow of his pre-deceased son, Bishen Singh. Each of these two ladies then brought a suit for declaration that she was the sole owner of the land. In each case the other widow was the sole defendant. Different issues were struck

in each suit, but they were disposed of by the same judgment ; and, by the consent of both parties, the evidence in Mt. Bhulli's suit, No. 184 of 1920, was read as evidence in that of Mt. Lachhmi's suit, No. 398 of 1920. The decision in the judgment disposing of the two suits was as follows:

I give Mt. Bhulli a declaration that she is the owner of half-square of Dewa Singh as heir of Dewa Singh, and that the other half-square shall remain with Mt. Lachhmi in lieu of maintenance. In Mt. Lachhmi's suit I give Mt. Lachhmi a declaration that she is in possession and shall remain in possession of half-square of Dewa Singh in lieu of maintenance only.

On this judgment two decrees were drawn up: one was in Suit No. 398 of 1920 in favour of Mt. Lachhmi, ordering that she be given a declaration that she is in possession and shall remain in possession of half-square of Dewa Singh in lieu of maintenance only. In Mt. Bhulli's suit, No. 184 of 1920, the decree was as follows:

It is ordered that Mt. Bhulli be given a declaration that she is the owner of half-square of Dewa Singh as heir of Dewa Singh, and that the other half-square shall remain with Mt. Lachhmi in lieu of maintenance.

Musammat Lachhmi has appealed against the decree in her own suit, No. 398 of 1920, claiming that she is entitled to a decree declaring her to be the owner of the whole of the land. She has not appealed against the decree granted to Mt. Bhulli in Suit No. 184 of 1920, and the time for her doing so has long since expired since the decree is dated 7th October 1922.

A preliminary objection has been raised that the question at issue in Mt. Lachhmi's appeal is *res judicata* by the decision in Mt. Bhulli's suit which is a final decision in a former suit within the meaning of Expln. 1 to S. 11, Code of Civil Procedure, since no appeal was preferred against it ; whereas Mt. Lachhmi's suit has been not finally decided because it is under appeal. On this point it is observed by Mr. Mulla, in his commentary on S. 11 (Mulla's Code of Civil Procedure, 8th edition, page 39), that the decisions of the Lahore Court are not uniform. The respondent relies principally on *Zaharia* v. *Debia* (1) and upon the fact that the Lahore Full Bench case *Jogul Kishore* v. *Chammoo* (2), relied on by the other side, has not been followed in at least four other Lahore cases: *Bhan Singh* v. *Gokal Chand* (3), *Mahomed Din* v. *Mt. Zebunnisa* (4), *Muhammad Jan* v. *Duli Chand* (5), and *Ghaniyalal* v. *Roshanlal* (6). The appellant points out that the judgment in *Jogul Kishore* v. *Chammoo* (2) is fortified by two other Full Bench decisions, *Panchanada* v. *Vaithinatha* (7) and *Mariamnissa* v. *Joynab* (8), and to some extent by a third, *Ghansham Singh* v. *Bhola Singh* (9), although this last-named decision by a majority of four out of five Judges refrained from dissenting from *Zaharia* v. *Debia* (1) on its own facts. The respondent, in reply, has referred us to a later Calcutta case, *A. I. R.* 1923 *Cal.* 496, which dissented from *Panchanada* v. *Vaithinatha* (7) and appeared to take the view that *Mariamnissa* v. *Joynab* (8) must be confined to its own particular facts, and is out of date since Expln. 1 to the present S. 11 of the Code of Civil Procedure was enacted.

The Punjab Full Bench case, *Jogul Kishore* v. *Chammoo* (2), followed *Abdul Mujid* v. *Jew Narain* (10), *Mariamnissa* v. *Joynab* (8), approved of *Abdul Mujid* v. *Jew Narain* (10), so far as its exposition of general principle went. *Zaharia* v. *Debi* (1) emphatically disagreed with *Mariamnissa* v. *Joynab* (8) and with *Panchanada* v. *Vaithinatha* (7). In *Mahomed Jan* v. *Debi Chand* (5), *Zaharia* v. *Debia* (1) was followed without reference to other cases. In *Bhan Singh* v. *Gokal Chand* (3) (a single Bench decision only) *Jogul Kishore* v. *Chammoo* (2) was referred to, and it was distinguished in it on its own facts. *Mahomed Din* v. *Mt. Zepunnissa* (4) mentions no case at all. In *Ghanialal* v. *Roshanlal* (6) most of the authorities including *Jogul Kishore* v. *Chammoo* (2), are stated in a list, but it is held that each case depends upon its own facts, and apparently the view taken in *Zaharia* v. *Debia* (1) was approved. *Zaharia* v. *Debia* (1) overruled *Damodar*

(1) [1911] 33 All. 51=7 I. C. 156=7 A. L. J. 861 (F. B.).
(2) [1905] 85 P. R. 1905.
(3) [1919] 1 Lah. 83=53 I. C. 137.
(4) A. I. R. 1922 Lah. 390=3 Lah. 215.
(5) A. I. R. 1921 Lah. 255.
(6) A. I. R. 1921 Lah. 271=4 L. L. J. 344.
(7) [1906] 29 Mad. 333=16 M. L. J. 63.
(8) [1906] 33 Cal. 1101=4 C. L. J. 149=10 C. W. N. 934.
(9) A. I. R. 1923 All. 490=45 All. 506 (F. B.).
(10) [1889] 16 Cal. 233.

Das v. *Sheoram* (11), whereas the later Allahabad case, *Ghansham Singh* v. *Bhola Singh* (9) declared that *Damodar Das* v. *Shivram* (11) had been rightly decided. The matter appears to us to be in some confusion, and we consider it desirable to refer to a Full Bench the following questions :

(1) Two widows A and B are jointly in possession of certain land. Each sues the other for a declaration that she (the plaintiff) is the exclusive owner of that land and that the defendant has no rights in it of any kind. Both suits are disposed of by a single judgment which decides that A is the owner but that B is entitled to hold possession of half the land in lieu of maintenance. A separate decree is drawn up in each suit, declaring the rights of the plaintiffs according to that decision. B appeals against one of these decrees only, namely the decree given in the suit in which she was a plaintiff. Does the fact that no appeal has been preferred by B against the decree in the other suit of A prevent B's appeal from proceeding ?

(2) If the answer to question (1) is in the affirmative, does the fact that A has filed cross-objections pressing her claim to exclusive ownership and possession affect the situation. If "yes" in what way?

The case will be laid before his Lordship the Chief Justice for orders constituting the Full Bench.

Order of the Full Bench

Tek Chand, J.—The questions of law, formulated by the learned Judges of the Division Bench, on which the Full Bench is invited to pronounce its opinion, are thus stated in the referring order :

> Two widows A and B are jointly in possession of certain land. Each sues the other for declaration that she (the plaintiff) is the exclusive owner of that land and that the defendant has no right in it of any kind. Both suits are disposed of by a *single judgment* which decides that A is the owner but that B is entitled to hold possession of half the land in lieu of maintenance. A separate decree is drawn up in each suit declaring the rights of the plaintiff according to that decision. B appeals against one of these decrees only, namely the decree given in the suit in which she was the plaintiff. Does the fact that no appeal has been preferred by B against the decree in the other suit of A prevent B's appeal from proceeding ?
>
> If the answer to question 1 is in the affirmative, does the fact that A has filed cross-objections pressing her claim to exclusive ownership and possession affect the situation ? If "yes" then in what way ?

The answer to the question depends on the application of the rule of *res judicata* to the facts as set forth above, and, as stated in the referring order, the case-law on the subject is in a state of some confusion. There is not only a serious conflict of judicial opinion between the different High Courts, but in some cases it is not possible to reconcile the rulings of the same High Court with one another. I think, therefore, that before discussing the various cases that have a bearing on the question to be decided, it will be useful to make a few preliminary observations which might clear the ground to some extent and be helpful in arriving at a correct conclusion on the exact points before us.

The doctrine of *res judicata* is of universal application ; and, as remarked by Hukam Chand in his well-known *Treatise* on the subject, it is

> in fact a fundamental concept in the organization of every jural society. Justice requires that every matter should be once fairly tried ; and, having been tried once, all litigation about it should be concluded for ever between the parties. It is a rule common to all civilized systems of jurisprudence that the solemn and deliberate sentence of the law upon a disputed fact or facts, pronounced after a proper trial by its appointed organs, should be regarded as a final and conclusive determination of the question litigated, and should for ever set the controversy at rest : Black on *Judgments* Vol. 11, page 2.

This rule, which treats the final decision of a competent tribunal as "irrefragable truth," was well understood by Hindu lawyers as well as by Mahomedan jurists, and is one of the greatest gifts of Roman jurisprudence to the modern jural systems of Europe.

In the Mitakshara (Book 11, Chap. 1, section V, verse 5) one of the four kinds of effective answers to suit is "a plea by former judgment" and in verse 10 *Katyayana* is quoted as laying down that

> one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of *Purva Nyaya* or former judgment. Macnaughten and Colebrooke's Translation (page 22).

The doctrine, however, seems to have been recognized much earlier in Hindu jurisprudence, judging from the fact that both the *Smriti Chandrika* (Mysore Edition, pages 97-98) and the *Virmitrodaya* (Vidya Sagar Edition, page 77) base the defence of

(11) [1907] 29 All. 730=4 A.L.J. 587=(1907) A. W. N. 245.

Prang Nyaya (former decision) on the following text of the ancient law-giver *Harita*, who is believed by some Orientalists to have flourished in the 9th century B. C., and whose *Smriti* is now extant only in fragments :

"The plaintiff should be non-suited if the defendant avers : 'In this very affair, there was litigation between him and myself previously,' and it is found that the plaintiff has lost his case."

There are texts of *Parasara* (Bengal Asiatic Society Edition, page 56) and of the *Mayukha* (Kane's Edition, page 15) to the same effect.

Among Mahomedan law-givers similar effect was given to the plea of "*Niza-i-munfasla*" or "*Amar Mania taqrir mukhalif.*" Under Roman Law, as administered by the Prætors' Courts, a defendant could repel the plaintiff's claim by means of *exceptio rei judicatæ* or plea of former judgment. The subject received considerable attention at the hands of Roman jurists ; and, as stated in Roby's Roman Private Law (Vol. 11, page 338), the general principle recognized was that "one suit and one decision was enough for any single dispute" and that " a matter once brought to trial should not be tried except, of course, by way of appeal."

The spirit of the doctrine is succinctly expressed in the well known maxim *nemo debet bis vexari pro eadem causa* (no one should be twice vexed for the same cause). At times the rule worked harshly on individuals (e. g., when the former decision was obviously erroneous), but its working was justified on the great principle of public policy. *Interest rei publicæ ut sit finis litium*" (it is for the public good that there be an end of litigation).

In some of these ancient systems, however, the operation of the rule was confined to cases in which the plaintiff put forward his claim to

"the same subject-matter with regard to which his request had already been determined by a competent Court and had passed into judgment."

In other words, it was what is described as the plea of "estoppel by *judgment*" or "estoppel by *record*," which was recognized and given effect to. In several European continental countries even now the rule is still subject to these qualifications, e. g., in the Civil Code of France, it is said :

"The authority of the thing adjudged (*chose jugee*) has place only in regard to that which has constituted the object of a judgment. It is necessary that the thing demanded be the same ; that the demand be founded upon the *same cause* ; that it be between the same parties and found by and against them in the same capacity."

In other countries, and notably in England, the doctrine has developed and expanded, and the bar is applied in a subsequent action, not only to cases where claim is laid to the same *property*, but also to the same *matter* (or issue), as was directly and substantially in dispute in the former litigation. In other words, it is the identity of the *issue* which has already been "necessarily tried," between the parties and on which a finding has been given before, and not the identity of the *subject-matter* which attracts the operation of the rule. Put briefly the plea is not limited to "estoppel by *judgment*', (or *record*), but is also extended to what is described as "estoppel by *verdict*. The earliest authoritative exposition of the law on the subject in England is by Chief Justice De Grey in the *Duchess of Kingston* case (12) which has formed the basis of all subsequent judicial pronouncements in England, America and other countries, the jural systems of which are based on or inspired by British Jurisprudence. In that case a number of propositions on the subject were laid down, the first of them being that

"the judgment of a Court of concurrent jurisdiction, directly upon the point, "is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court."

In British India, the rule of *res judicata* seems to have been first introduced by S. 16 of the Bengal Regulation III of 1793, which prohibited the Zilla and City Courts

"from entertaining *any cause*, which, from the production of a former decree or the record of the Court, shall appear to have been heard and determined by any Judge or any Superintendent of a Court having competent jurisdiction."

The earliest legislative attempt at codification of the law on the subject was, however, made in 1859 when the first Civil Procedure Code was passed. S. 2 of the Code barred the cognizance by Courts of suits based on the *same cause of action*, which had been heard and determined before by Courts of competent jurisdiction. It will be seen that this was only a partial recognition of the English rule in so far as it embodied the

(12) 11 Smiths' Leading Cases 754.

principles relating to estoppel *by judgment* (or record) only and did not extend to estoppel by *verdict*. In 1877, when the Code was revised, the operation of the rule was extended in S. 13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action, but the prohibition equally applied against re-agitating an issue which had been heard and finally decided between the same parties in a former suit by a competent Court. The section has been amended and amplified twice again, and has assumed its present form in S. 11 of the Code of 1908, the principal amendments, which have a bearing on the question before us, being : (a) that the expression "former suit" was defined as meaning a suit which has been first *decided* and not one which was first *instituted* ; and (b) that the competence of a Court is not regulated by the course of appeal of the former suit, but by its capacity to try the subsequent suit as an original Court.

But although the Indian legislature has from 1859 onwards made several attempts to codify the law on the subject and the present S. 11 is a largely modified and improved form of the original S. 2 of Act VIII of 1859, it must be borne in mind that the section, as even now enacted, is not exhaustive of the law on the subject, and the general principles of *res judicata* apply to matters on which the section is silent, and also govern proceedings to which the section does not in terms apply. In *Soorijomonee Dayee* v. *Suddanund Mahapatter* (13) their Lordships of the Judicial Committee said :

"We are of opinion that S. 2 of the Code of 1859 would by no means prevent the operation of the general law relating to res judicata founded on the principle *nemo debet bis vexari pro eadem causa*."

In *Ram Kirpal* v. *Rup Kuari* (14) the same high tribunal ruled that S. 13 of the Code (X of 1877) did not apply to execution proceedings; but upon general principles of law the decision of a matter once decided in those proceedings was a bar to the same matter being re-agitated at a subsequent stage thereof. Under the present Code the matter was considered in *Hook* v. *Administrator-General of Bengal* (15), when their Lordships once again laid down that "S. 11 of the Code is not exhaustive of the circumstances in which an issue is *res judicata*. Although the section did not in terms apply, the plea of *res judicata still remained, apart from the limited provisions of the Code*, and it was that plea which the respondents had to meet in the present case." This dictum was re-affirmed by Lord Buckmaster in *T. B. Ramchandra Rao* v. *A. N. S. Ramachandra Rao* (16), when it was remarked that "the principle which prevents the same cause being twice agitated is of general application and is not limited by the specific words of the Code in this respect."

It will be seen from the foregoing discussion that the matter is to be looked at from two different points of view, viz. whether the hearing of B's appeal in the High Court (see the first question as given in the referring order) is barred

(1) by the provisions of S. 11, Civil Procedure Code, or

(2) if this be not so, by the general principles of *res judicata*.

If S. 11 is applicable, the problem will become easy of solution, for in that case the function of the Court is narrowed down to ascertaining the meaning of the phraseology used in the section and to giving effect to it regardless of the consequences. The appellant's learned counsel argued that in a case like the one before us a strict application of the section would lead to great hardship. But this is an argument which I cannot for a moment accept. If the section applies, the Courts cannot get over the bar merely because of the resulting hardship or inconvenience. The argument *ab inconvenienti* might be admissible if the meaning of the statute is obscure; but, if the language is explicit, its consequences are for the legislature and not for the Courts to consider. In that event, as was remarked by Coleridge, J., in *Garland* v. *Carlisle* (17), "the suffering citizen must appeal to the law-giver and not to the lawyer."

It must, therefore, be settled at the very outset whether S. 11 applies to

(13) 12 B. L. R. 304, 315.
(14) [1884] 6 All. 269=11 I. A. 37=4 Sar. 489 (P. C.).
(15) A. I. R. 1921 P. C., 11=48 Cal. 499=48 I. A. 187 (P.C.).
(16) A. I. R. 1922 P.C. 80=45 Mad. 320, 331=49 I. A. 129 (P.C.).
(17) 4 Cl. & F. 693, 705.

appeals or whether its operation is limited only to suits as meaning proceedings in an action in Courts of the first instance as distinguished from proceedings in appellate Courts. After a careful examination of the section, I have reached the conclusion that it applies to suits only and not to appeals. It is no doubt true that in the body of the Civil P. C., as well as in other enactments, the word suit" is often used as including proceedings before an appellate Court, and also other proceedings of a civil nature. But having regard to the phraseology used in S. 11, and more particularly to Expl. II, which, it might be noted, was for the first time added in 1908, the word 'Court' as used in this section can but mean the trial Court, and 'suit' signifies proceedings beginning with the plaint and ending with the decree in that Court. It seems to me that no other interpretation is possible. If the word 'suit' is to be taken as including 'appeal' the section becomes inconsistent with Expl. II. This was specifically ruled by Le Rossignol, J., (Chevis, J., concurring) in *Dalipa* v. *Rani Suraj Kaur* (18), where, at page 139, it is stated :

" The word 'Court' referred to in S. 2 of the Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time for appeal has lapsed or till the appeal has been finally decided. This view is confirmed by the language of Expl. II to the section."

In *Mt. Fakhur-un-Nissa* v. *Malik Rahim Bakhsh* (19) and *Malik Rahim Bakhsh* v. *Mt. Fakhur-un-Nissa* (20) (which latter was a judgment delivered on review in the earlier case) Chatterji and Stogdon, JJ., were also inclined to take the same view ; and in *Ram Lal* v. *Chhab Nath* (21) Edge, C. J., and Brodhurst, J., definitely laid down that S. 13 of the Code of 1882 did not " apply to appeals, but the principle of *res judicata* did, as S. 13 is not exhaustive." I feel strengthened in this view by the fact that, after these judgments had been delivered under the Code of 1882, the legislature deliberately enacted Expl. II for the first time in 1908, which, read with the main clause of the section, leaves no doubt whatever that ' suit' does not include ' appeal'.

If then, S. 11 does not in terms apply to appeals, we have to fall back upon the general principles of the rule of *res judicata* and to see if there is anything in those principles which debars the appellate Court from hearing and deciding an issue under circumstances such as those described in the question. It is, however, necessary to bear in mind that in applying these general principles, the Courts are not hampered by any technical rules of interpretation such as govern the applicability of a statute. As remarked by Sir Lawrence Jenkins in *Sheoparsan Singh* v. *Ramanandan Prasad Singh* (22),

" the application of the rule by Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

In England, the same was laid down by Brett, M. R., in *In re May* (23), when he said that

" the doctrine of *res judicata* was not a technical doctrine, but was a very substantial one."

So also in Roman Law, as administered by the Prætors, the " *exceptio rei judicatae* ' was among the "equitable grounds" on which the defendant was allowed to render ineffectual an action *ipso jure* (see Broom's Legal Maxims, Ninth Edition, page 225.) In India, some Judges have gone to the extent of laying down that in interpreting the sections of the Civil Procedure Code relating to *res judicata* the fundamental principles of the rule embodied in it should not be ignored : [per Mahmood, J., in *Sita Ram* v. *Amir Begam* (24) and per West, J., in *Bholabhai* v. *Adesang* (25).] What we have therefore, to do is to ascertain the *raison d' etre* of the doctrine and then to apply it to the facts of a particular case unfettered by any technicalities. It is the *spirit* of the law and not its *letter* which is to be the governing factor, the soul of the rule rather than its outward form.

Let us see what are the fundamental principles of *res judicata* and how do they affect the present case. It has already been indicated that the foundation of the rule, as understood both by ancient and modern lawyers is that a question must be *once* fairly and finally tried by a competent Court and *after* this has been done all further litigation about it should be concluded for ever between the parties. The maxim is, as

(18) [1916] 48 P. R. (1916)=34 I. C. 581=142 P. W. R. 1916.
(19) [1897] 23 P. R. 1897.
(20) [1898] 31 P. R. 1898.
(21) [1890] 12 All. 578=(1890) A. W. N. 184.
(22) [1916] 43 Cal. 634 at p. 706 = 33 I. C 194=43 I. A. 91 (P. C.).
(23) 28 Ch. D. 516.
(24) [1886] 8 All. 324=(1886) A. W. N. 101.
(25) [1885] 9 Bom. 75 at p. 81.

has been stated above, that "no one shall be vexed *twice* over the same matter." This, to my mind, presupposes that the issue has been *once* fairly and finally tried in a former litigation, which was independent of the proceedings in which the same matter is again in dispute. The essence of the rule seems to me to be that the two proceedings should be so independent of each other that the trial of one cannot be confused with the trial of the other. Where two suits, having a common issue, are, by consent of parties or by order of the Court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, can it be said that there have been two distinct and independent trials? There being but one finding and one judgment, on what principle can the hearing of the appeal in which this finding and this judgment are under consideration be barred merely because no appeal has been filed in the connected suit which was disposed of by that very judgment? There has been, in substance as well in form, but one trial and one verdict, and, I venture to think, it will be a travesty of justice to stifle the hearing of the appeal against such a judgment on the ground that the findings contained in it operate as *res judicata*. In such a case there can be no question of the successful party being "vexed twice" over the same matter, nor does the hearing of the appeal in any way militate against any rule of public policy, which requires that there must be an end of litigation. There is not only nothing here to attract the principles underlying the rule of *res judicata*, but, on the other hand, it seems to me that the acceptance of such a plea in such circumstances would strike at the very root of the basic conception of the doctrine which requires that a party must have at least *one* fair trial of the issue resulting in a decision by the Court of ultimate appeal as allowed by the law for the time being in force.

It is, however, suggested that in the present case the two suits were really disposed of by *two separate* judgments and not by a *single* judgment, as has been assumed above. But this is a matter into which we, sitting as a Full Bench, should refuse to enter. The Subordinate Judge who tried the suit says in the opening sentence of his judgment that he is disposing of the two suits "in *one* judgment," and the learned Judges of the referring Bench, after hearing the appeal on the merits of the preliminary objection, and examining the record, came to the conclusion that the two suits had been disposed of by a *single* judgment, though separate decrees had been framed, and the questions of law for our decision have been formulated on that hypothesis. We have given our opinion on the questions as framed, and, I think we shall be departing from our proper function if we constitute ourselves into a Court of Appeal and set ourselves to see whether the questions have been correctly framed or not.

Assuming, however, that it is permissible for us to go into the matter, and that the Court which simultaneously tried and decided the two suits wrote a full and detailed judgment in one suit and a brief one in the other (therein referring to its judgment in the former suit), this circumstance ought not in any way to affect the decision of the question before us. It seems to me that this is a distinction without a difference. Whether the Court actually gave only one judgment in both suits or it wrote a full judgment in one suit and in the other merely gave a brief note stating that for the reasons recorded in the judgment of the first suit the second suit was also disposed of in a particular way, or again, as occasionally happens, a verbatim copy of the judgment in the first suit is attached to the record of the second suit and it is stated that the former judgment should be considered to be a part of the judgment in the second suit—whichever of these courses is adopted—there is, in my opinion, no difference in substance. The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice, or whether there has been in reality but one trial, one finding and one decision. Before the so-called judgment in the second suit can be regarded as a proper judgment, there must have been, in the words of a well-known English lawyer, quoted at p. 225, footnote (y), of Broom's Legal Maxims

> "A real judgment, a real prosecution, a real defence and a real decision."

The same conclusion is reached by looking at the matter from another point of view. Under the English practice,

if with a view to save the trouble and cost of having two separate trials of two actions involving common points, it is intended to have them tried together, an order for consolidation is passed under Order 49 of the Rules of the Supreme Court, and then there is one trial and one judgment in the consolidated action. In India there is no specific provision for consolidation of suits, but it has been held that the Code being silent on the point, the inherent jurisdiction of Courts to pass such orders has not been taken away. In *Hukum Chand Boid* v. *Kamalanand Singh* (26) Woodroffe, J., held that "Courts have inherent power *ex dibito justitiæ* to consolidate," and his opinion was endorsed by Mookerjee, J., in *Nand Kishore Singh* v. *Ram Golam Sahu* (27), and there are some reported cases of that Court in which consolidation orders were actually passed: *vide Peacock* v. *Byjnath* (28) and *Kashi Prosad Singh* v. *Secretary of State* (29). In fact, there seems to be unanimity of opinion in the various Courts on this point: see *Secretary Panchaiti Akhara* v. *Mahant Dharam Das* (30), *Vengu Naidu* v. *The Deputy Collector of Madura Division* (31), *In re. Dorabji Cursetji Shroff* (32) and *Muhammad Aazab* v. *Mankumar Mahton* (33). I am, however, not aware of any case in this province where a formal order consolidating suits or appeals was ever passed, but, here, the same object is attained by the two suits being tried together by consent of parties and with the approval of the Court, thus bringing about what may be described a *de facto* consolidation. There is in substance, if not in form, one trial and one judgment, though the letter of the law is sometimes saved by passing a formal order in the second suit, referring to the detailed proceedings and judgment in the first. In my opinion under such circumstances the same consequences should follow as in the case of formal consolidation; and, looking at the matter from the standpoint of fundamental legal principles, a person, who, by his own acts or conduct, has brought about a virtual, if not an actual, consolidation of the two suits, ought not to be allowed to turn round and invoke the rule of *res judicata* with a view to prevent the hearing of the appeal against the real judgment delivered in the "consolidated" suits.

Some rulings, e.g., *Abdul Basit* v. *Ashfaq Hussain* (33a), support the conclusion in favour of the bar by suggesting that

> "though the judgment pronounced is the detailed judgment in the first suit, the judgment in the second suit must, in the eye of the law, be considered merely a decision to the effect that the points in issue, having been already decided in the first judgment, need no longer be decided."

That is to say, by a legal fiction, the brief judgment in the second suit is to be taken as meaning that the findings in the first judgment are *res judicata* in the second. But it seems to me that this cannot be the correct view, for the decision in the first suit was liable to appeal at the time when the decision in the second suit was given, and, therefore, being merely a provisional and not a definitive or final adjudication, it could not have operated as *res judicata* till the period allowed by the law of limitation for preferring the appeal had expired. The question is discussed at length in a Madras case, *Chengalvala Girraju* v. *Madapathy Venkateswara Row Pantulu Garu* (34), which follows the well-known observations of Mahmood, J., in *Balkishan* v. *Kishan Lal* (35), based on quotations from Pothier's *Law of Obligations* Vol. 1, page 534, that

> "judgments liable to appeal stand for purposes of *res judicata* on the same footing as those under appeal."

As held in the Madras case just cited, the brief judgment in the second suit (according to the legal fiction above mentioned), not being a decision on the merits, but having proceeded on a mistaken view of the law of *res judicata*, could not bar the disposal of the appeal against the first judgment.

Another point remains to be noticed, *viz.*, that even though the two suits were tried together, and may be taken to have been disposed of by one judgment,

(26) [1906] 33 Cal. 927 (932)=3 C. L. J. 67.
(27) [1913] 40 Cal. 955 (959)=18 I. C. 207=16 C. L. J. 508.
(28) [1884] 10 Cal. 58.
(29) [1902] 29 Cal. 140.
(30) [1917] 40 I. C. 182-3.
(31) [1918] 34 M. L. J. 279=45 I. C. 468.
(32) [1908] 10 Bom. L. R. 675 (677).
(33) A. I. R. 1922 Patna 566=1 Pat. 669.
(33a) [1908] 28 A. W. N. 211=4 M. L. T. 172.
(34) [1916] 30 M. L. J. 379=33 I. C. 9=(1916) 1 M. W. N. 223.
(35) [1889] 11 All. 148 at p. 160=(1889) A. W. N. 42 (F. B.).

yet two *decrees* were actually passed, one in each suit, and as only one such *decree* has been appealed against, the other remains outstanding and has become final. It is suggested, that if the appeal is allowed to proceed and is successful, an anomalous and embarrassing situation of having two inconsistent and contradictory decrees on the record of the Court might be created. This argument, which at first sight appears to be unanswerable, is the basis of the leading Allahabad case reported as *Zaharia* v. *Debia* (1). It also found favour with my learned brother Addison in *Sulaiman* v. *Partab* (36) and has the high authority of the great Calcutta Judge, Sir Asutosh Mookerjee, in support of it: *vide Isup Ali* v. *Gour Chandra Deb* (37). I have, therefore, given much careful and anxious thought to it, and it is with a great deal of hesitation and diffidence that I have found myself unable to accept it. It is necessary to emphasize here what has been stated already, that *res judicata* is either estoppel by *verdict* or estoppel by *judgment* (or record), and there is no such thing as estoppel by '*decree*'. As remarked by Caspersz in para. 575 of his book on Estoppel, "the *decree* itself is not the test of what is or is not *res judicata*, but the question in each case is what did the Court *decide*." The determining factor is not the *decree* but the *decision* of the matter in controversy. The cases in which the property in dispute in two suits is different the matter is simple enough, for there the plea of *res judicata* can, if at all, be sustained on the ground of a common issue having been decided before. The estoppel is created by *verdict* and as the two decrees relate to distinct properties no question of any embarrassment by contrariety of decrees arises. The matter is, however, not so easy when the subject-matter of the two suits is identical. Here it seems to me that two possible situations might arise:

(i) When, after a suit has been tried and finally decided on the merits, the defeated party wishes in another suit between the same parties relating to the same property to have the same questions re-litigated. It is clear that he cannot be allowed to do so, because his cause of action has passed into a judgment. The matter has become *res judicata*, and the plea of 'estoppel by judgment' (or record) will absolutely bar the new trial.

(ii) Where the same property is the subject-matter of two *contemporaneous* suits between the same parties, in which common issues are involved. The two suits are tried together and disposed of by a single judgment, but two decrees are prepared and an appeal is preferred against one decree only. Does the fact that there is an unappealed decree create an estoppel against the hearing of the appeal? I think not. The estoppel in such a case would not, as stated already, be created by the *decree*. It could only be created by the *judgment*. But there is *ex hypothesi* a *single* judgment disposing of the two suits, which judgment is under appeal, and, therefore, the plea cannot prevail on that ground. The unappealed decree-sheet is not such a "record," in the technical sense of the term, as would create the estoppel. In order to understand the real basis and significance of the expression "estoppel by record" reference may usefully be made to the following remarks of Spencer Bower at page 5, para. 10, of his valuable book on the "Doctrine of Res Judicata:" "It is the *res judicata*, not the record of it, which creates the estoppel. As will be seen hereafter it is quite immaterial whether the judicial decision is pronounced by a tribunal which is required by law, or authorized by custom to keep written memorials of its decisions or by a tribunal which is not so required or authorized...The term as applied by Coke and the other Elizabethan jurists, did undoubtedly reflect the views then obtaining as to the characteristics and limits of this class of estoppel. At a time when it was considered a sacrilege to question the inviolable credit and verity of a judicial record, rather than an injustice and scandal to impeach and reagitate a judicial decision, the phrase was natural and appropriate enough. But now that the latter aspect of the question has gradually, but utterly and completely superseded and obliterated the former, the retention of the expression has become a ridiculous and archaic survival." The learned author further emphasizes that "though *res judicata* happens to be recorded, and can only be proved by the record, the *principle of the*

(36) A. I. R. 1927 Lah. 98.
(37) A. I. R. 1923 Cal. 496=74 I. C. 591.

estoppel is altogether independent of the form in which the judicial decision is recorded, or of the question whether it is recorded or recordable at all."

That the circumstance that a decree in a former suit is outstanding in favour of the defendant is in itself insufficient to support the plea of *res judicata* is further clear from the Privy Council decisions in *Sheo Sagar Singh* v. *Sita Ram Singh* (38) and *Abdullha Asghar Ali* v. *Ganesh Das* (39), in each of which, though the decree in the former suit was subsisting in favour of the defendant, the subsequent suit was allowed to proceed as the matter could not be said to have been *finally decided* therein. In determining, therefore, whether the plea has any force, attention must be concentrated, not upon the fact that there is a record of an outstanding decree in favour of a party, but upon the question whether there has been an *independent decision* upon which the record was based.

Looking at the matter from another standpoint we arrive at the same conclusion. When the parties desired to have the two suits tried together, the strictly proper procedure would have been to pass a formal order of consolidation, and if that had been done only one decree would have been prepared and one appeal would have been sufficient. Where this formality has not, however, been gone through, but a virtual consolidation of the suits has been (as suggested above) brought about, I think the position of the parties should not be in any way made worse. As pointed out in *Damodar Das* v. *Sheoram Das* (11), which has been approved in *Ghansham Singh* v. *Bhola Singh* (9), there is in such a case in reality "but one decree, though written in duplicate" on two different pieces of the paper, one of which is attached to the record of each suit. Looking, therefore, to the substance of the matter, rather than to its form, one appeal should be considered to be sufficient. I am, therefore, of opinion that no "estoppel by record" is created by the omission to appeal against the second decree in such a case.

Lastly it may be pointed out that if the rule of *res judicata* has (as shown above) no application to a case like this, no anomaly or embarrassment in execution proceedings is likely to arise by there being two conflicting decrees on the records of the Court. For it is now well settled that, if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the *last* one which will prevail. In such cases the later decision should be taken as superseding the earlier, and is thenceforward the only effective adjudication: see in this connexion *Moturi Seshayya* v. *Venkatadari Appa* (40), *Damtar Singh* v. *Munawar Ali Khan* (41) and *Mallu Mal* v. *Jhamman Lal* (42). Reference may also be made to Freeman on Judgments, Vol. I, page 605 para. 332, and Vanfleet's "Former Adjudication," Vol. 1, page 91.

The foregoing discussion of the matter from different points of view leads me to the conclusion that there is nothing in the fundamentals of the doctrine of *res judicata*, which would bar the hearing of the appeal in the circumstances described in the first question, and on general principles I would answer the first question in the negative.

I shall now deal with the rulings of the various High Courts bearing on the point, but, before doing so, I think it will be useful to say that the cases divide themselves into two distinct classes: (1) those where *two suits* were simultaneously tried and disposed of together, the main judgment being written in one record, and the defeated party having preferred an appeal in one suit only; and (2) those in which there was only one suit which was partially decreed by the trial Court, and both the plaintiff and the defendant preferred two cross-appeals to the lower appellate court which decided them simultaneously, writing the main judgment in one such appeal and disposing of the other by a brief judgment, and the defeated party preferring one second appeal only. It will be seen that the present is a case falling under the first class and, therefore, we are not directly concerned with cases which belong to the second class, though there is a fundamental similarity between the two, and

(38) [1897] 24 Cal. 616=24 I. A. 50=1 C. W. N. 297=7 Sar. 124 (P. C.).
(39) [1918] 45 Cal. 442=42 I. C. 959=44 I. A. 213 (P. C.).
(40) [1916] 2 M. W. N. 219=36 I. C. 289=31 M. L. J. 219.
(41) [1915] 37 All. 531, 534 =30 I. C. 775=13 A. L. J. 764.
(42) [1904] A. L. J. 416.

to my mind the decision of both kinds of cases is covered by the same principles.

Taking the Punjab cases first : the earliest ruling that needs notice is *Nur Muhammad* v. *Jammun* and *others* (43), where the collaterals of a sonless proprietor sued the latter and his alienees to obtain the usual declaration as to their reversionary rights. The suit was decreed and the defendants appealed. Pending appeal the alienor died and the plaintiff's reversioners brought a second suit for possession of the same property. This suit was also decreed and the defendants filed an appeal against this decree also. Both appeals were heard by the Divisional Judge on the same day. In the appeal arising out of the declaratory suit the gift as to the houses and the moveables was upheld, but it was declared invalid as to the land, while in the other appeal the Court, following its decision in the other case, dismissed the claim as to houses and moveables and decreed it as to the land. The plaintiffs appealed to the Chief Court from the latter decree alone, and it was held that the hearing of the appeal was barred by S. 13, Explanation IV (Civil P. C. 1882) by reason of the plaintiffs' omission to appeal from the decree of even date in the declaratory suit. There is no discussion of the question and the judgment proceeds merely upon Explanation IV of the Code of 1882. This case is, in the first place, distinguishable as the two appeals were not decided by a *single* judgment ; secondly, it was decided with reference to Explanation IV of S. 13 of the old Code which has now been repealed ; and thirdly, the interpretation of the Explanation, as adopted by the Chief Court, is in conflict with *Balkishen* v. *Kishen Lal* (35) and is, I venture to think, erroneous for reasons given in detail in *Chengalvala Girraju* v. *Madapathy Venkatesewara Row* (34).

The point was next considered in *Mt. Fakhur-un-Nissa* v. *Malik Rahim Bakhsh* (19), to which reference has already been made in another connection. There the same issue arose in two suits and, by consent of parties the suits were tried together and a full judgment disposing of all the issues was written in the first case and the usual short one in the second. But no appeal was filed against the decree in the first suit, which, therefore, had become final at the date of hearing of plaintiff's appeal against the decree in the second. On a preliminary objection being taken to the hearing of the appeal it was held that the plaintiff's appeal was barred neither under S. 13 of the Civil Procedure Code nor on the general principles of *res judicata*. Against this judgment of the Chief Court a review was preferred by the respondent, the judgment whereon is reported as *Malik Rahim Bakhsh* v. *Mt. Fakhur-un-Nisa* (20). In an exhaustive judgment Chatterjee, J., (Stogdon, J., concurring) recorded the opinion that "where two cross suits relating to the same subject-matter, and giving rise to identical issues, are tried by the same Court, it cannot be urged that there is a bar to the trial of the issues by the Court in either case ; it is not quite so apparent that the appellate Court would be precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though they may have both given the same findings on the issues." The remarks of Mahmood, J., in *Sita Ram* v. *Amir Begam* (24) were cited with approval that, in interpreting the language of S. 13, the Court cannot ignore the fundamental principles of the rule to which that section gives expression, unless indeed the express words of the statute clearly contradict those principles.

The next reported case is *Gurmukh Singh* v. *Hari Chand* (45), where two rival pre-emptors instituted separate suits to pre-empt the same sale and the plaintiff in each case was cross-impleaded as defendant in the other. Identical issues were framed in both suits, one set of witnesses was heard and the suits disposed of in one judgment. An appeal was preferred against the decree in one suit only and the Division Bench (Reid and Harris, JJ.), following *Chajju* v. *Sheo Sahai* (46), held that the hearing of the appeal was barred.

This last-mentioned ruling was, however, considered by a Full Bench in *Jugal Kishore* v. *Chammo* (2) where Clark, C. J., and Reid and Chatterjee, JJ., overruled it and approved of the conclusions arrived at in *Malik Rahim*

(43 and 44) [1890] 153 P. R. 1890.

(45) [1904] 8 P. R. 1904=104 P. L. R. 1903.
(46) 10 All. 123=(1887) A. W. N. 301.

Bakhsh v. *Mt. Fakhur-un-Nisa* (20) "that the general principles of the rule of *res judicata* do not prevent the Court of appeal from deciding such matter or issue by reason of the finding in the other case not having been challenged by appeal and the decision in it having in consequence become final." It was also stated that "under S. 13 or under the general principles of the law it (the filing of one appeal) is certainly conducive to convenience and saves useless expenditure of money, while the imperative necessity in law of a double appeal is not clearly established. The contrary view simply lays a trap for unwary litigants and often leads to failure of justice."

The question again arose in *Dalipa* v. *Rani Suraj Kaur* (18), where three suits were decided by one judgment by the Subordinate Judge. As the jurisdictional value of each suit was different, the appeal in one of them was filed in the Divisional Court and first appeals in the other two were preferred to the Chief Court. The Divisional Judge, in the appeal before him, affirmed the trial Court's findings. On the first appeals coming up for hearing before the Chief Court, the findings of the Divisional Judge in the appeal decided by him were pleaded as *res judicata*. After an examination of most of the relevant authorities, Chevis and LeRossignol, JJ., overruled the objection holding that "as the decision of the first Court was given in all the three suits in one judgment, i. e., at the same time, it could not be held to have been given in a 'former' suit within the meaning of S. 11 of the Code of Civil Procedure and as regards the decision of the Divisional Judge on appeal, although it was a decision in a former suit, it was not a decision by a "Court" which was competent to deal with the present suit in appeal."

In Mahomad Jan v. *Duli Chand* (5) Leslie-Jones and Wilberforce, JJ., in a brief judgment, and following *Zaharia* v. *Debia* (1) (which will be noticed hereafter) and *Anant Das* v. *Udai Bhan Pargas* (47) [which has since been overruled in *Gansham Singh* v. *Bhola Singh* (9)], held the hearing of the appeal barred by the rule of *res judicata*. This ruling is of no assistance to us, as the question was not discussed at any length and the Allahabad decisions which it followed have since ceased to be authoritative even in that Court.

The only other ruling of this Court is a Single Bench judgment in *Suleman* v. *Partap* (36), already referred to, which followed *Zaharia* v. *Debia* (1) the learned Judge after a review of the authorities expressed the opinion (and I think rightly) that to a great extent the reasoning adopted in *Jugal Kishore* v. *Chammo* (2) had become obsolete.

There is a number of cases of the second class decided by the Lahore High Court, which I shall now briefly notice. The first of these is *Bhan Singh* v. *Gokal Chand* (3) a Single Bench judgment by Bovan Petman, J., in which he refused to hear a second appeal against the appellate decree of a District Judge, before whom two appeals had been filed by the plaintiffs and the defendant respectively arising out of the same suit and both had been disposed of by the same judgment and two decrees prepared, but only one of which had been appealed against to the High Court. The learned Judge distinguished *Jugal Kishore* v. *Chammo* (2), but I confess the distinction is not quite clear to me. If *Jugal Kishore* v. *Chammo* (2) was correctly decided, this decision cannot, in my opinion, be supported.

In *Mahommad Din* v. *Zeb-un-Nisa* (4), the facts were peculiar and the real point decided was that the necessary copies not having been filed with the memorandum of the second appeal, the appeal was defective and could not be considered to be properly presented with reference to the provisions of Order 41, Rule 1, Civil Procedure Code. There is, however, an *obiter dictum* by the learned Judges (Scott-Smith and Harrison, JJ.) to the effect that "in any case it was useless to proceed with the hearing of the appeal as the unappealed decree of the District Judge would operate as *res judicata*." The point was not, however, discussed in any detail nor were any previous decisions cited.

In *Ghaniya Lal* v. *Roshan Lal* (6) the same question arose again and Leslie-Jones and Broadway, JJ., after referring to a number of authorities, expressed the opinion that each case must be decided according to its own facts. The reasoning of the learned Judges in support of

(47) [1913] 35 All. 187=19 I. C. 73=11 A. L. J. 214.

their decision of that particular case does not, however, appear to me to be convincing, and, with the utmost respect, I confess that I am unable to understand on what principle the conclusion arrived at can be supported.

The question was next considered by Harrison and Jai Lal, JJ., in *Mt. Bhuri* v. *Mt. Asghari Begam* (48), and the learned Judges held that, in such cases, the second appeal cannot be said to be defective because of the failure to attach with the memorandum of appeal a copy of the decree of the District Judge in the unappealed cross-appeal. They refused to follow *Bhan Singh* v. *Gokal Chand* (3) and *Muhammad Din* v. *Zeb-un-Nisa* (4), and feeling themselves bound by the decision of the Full Bench in *Jugal Kishore* v. *Chammo* (2) they held that the second appeal could proceed. This ruling was followed by Jai Lal, J., in *Kishori Lal* v. *Tilak Ram* (49).

After a careful examination of all these rulings, I have reached the conclusion that though much of the reasoning in *Jugal Kishore* v. *Chammo* (2) cannot be supported, the ultimate decision of the Full Bench was correct and as to the cases of the second class I venture to think that *Mt. Bhuri* v. *Mt. Asghari Begam* (48) lays down the view which is consonant with the general principles of *res judicata*, and *Bhan Singh* v. *Gokal Chand* (3), *Ghaniya Lal* v. *Roshan Lal* (6) and the *obiter dictum* in *Muhammad Din* v. *Zeb-un-Nisa* (4) cannot be considered to be sound.

In the Calcutta High Court, the earliest case which needs notice, is *Enayetoollah* v. *Radha Churn Roy* (50) in which Norman, C. J., and Loch, J., thus summarized the facts and their decision thereon :

"Two suits had been instituted by a purchaser of two different portions of the same tenure for enhancement of the rent of the respective portions. The cases having been set down for hearing, the first Court treated them as if they constituted one suit and gave, very sensibly and reasonably, as it appears to us, one decision in both cases. From the decree which was substantially one decree in two consolidated suits the defendant appealed. If the lower Court thought fit to treat the two cases as consolidated, and passed one decree in both suits, it seems to us that there can be no possible objection to the defendants preferring one appeal."

Next we come to the case of *Abdul Majid* v. *Jew Narain Mahto* (10), where it was held that the decision of an issue in one of the two suits tried together, which is not appealed against, cannot be treated as *res judicata*, so far as the second issue is concerned, in an appeal from the decision in the other suit. The decision was based upon three grounds: (1) the two suits were not brought on the same cause of action ; (2) S. 13 (of the Code of 1882) was inapplicable because the first appellate Court was not holding a trial of the issue but was deciding the suit in appeal, the issue having been already tried in the Court of first instance, and (3) on general principles. It must be conceded that ground (1) cannot be supported in view of the amendments made in the Codes of 1877 and 1882. Nor am I able to appreciate the second ground unless it seems that S. 13 did not in terms apply to appeals. But I am of opinion that the conclusion arrived at by the learned Judges on general principles is sound and must be accepted. They state that

"the Court of first instance tried the two suits together and upon the evidence taken in both, the evidence taken in the one suit being considered as evidence taken in the other by consent of the parties, and came to a certain conclusion. The appellant before us who was plaintiff in one of the suits and defendant in the other did not think it worth his while to appeal in one of these suits, but did appeal against the conclusion at which the lower Court had arrived in the other suit. We do not see any valid reason why the appellant should be deprived of his right to have the opinion of the appellate Court on a question which had been considered and decided by the Court of first instance."

In the next Calcutta case reported as *Mariamnisa Bibi* v. *Joynab Bibi* (8) the question is discussed at great length and as I find myself in general agreement with the view expressed by Ghose, Offg. C. J., and Harrington, J., whose view prevailed, I shall reproduce certain passages from their judgments. The case is also of value, because, though it was decided at a time when the Civil Procedure Code of 1882 was in force, and there was considerable doubt as to the meaning of the expression "former suit," the learned Judges quite correctly held that the "former suit" meant a suit which was *decided* first and not that which had been *instituted* earlier. After giving the facts of the case and mentioning that the two suits had been tried together, Harrington, J., stated as follows :

"The Subordinate Judge did what he had no business to do, i. e., tried both suits together and

(48) A. I. R. 1926 Lah. 458=7 Lah. 447.
(49) A. I. R. 1926 Lah. 540=95 I. C. 256.
(50) 15 W. R. 395.

disposed of both cases in one judgment * * * * * * it could not be said that the question had been substantially in issue in a former suit and had been finally decided, because the judgment deciding the question is the very judgment against which Joynab was appealing.

It appears to me to lead to an anomaly to say where one judgment disposes of one issue which has been raised in two suits that the party against whom the issue is decided cannot question the judgment unless he files two appeals against it. Had the cases been separately tried the question as to the title to the houses in dispute could only have been determined in the case first tried. Section 13 of the Code of Civil Procedure would have been a bar to the determination over again in the hearing of the other case of the question determined in the first. Then, if Joynab had desired to appeal, she could only have filed one appeal in which the question as to the title to the property in dispute could have been gone into, viz., an appeal against the judgment in the first case. The only question which could have been raised in appeal on the second case would have been whether the title to the property in dispute had or had not been in issue and been determined in the first case, and whether S. 13 of the Civil Procedure Code was applicable.

I do not think she ought to be put in a worse position because of the irregularity due to the joint trial. The bar of *res judicata* could only be raised if by a fiction the one judgment could be regarded as two judgments, i. e., judgment in each suit; because, if it is regarded as one judgment it was not final but was the subject of appeal to the lower appellate Court. But if by a fiction it is regarded as two judgments, then it must be a judgment on the fact of title in the first case only, and in the second case a judgment that the question in issue as to title had been already determined in the first case, because in the second case the Court is precluded by S. 13, Civil Procedure Code, from trying the question of title which has been already determined. As the appeal is on the question of the title to the property in dispute it must be taken to be an appeal, therefore, against the first judgment. It is immaterial in my view which case was filed first."

Ghose, Offg. C. J., who agreed with the opinion of Harrington, J., further stated that

"if the proper procedure had been observed the Subordinate Judge should have proceeded to try one of the two suits and stayed the other under S. 20 read with S. 12 of the Civil Procedure Code (of 1882), and having determined in the first suit the question of title would record in the other suit that the decision in the former suit was a bar to the trial of the issue as to the title in the latter suit. But that was not the course followed in this case. Both parties apparently consented that the two suits should be tried together as if they were one suit * * * *. To my mind it is difficult to hold that there was a separate judgment in the case of *Mariam* upon the question of title to the two properties such as operates as a bar, for it is the very judgment that was appealed against by Joynab Bibi before the lower appellate Court * * * *. This view is supported by the ruling in the case of *Abdul Majid* v. *Jew Narain Mahto* (10) and though I am not prepared to agree with the learned Judges who decided that case as regards some of the grounds given by them for holding that the plea of *res judicata* did not apply in the case, yet I accept the conclusion that was arrived at by them on general principles . . . . I might, however, as well refer to the observations of Mahmood, J., in the case of *Balkishan* v. *Kishen Lal* (35) as to the main object of the doctrine of *res judicata*, that being, as stated by the learned Judge, the prevention of multiplicity of suits and interminable disputes between litigants. Now, if the main object of the doctrine is to prevent multiplicity of suits, could it be said that in this case that object has been defeated, the trial being but one, the issue being one common to both suits and the judgment being one and the same as applicable to both of them.

The observations of the learned Judges seem to me to be unanswerable and I venture to express my complete and respectful concurrence with them. There are, however, subsequent rulings of the Calcutta Court in which a contrary view has been taken. The first of these is the case reported as *Midnapore Zemindary Co.* v. *Nitya Kali Dasi* (51), where Mookerjee and Beachcroft, JJ., doubted *Abdul Majid* v. *Jew Narain Mahto* (10) and followed *Gururajammah* v. *Venkatakrishnama Chetti* (52) and *Nur Muhammad* v. *Jamun* (43), the former of which deals with an entirely different point and the latter is no longer considered sound in the Punjab. It may also be mentioned that the decision in *Midnapore Zemindary Co. Ld.* v. *Nitya Kali Dasi* (51) was expressly dissented from by Chevis and LeRossignol, JJ., in *Dalipa* v. *Rani Suraj Kaur* (18), already referred to above. Further, it is to be noted that the case is distinguishable on the ground that the two suits were not decided by the trial Court on the same date and by one judgment. While the appeal against the decision in the first suit was pending in the lower appellate Court the trial Court decided the second suit, which decision was not appealed against, and this latter decision was held to bar the hearing of the appeal against the decision of the first suit. There is much in the reasoning of the learned Judges to which exception might be taken, but as the ruling proceeded on a different set of facts and is clearly distinguishable, I do not think it necessary to pursue the matter further.

(51) [1914] 24 I. C. 243.
(52) [1901] 24 Mad. 350.

The question arose again in *Gangadhar Kalwar* v. *Mt. Sekali Telini* (53), where two suits, in which one issue was common, were decided by separate judgments delivered on the same day. An appeal having been filed in one suit only, the finding in the other was held to operate as *res judicata* against the hearing of this appeal. The question was not discussed at any length, it being considered unnecessary to examine the rulings cited, though *Chajju* v. *Sheo Sahai* (46) and *Zaharia* v. *Debia* (1) were followed.

The last Calcutta ruling to which we have been referred is the judgment of Mookerjee and Chotzner, JJ., in *Isup Ali* v. *Gour Chandra Deb* (*A. I. R.* 1923 *Cal.* 496), the facts of which are distinguishable from the present case as there some persons who were parties to one of the suits in the trial Court had not been impleaded as respondents in the appeal. The reasoning of the learned Judges, however, is decidedly in favour of the applicability of the rule of *res judicata* to cases similar to the one before us. It must be noted that the learned Judges largely relied on *Zaharia* v. *Debia* (1), *Dakhni Din* v. *Syed Ali Ashgar* (54), *Anant Das* v. *Udai Bhan Pargas* (47), and *Balhari Pande* v. *Shivasampat Pande* (55), all of which (except the first one) have since been overruled by the Allahabad High Court in *Ghansham Singh* v. *Bhola Singh* (9); and as to *Zaharia's* case (1) its authority has been considerably shaken, if not entirely destroyed, by the subsequent five Judges' decision referred to above, as will be shown later on. The learned Judges dissented from the two previous decisions of their own Court reported as *Abdul Majid* v. *Jew Narain Mahto* (10) and *Mariam Nisa Bibi* v. *Joynab Bibi* (8), but, while their criticism of the former of these two decisions is to a large extent correct, it seems to me that they brushed aside the opinion of the majority in the latter on wholly insufficient grounds when they remarked that the dicta (in that case) were pronounced while the Code of 1882 was in force and before the Explanations I and II to S. 11 of the Code of 1908 had been enacted. Now the judgments of Harrington, J. and Ghose, Offg. C. J., in that case, from which I have given copious quotations above, clearly indicate that both the learned Judges had laid down the law correctly which was subsequently embodied by the legislature in the two Explanations aforesaid. In these circumstances it cannot be said that the decision in that case had become obsolete by the amended S. 11 of the Code of 1908. The learned Judges further remarked that the rule of *res judicata* is applicable to all the stages of the suit till it is finally terminated and is not confined to the Court of first instance; but, as I have shown above, this is so not because S. 11 applies, but because the fundamental rules of *res judicata* govern such proceedings. For these reasons I am not prepared to follow this case in preference to the majority decision in *Mariamnisa Bibi* v. *Joynab Bibi* (8), which, I consider, lays down the law correctly.

Of the decisions of the Madras High Court the first ruling cited is *Gururajammah* v. *Venkatakrishnama Chetti* (52). But in that case two suits were pending in two different Courts and were decided on different dates, the sole question involved being whether the expression "former suit" in S. 13 of the Code of 1882 meant the suit which was first instituted or that which was first decided. This controversy has since been set at rest by the Legislature enacting Explanation I to S. 11 of the Code of 1908 and the judgment is not now of much assistance. The question now before us, however, was considered by a Full Bench of that Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (7), where it was ruled that, where cross suits between the same parties on the same facts were tried together, and judgment was given on the same date, and two separate decrees were passed, but only one appeal was preferred, the decree in the unappealed suit did not operate as a bar under S. 13, Civil P. C. (1882), it being decided that the doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form, was to get rid of decision pleaded in bar. *Abdul Majid* v. *Jew Narain Mahton* (10) was referred to and followed. The learned Judges also expressed the opinion that neither under S. 13 nor on general principles had the doctrine of *res judicata* any application to a case like this. The Madras Court has consistently followed this ruling even after the enact

(53) A. I. R. 1921 Cal. 291.
(54) [1911] 33 All. 151=7 I. C. 909=7 A. L. J. 995.
(55) [1920] 18 A. L. J. 40.

ment of the new Code in 1908: vide *Nukalapati Rami Reddi* v. *Vavilla Venkatesam* (56), *Ramasamy Chetti* v. *Karuppan Chetty* (57), and *Sinnanna Kone* v. *Muthupalani Chetti* (58); and, so far as I am aware, there is no decision of that Court to the contrary.

Coming now to the decisions of the Allahabad High Court, we find that the divergence of judicial opinion in that Court is even greater than elsewhere. The earliest ruling which need be referred to is *Chajju* v. *Sheo Sahai* (46), where two rival pre-emptors had instituted separate suits which were tried upon the same evidence and disposed of by a single judgment, but by separate decrees. An appeal was preferred against the decree in one suit only, and Straight and Brodhurst, JJ., held, without any discussion, that the findings in the unappealed suit were a bar to the hearing of the appeal in the other suit. This ruling was followed in a number of decisions of that Court reported in the *Allahabad Weekly Notes*.

The soundness of the rule on which these decisions were based was, however, doubted in *Damodar Das* v. *Sheo Ram Das* (11), where a suit had been partially decreed by the trial Court and two appeals filed before the lower appellate Court which had disposed of them by one and the same judgment and framed two decrees. A second appeal to the High Court was preferred against the lower appellate Court's decree in one appeal only. It was held that the hearing of this appeal was not barred by reason of the omission to appeal against the decree in the other appeal. Curiously enough *Chajju* v. *Sheo Sahai* (46) and several *Allahabad Weekly Notes* rulings were not referred to. The learned Judges (Richards and Griffin, JJ.), however, approved of the rule laid down by the Calcutta Court in *Mariamnisa Bibi* v. *Joynab Bibi* (8) and by the Madras Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (7) both of which had taken a view diametrically opposite to that which had till then found favour at Allahabad. The opinion was strongly expressed that in such cases there is in fact" but one decree, though written out in duplicate in both the appeals," and that, therefore, it is not necessary to appeal against both.

The question was, however, again considered by a Full Bench (Stanley, C. J., Tudball and Chamier, JJ.) in *Zaharia* v. *Debia* (1), where two rival pre-emptors had instituted two suits for pre-emption which were tried together; a full judgment was delivered in one of these suits, a copy of it was placed on the record of the other, and two decrees were prepared. After a review of the existing case-law on the subject, the learned Chief Justice was of opinion that the hearing of the appeal was barred, as the unappealed decree in the second suit had become final and the fact of accepting the appeal would be to have two inconsistent decrees on the file of the Court. Mr. Justice Chamier remarked that

> "in the absence of a provision enabling the Court to consolidate suits and appeals, and pass one judgment and one decree, instead of as many judgments and decrees as there are suits or appeals, I see no escape from the conclusion that in a case like the one before us the appellant must file two appeals if he wishes to avoid the bar of *res judicata*."

The decision of the Full Bench in *Zaharia's* case (1) was followed in *Dakhni Din* v. *Syed Ali Asghar* (54), and *Anant Das* v. *Udai Bhan Pargas* (47), in each of which two suits had been disposed of by a single judgment and appeal preferred in one suit only, but it was held barred by reason of the findings in the other. The same rule was applied in *Lala Ram Charan* v. *Lachman Pershad* (59) and *Balhari Pande* v. *Shiva Sampat Pande* (55) to cases in which only one second appeal had been filed though there were two cross-appeals preferred to the lower appellate Court in a suit partially decreed by the trial Court. The effect of these decisions was to render *Damodar Das* v. *Shiv Ram Das* (11) obsolete and to apply the bar of *res judicata* in all its rigour. This view, however, did not continue to hold the field for a very long time; for, in the referring order in *Ghansham Singh* v. *Bhola Singh* (9), Walsh and Ryves, JJ., definitely stated that they did not feel satisfied with the prevailing view in that High Court, and expressed the opinion that "it sacrificed the ends of justice on the merits of the case to the purest technicality." They thought that the matter

(56) [1914] M. W. N. 916=27 I. C. 274.
(57) [1915] 29 M. L. J. 551=31 I. C. 216.
(58) A. I. R. 1926 Mad. 378.

(59) [1910] 9 I. C. 667.

should be reconsidered from the point of view :

having regard to the strong views that had been taken by Full Benches of the Calcutta and Madras High Courts in *Mariam Nisa Bibi* v. *Joynab Bibi* (8) and *Panchanan* v. *Vaithinatha Sastrial* (7),

the reference was heard by five Judges a majority of whom (Mears, C. J., Piggot, Walsh and Ryves, JJ.) laid down :

A. that *Damodar Das* v. *Shiv Ram Das* (11) was correctly decided when it treated the two decrees as being in substance one, though drawn up in duplicate ; B. that the Full Bench judgment in *Zaharia* v. *Debia* (1) had been erroneously treated as laying down a general rule to be followed in all cases in which an unappealed decree passed in ccntemporaneous proceedings arising out of the same dispute is outstanding in the lower appellate Court. The learned Judges without differing from that decision as applied to the facts of that and cognate cases held that some of the reasoning and dicta contained in that judgment went further than was necessary and that they have been misapplied in some of the subsequent cases ; C. that *Abdul Basit* v. *Ashfaq Hussain* (33). *Dakhni Din* v. *Syed Ali Ashgar* (54), *Lala Ram Charan* v. *Lachhman Parshad* (59), *Anant Das* v. *Udai Bhan Pargas* (47) and *Balhari Pande* v. *Shiva Sampat Pande* (55) were all erroneously decided and were specifically overruled and finally D. the opinion was expressed that where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate appellate Court and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of res judicata or at all by reason of his failure to appeal from the decree which does not prejudice him.

I have given much anxious thought to the decision of the majority in this case and I confess that I have been unable to comprehend its full significance. If *Zaharia* v. *Debia* (1) was good law as applicable to the facts of that and cognate cases *Dakhni Din* v. *Syed Ali Asghar* (54) and *Anant Das* v. *Udai Bhan Pargas* (47) which had come to identical conclusions must necessarily be held to to be sound but the Full Bench proceeded to specifically overrule these two last mentioned decisions. Similarly if the reasoning in the *Zaharia's* case (1) is correct *Damodar Das* v. *Shiv Ram Das* (11) is clearly wrong but the authority of the latter judgment has been restored by the Full Bench and it has been definitely held that it lays down correct law. With all deferences to the learned Judges, I venture to think that *Damodar Das* v. *Shiv Ram Das* (11) and *Zaharia* v. *Debia* (1) cannot both be sound. I cannot find it possible to harmonise the two or either the one or the other is incorrect. It is no doubt true that the facts in *Ghansham Das* v. *Bhola Singh* (9) were peculiar but there is no escape from the conclusion that the reasoning and dicta in that case have for all practical purposes rendered *Zaharia* v. *Debia* (1) obsolete and I feel fortified in the conclusion by two subsequent decisions of the same High Court reported as *Bijai Bahadur* v. *Parmeshawari Ram* (60) and *Ram Narain* v. *Nihal Singh* (61) where *Ghanysham Singh* v. *Bhola Singh* (9) was applied to cases which would have beeen decided differently if *Zaharia* v. *Debia* (1) were still good Law.

No decision of the Bombay High Court bearing on this question has been brought to our notice. There are rulings of the Patna Court in *Dhani Singh* v. *Sri Chandra Choor Deo* (62), of the Rangoon Court in *Anwar Ali* v. *Amir Ali* (63) and of Oudh Judicial Commissioner's in *Lachhmi Kuer* v. *Umrao Singh* (64) and *Pancham Singh* v. *Thakar Singh* (65) but in none of them was the subject discussed in any detail. All these decisions were based upon *Zaharia* v. *Debia* (1) and *Dakhni Din* v. *Syed Ali Asghar* (54) which they purport to follow. But in view of the fact that *Dakhni Din* v. *Syed Ali Asghar* (54) has been expressly overruled and the authority of *Zahria* v. *Debia* (1) has been considerably shaken if not altogether destroyed by the five Judges' decision in *Ghanysham Singh* v. *Bhola Singh* (9). These rulings of the Patna, Rangoon and Oudh Courts do not posseess any particular value.

The result of the examination of the rulings of the various High Courts may be summed up as follows :

(a) The Madras High Court is whole heartedly in favour of the right to proceed.

(b) The Allahabad High Court has held different views at different times, but the tendency of the latest decisions is in favour of the right to proceed.

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(60) A. I. R. 1924 All. 834.
(61) A. I. R. 1925 All. 448.
(62) A. I. R. 1924 Patna 823.
(63) A. I. R. 1925 Rang. 104=2 Rang. 633.
(64) A. I. R. 1924 Oudh 311.
(65) A. I. R. 1925 Oudh 598.

(c) The opinion of the majority in *Mariam Nissa Bibi* v. *Joynab Biti* (8) is in favour of the right to proceed. In the Calcutta Court subsequent decisions of Division Benches (none of which, it is significant, has found its way into the authorised Reports) have taken the contrary view, but I venture to think that the reasoning of these decisions in so far as it conflicts with the earlier case cannot be supported.

(d) The High Courts of Patna and Rangoon have followed the earlier decisions of the Allahabad High Court but these latter are no longer considered to be authoritative in that Court itself.

(e) In the Punjab the rulings are not uniform, but on the whole, it seems to me that though much of the reasoning of the Full Bench judgment in *Jogul Kishore* v. *Chammo* (2) cannot be supported the conclusion arrived at in that case is correct.

The contrary decisions proceed on one or other of the following three grounds :

(a) Section 11 Civil P. C., in terms applies to such a case :

(b) There are two separate and independent judgments and therefore two appeals are necessary, or

(c) Two decrees having been prepared, an appeal against only one of them ought not to be allowed to proceed, as it is necessary to avoid the scandal of having two conflicting decrees on the record of the Court.

I have already examined the question in detail from each one of these points of view and with the utmost respect to the learned Judges who have endorsed one or other of these views, I am of opinion that none of them can on principle be supported. They have, if I may venture to say so, taken too technical a view of the doctrine of res judicata which it must not be forgotten is as pointed out by Hukam Chand and other authors of standard text books on the subject, a rule of procedure rather than of substantive law strictly so called. And in enforcing rules of procedure it is as well to bear in mind the following remarks of Lord Penzance in *Henry J. B. Kendall* v. *Peter Hamilton* (66).

Procedure is but the machinary of law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct and even extinguish, legal rights and is thus made to govern where it ought to subserve.

For the foregoing reasons I am of opinion that the first question referred to us must be answered in the negative and it be held that B's omission to prefer an appeal in A's suit does not prevent the appeal in her own suit from proceeding.

The second question is a simple one and no lengthy discussion is necessary. It is conceded by the learned counsel on both sides that the answer to this question will depend on our answer to the first. Mutuality is a condition of estoppel by res judicata and if the hearing of the appellant's appeal is barred by res judicata the same bar will apply equally to the respondent's cross objections. If, in the other hand, it is held that the appeal can proceed, the cross objections must also be heard and decided.

As I have answered the first question in favour of the appeal prceeding, I must also answer the second question in similar terms, namely, that there is no bar to the hearing of the cross objections.

Campbell, J.—I have nothing to add to the exhaustive judgment of my brother Tek Chand with which I agree.

The second question referred does not now arise. To the first I would reply that no bar to B's appeal proceeding is created either by the provisions of S. 11 of the Code of Civil Procedure, or by general principles of res judicata, or by the fact that B has left outstanding against her a decree with which the decree sought by her to be obtained in the appeal would be in direct conflict.

Addison, J.—I agree generally with the judgment of my brother Tek Chand. The first question referred to us appears to bring into conflict two fundamental principles. The first is that, where the law allows an appeal, a party to a suit aggrieved by a decision should have a full and fair right of appeal against it. The other is that, unless a decree is to be a mere meaningless form a party to a suit must either accept or bring to appeal every decree of which he complains and. if he does not appeal against a decree that decree must be regarded as final against him. When these two principles

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(66) 4 A. C. 504=41 L. T. 418=28 W. R. 97=48 L. J. C. P. 705.

clash, the question which is to prevail is one of extreme difficulty. The arguments in favour of one or the other appear to me to be almost evenly balanced and in these circumstances the correct decision, in my opinion is that the appeal should be allowed to proceed. I therefore agree that the answer to the first question should be in the negative. The second question does not require an answer.

Dalip Singh, J.—The questions referred to the Full Bench for decision are as follows :

(1) Two widows A and B are jointly in possession of certain land. Each sues the other for a declaration that she (the plaintiff) is the exclusive owner of that land and that the defendant has no rights in it of any kind. Both suits are disposed of by a single judgment which decides that A is the owner but B is entitled to hold possession of half the land in lieu of maintenance. A separate decree is drawn up in each suit declaring the rights of the plaintiff according to that decision. B appeals against one of those decrees only, namely the decree given in the suit in which she was plaintiff. Does the fact that no appeal has been preferred by B against the decree in the other suit of A prevsnt B's appeal proceeding.

(2) If the answer to question (1) is in the affirmative does the fact that A has filed cross-objections pressing her claim to exclusive ownership and possession affect the situation, if yes, then in what way ?

In order to decide the first question referred, which in some form or another has been the subject of conflicting decisions in almost all the High Courts in India, it is necessary to examine more fully the facts and the pleadings in this particular case. Mt. Bhulli filed a suit on the 28th April 1920 against Mt. Lachhmi claiming a declaration to the effect that the plaintiff Mt. Bhulli holds a certain square of land as proprietor and that the defendant Mt. Lachhmi has no connexion with the said land. The grounds upon which the claim to the declaratory relief was based were that the square in question belonged to Dewa Singh husband of Mt. Bhulli who was dead, that Mt. Lachhmi was a widow of Bishan Singh son of the said Dewa Singh who had predeceased his father Dewa Singh, that the revenue authorities had been induced to mutate the land in equal half shares during the absence of the plaintiff, that Mt. Lachhmi had no right to the said square in the presence of the plaintiff, that Mt. Lachhmi had brought a previous suit in forma pauperis for maintenance during the lifetime of Dewa Singh but the application to sue in forma pauperis had been rejected and that in these circumstances the plaintiff alone was the sole heir to the property in question. In reply Mt. Lachhmi pleaded by a written statement dated the 8th June 1920, that the plaintiff was not the widow of Dewa Singh deceased but was as a matter of fact his mistress, that her previous husband Ram Singh was still alive and that in the lifetime of Ram Singh the plaintiff could not remarry.

It was further pleaded that the plaintiff was not in possession of the entire square but was only in possession of the eastern half, the western half being in the possession of the defendant. It was denied that there had been any sharp practice with reference to the mutation. It was contended that the dismissal of the previous application to sue in forma pauperis for maintenance had no effect whatsoever upon the rights of the defendant and that the defendant was entitled to the entire heritage of Dewa Singh deceased even in the presence of the plaintiff. There was also an objection as to the form of the suit which it was contended should be for possession. It was further contended that the plaintiff was a woman of loose character and committed adultery and for this reason was not entitled to the inheritance of Dewa Singh. In her oral pleadings Mt. Bhulli stated that she had been lawfully married to Dewa Singh and that she was still his lawful widow, that Mt. Lachhmi was the widow of the *pichhlag* son of Dewa Singh and had no right of inheritance against the plaintiff, that she did not live with Dewa Singh and her former suit for maintenance had been dismissed. Ganda Singh agent of Mt. Lachhmi in oral pleadings stated the same as in the written statement.

On the 23rd Nov. 1920 Mt. Lachhmi filed a suit against Mt. Bhulli for a declaration to the effect that the plaintiff is the exclusive owner of the square and that the defendant has no concern with the square. The grounds of the claim were that the square in question was originally owned by Dewa Singh father-in-law of the plaintiff, that Dewa Singh had died and the land had been mutated half in the name of the plaintiff and the other half in that of the defendant, but the plaintiff was in the possession of the said land, that Mt. Bhulli defendant had no right in

the said land because she was not the widow of Dewa Singh, father-in-law of the plaintiff. Mt. Bhulli in her written statement replied that the mutation of names in favour of Mt. Lachhmi was effected through fraud in defendant's absence, that the defendant was entitled to the property left by her husband, that the husband of the plaintiff had died in the life-time of his father and the plaintiff had severed all connexion with her father-in-law and had not been allowed maintenance by the said father-in-law, that the plaintiff's application to bring a suit for maintenance in *forma pauperis* had been rejected and the plaintiff had no right whatsoever in the property left by the defendant's husband and that at any rate in lifetime of the defendant the plaintiff had no right whatsoever according to law and custom. Ganda Singh agent for Mt. Lachhmi pleaded orally that Mt. Bhulli was not the widow of Dewa Singh, that the rejection of the former application of Mt. Lachhmi had no bearing upon the case, that Mt. Lachhmi alone was the proper heir and that *even assuming that the defendant was the widow of Dewa Singh still she had no right of succession to Dewa Singh in the presence of the plaintiff.* Mt. Bhulli pleaded orally that the plaintiff could not succeed to Dewa Singh in her presence and for the rest repeated the statement contained in the written statement. The Court struck the following issues in Mt. Bhulli's case:

1. What should be the value of the suit for jurisdiction?
2. Did plaintiff marry Dewa Singh about 17 years ago and is Mt. Bhulli the lawful widow of Dewa Singh?
3. If so has defendant Mt. Lachhmi a right of succession to Dewa Singh's land?
4. If not is plaintiff not entitled to the relief prayed for?
5. Is plaintiff unchaste and is she on that account not entitled to succeed Dewa Singh?

In Mt. Lachhmi's case it struck the following issues:

1. Is the defendant Mt. Bhulli still the wife of Ram Singh?
2. Did plaintiff live with her father-in-law since her husband's death and did he maintain her? If not what is the effect of these circumstances?
3. Does the rejection of the plaintiff's application in forma pauperis affect the suit? if so how?
4. If issue No. 1 is decided against the plaintiff and defendant is found to be the widow of Dewa Singh, is plaintiff entitled to the whole of the property of Dewa Singh? If not to how much?

It then proceeded to dispose of both the suits by one judgment holding in the opening line of that judgment that the two suits covered exactly the same ground and therefore could be so disposed of. It held that Mt. Lachhmi had failed to prove that Ram Singh the first husband of Mt. Bhulli was alive or that she was living a life of unchasitity. It held affirmatively that Mt. Bhulli was the widow of Dewa Singh and competent to succeed to the latter's estate unless Mt. Lachhmi could make out a superior right for herself. It held that the previous suit and the non-residence of Mt. Lachhmi with Dewa Singh were no disqualifications against her right to inheritance or to maintenance. It held that Mt. Lachhmi had no right of inheritance. It held that she had a right of maintenance only and that she was entitled to retain half the square as mutated by the revenue authorities in lieu of maintenance but not as heir and that Mt. Bhulli was entitled to hold half the square as heir of Dewa Singh. It therefore gave Mt. Bhulli a declaration that she was the owner of half the square of Dewa Singh as heir of Dewa Singh and that the other half square should remain with Mt. Lachhmi in lieu of maintenance. In Mt. Lachhmi's suit it gave a declaration that Mt. Lachhmi was in possession and should retain possession of half the square of Dewa Singh in lieu of maintenance only; and the parties were left to bear their own costs in both the suits. In Mt. Lachhmi's case the following order was placed on the record.

For the reasons given in the judgment (in English) forthcoming on the record of case No. 1841 Mt. Bhulli v. Lachhmi a declaratory decree be passed to the effect that Mt. Lachhmi plaintiff is in possession of half the square left by Dewa Singh for her maintenance and that she shall remain in possession thereof simply for the maintenance. The parties to bear their own costs. Order announced in open Court in the presence of Lala Wazir Chand Dhawan Vakil for the plaintiff and Sardar Rachhpal Singh Vakil for the defendant.

This brief order is dated the 7th October 1921 that is the same date as the more lengthy judgment referred to in this order which was actually placed on the record in Mt. Bhulli's case.

Mt Lachhmi appealed from the decree in her suit and along with the appeal filed a copy of the judgment

placed on the record in Mt. Bhulli's suit but no copy of the order placed on the record in her own suit. She did not attach any copy of the decree passed in Mt. Bhulli's suit.

The question that now arrises for decision therefore is whether the decree in Mt. Bhulli's case which has not been appealed from bars the hearing of the appeal filed.

I may say at the outset that counsel on both sides contented themselves with giving a list of the rulings of this Court and of the other High Courts which bear in some degree or or other on the point in question and as these rulings are conflicting and as the facts in them are often difficult to ascertain from the reported judgments no light on the difficult question involved has been thrown by the arguments addressed to us. The only argument of counsel for Mt. Lachhmi was that the decision in a suit which had been decided simultaneously with another suit could not operate as res judicata in appeal from either of the suits. Counsel for Mt. Bhulli contended that there were two judgments because there were two suits that his suit had been finally decided and that the suit of the other side was still pending and was, therefore, barred by the rule of res judicata as stated in S. 11, Civil P. C.

In view of the conflicting, and if I may say so with all deference, confusing decisions given in the various cases, I consider that it is necessary to go back to first principles to analyse and determine as far as possible what the principles involved in a decision of this particular question or cognate questions are. The law of res judicata is not fully stated in S. 11 of the Civil P. C. It involves for the purposes of this case two principles which for convenience I shall designate estoppel by record and estoppel by verdict. No doubt as pointed out by Mr. Hukam Chand in his treatise on the Law of Res Judicata at page 9 of the 1894 edition the two principles are not really separate and independent branches of the rule of res judicata but they are convenient for the purpose of bringing out the question involved and serve to keep clear what are the essentials to be looked at for the purposes of the decision in any particular case. It is unnecessary to enter into the question of estoppel by suit. I shall, therefore, first proceed to consider the nature of estoppel by record and then to consider the nature of estoppel by verdict and see whether either or both apply to the present case.

At page 7 of the Treatise of Mr. Hukam Chand bar (estoppel) by record is thus defined :

> The supreme Court of Massachusetts is stated by the learned author to have held in *Foster* v. *Richard Busteed* that the doctrine of res judicata amounts simply to this, that a cause of action once finally determined without appeal between the parties on the merits by a competent tribunal cannot afterwards be litigated by new proceedings either before the same or any other tribunal.

Put shortly the meaning of estoppel by record in its simplest form is that where a suit has once been brought and decided on a certain claim or demand, the same claim or demand cannot be relitigated between the parties. As regards the question what the words cause of action in the above definition mean it is important to bear in mind the decision of their Lordships of the Privy Council in *Chand Kaur* v. *Partap Singh* (67). In that case Lord Watson held that the cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. In *Soorjomonee Dayee* v. *Sudanand* (13) their Lordships of the Privy Council further held that the term cause of action is to be construed with reference rather to the substance than to the form of action. In *Krishna Behari Ray* v. *Banwari Lal* (68), their Lordships of the Privy Council held that the expression cause of action cannot be taken in its literal and its most restricted sense. It thus appears that an estoppel by record prevents parties from litigating in a suit brought on a cause of action which cause of action has been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under

(67) [1889] 16 Cal. 98=15 I. A. 156=5 Sar. 243 (P. C.).

(68) [1874] 1 Cal. 144=2 I. A. 283 =25 W. R. 1=3 Suther 213=3 Sar. 559 (P.C.).

whom they claimed and this estoppel by record was independent of the form in which the subsequent suit was brought.

Estoppel by verdict is alsc dealt with by the learned author Mr. Hukam Chand at page 7, S. 7, of his work and he states it thus :

> The gist of that branch of the doctrine is that an actual decision on any matter directly in issue in every subsequent suit brought on any cause of action or for any purpose or object.

At page 8 the learned author quotes Mr. Black as follows :

> The difference between the two cases (i.e., estoppel by record and estoppel by verdict) are found chiefly in two regards namely as regards the identity of the subject matter in the successive suits and as respects the scope of the estoppel as to the matters determined by it.

Now S. 11 of the Civil P. C., runs as follows :

> No Court shall try any suit or issue in which the matter directly and substantially in issue (has been directly and) substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation 1 of the section is as follows :

> The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

The first question is whether S. 11 in terms applies to the facts of this particular case. In order to determine that it is necessary to decide what is the meaning of the word "suit" in the section. The clue to this is furnished by the expression in a Court competent to try such subsequent suit or the suit in which issue has been subsequently raised. From these words to my mind it appears perfectly clear that the word "suit" refers to the trial of the suit in the Court of first instance. It is a general principle of the construction of statutes that unless there is something distinctly to the contrary, words in the same statute and a fortiori in the same section must be held to mean one and the same thing and I would, therefore, hold that the word "suit" in S. 11 whereever it occurs always means "Suits in the Courts of first instance."

The next question for decision is when is the suit said to be decided. Here again the clue to the decision is furnished by the expression "and has been heard and finally decided by such Court." The words "such Court" refer back to the words Court competent to try such subsequent suit, and, therefore, refer, in my opinion, to the Court of first instance. The words "former suit" shall denote a suit which has been decided prior to the suit in question in Explanation. I refer, therefore, to a decision of the suit in the Court of first instance. In this particular case if it be taken for granted that the suits were disposed of by one judgment as stated by the trial Court and as assumed in the question referred to the Full Bench there was no former suit within the meaning of Explanation I, because neither of the two suits could be said to have been decided prior to the other suit.

I should like to point out, however, that on the facts given above it is a question of some difficulty as to whether the Court meant to deliver two identical judgments in the two suits or whether the Court intended to dispose of the suits by one judgment as stated by him in words. It must be borne in mind that apart from certain formal and technical issues there were two main issues on the merits in the two suits. The first issue was whether Mt. Bhulli was the lawful widow of Dewa Singh. The onus of the Issue was not the same in the two cases because Issue No. 1 in the Lachhmi's case which was framed is the defendant Mt. Bhulli still the wife of Ram Singh was really equivalent to the issue "is defendant Mt. Bhulli not the widow of Dewa Singh." The second issue on the merits was whether Lachhmi was a preferential heir to Dewa Singh's land in the presence of his widow Mt. Bhulli. The onus of this issue was the same in both suits. The learned Judge in his order placed on the record in Mt. Bhulli's case held both negatively that Mt. Lachhmi has failed to prove that Mt. Bhulli was not the widow of Dewa Singh and held affirmatively that Mt. Bhulli was the widow of Dewa Singh. The reliefs sought by both the plaintiffs were also stated in that order. As already pointed out, the opening line of the judgment was that the two suits were to be disposed of by one judgment. On the other hand it seems to me extremely difficult to hold that two suits can be disposed of by one judgment

though it is easy to hold that they are disposed of by two identical judgments. However, no copy of the order in Mt. Bhulli's case was placed on the record in Mt. Lachhmi's case which only contained the few words already given. If those few words were to be treated as a judgment then the decision of the present appeal would be that Mt. Lachhmi had appealed from the decree in her own suit and had attacked the judgment in Mt. Bhulli's suit but not the judgment in her own suit. The appeal would, therefore, not be properly constituted. No such objection seems to have been raised by counsel before the Division Bench nor was any such objection raised before the Full Bench. It must be taken, therefore, for purposes of this case that the suits were disposed of by a single judgment and not by two identical judgments or by two separate judgments one of which incorporated and embodied the other in itself. It follows from this that S. 11, does not in terms apply to the facts of this case.

It has, however, been held by their Lordships of the Privy Council in recent cases that S. 11 is not exhaustive of the law of res judicata, and it, therefore, becomes necessary to consider whether in a case like this the appeal is barred by reason of any principle of the law of res judicata as apart altogether from the terms of S. 11. It seems to me that it is extremely difficult to hold on general principles that there can be any estoppel by verdict when the verdict on which reliance is placed as constituting the bar is itself contained in the judgment which is the subject of appeal. In order to decide the question of estoppel by verdict it is not sufficient to look merely at the formal expression of adjudication in a former suit. It is essential to see whether the matter in issue in the subsequent suit was put in issue in the former suit, and was heard and finally decided. In order to determine whether the matter in issue was heard, and finally decided it is always necessary to refer to the pleadings and the judgment in the former suit, to the pleadings in order to determine what was the matter in issue and to the judgment to determine whether it was heard and decided. It is, therefore, necessary as it seems to me that there must be a judgment other than the judgment in appeal on which reliance must be placed in order to constitute the bar and if for some reason or another there is no such judgment then estoppel by verdict cannot possibly be held to arise.

Next I proceed to consider the question whether in this case there is an estoppel by record, because of the fact that two separate decrees were drawn up in the two suits. Bearing in mind the definition given of cause of action in the ruling of their Lordships of the Privy Council already cited above it seems to me that in substance the plaint of Mt. Bhulli asserted that she was the heir of Dewa Singh in preference to Mt. Lachhmi and asked for a declaration to that effect. Similarly in substance the suit of Mt. Lachhmi asserted that she was the preferential heir of Dewa Singh as against Mt. Bhulli and asked for a declaration to that effect. A declaration was given in Mt. Bhulli's suit to the effect that she was the heir of Dewa Singh in preference to Mt. Lachhmi. It is clear that if the above is the correct way of looking at the two suits then there is an estoppel by record against Mt. Lachhmi, because, of the existence of the decree. I have been much pressed by the argument that it is really a matter of accident that the suit was brought in a declaratory form as it actually was. If Mt. Lachhmi had been in possession of other property the suits of both parties would have been suits for possession of that property of which they themselves were not in possession. No doubt even in such a case an issue would have arisen as to which of them was the preferential heir, and the decision on the issue might have constituted in certain circumstances an estoppel by verdict, but would not necessarily have constituted an estoppel by record. In this particular case for instance both the suits have been dismissed. Mt. Lachhmi's on the ground that Mt. Bhulli was a preferential heir and Mt. Bhull's on the ground that Mt. Lachhmi was entitled to retain the property in lieu of maintenance. But, the decrees in the two suits would simply have been for the dismissal of the suits and in order to see whether any bar was created by way of estoppel it would have been necessary to look at the judgment as distinguished from the decree. It might be urged that in effect the two suits really related to the property to

which the title of the parties was disputed, and that it was only the accident of mutation which constituted them cosharers in a joint Khata which led to the suits being in the form that they were. It seems to me, however, on a closer examination of the argument that the form of the suit did really express the real matter of contention between the parties which was their claim to the inheritance of Dewa Singh. It follows that Mt. Bhulli obtained a decree declaring that she was the heir and this decree settled the status of the parties inter se, and as the decree in that suit has not been appealed against it is now outstanding against Mt. Lachhmi and constitutes a bar by record against her. In this appeal, therefore, where she asks for a declaration that she is the exclusive owner of the square on the ground that she is a preferential heir to Mt. Bhulli if she succeeded there would be two conflicting decisions on the same point. I am, therefore, of opinion that his appeal cannot proceed.

In view of the numerous conflicting decisions of our own and other High Courts I think it is necessary to briefly examine the rulings of our own Court and certain rulings of the other High Courts in order to make the basis of the above decision more clear and in order to prevent confusion in subsequent suits. It may be a moot point whether res judicata is a matter of procedure or of substantive law but in cases of this kind the question really is a matter of procedure and Court fees and it is essential that litigants should know exactly what the position is lest the justice of the matter be defeated on technical grounds or the substantive rights of appeal be adversely affected. I, therefore, pass on to consideration firstly of the rulings of our own High Court and the Chief Court.

In *Jogul Kishore* v. *Chammo* (2) there were two suits for pre-emption filed by two rival pre-emptors against the same defendant. The plaintiff in one case was made a party in the suit of the other pre-emptor. No corresponding order was passed in the suit in which the first pre-emptor was himself plaintiff. The two cases were tried together and ultimately the second pre-emptor was held by the trial Court to have the superior right and a decree was passed in favour of the second pre-emptor giving him the right to pre-empt within a certain time and on his failure to do so the first pre-emptor was also given a right to pre-empt. There was one judgment and decree in both the suits, see page 261 of the reported ruling. The second pre-emptor appealed in his own case and the question was whether the decision in the other case barred the appeal. Assuming that the facts are correctly stated and that there was only one judgment and decree in both the cases (and I draw attention to this fact because in *Bhan Singh* v. *Gokal Chand* (3) it is stated that the head note of the case is wrong in stating that the same decree was given in both suits) then it seems to me quite clear that impliedly the trial Court had consolidated the two suits after impleading the second pre-emptor in the suit of the first pre-emptor and as held by the Full Bench it was only a clerical omission on account of which the first pre-emptor was not impleaded in the suit of the second pre-emptor. If this was so then there could be no question of bar of an appeal because when the suits were consolidated there was but one judgment and one decree and therefore the decision was correct though I am unable with all deference to accept the reasoning of the decision which proceeds on the ground that the word 'former' in S. 11 of the Civil Procedure Code must be decided with reference to priority of institution and not to priority of decision. The controversy that once existed on this point has been set at rest by the Legislature by Explanation (i) but the fact that the words are put into an explanation shows also that the Legislature considered that they had always existed impliedly in the section as it stood originally.

The weight of authority was also the other way even prior to the amendment of the Code in 1908. If it be held that in *Jogul Kishore* v. *Chammo* (2) there were two identical decrees and two identical judgments then it seems to me that the appeal was barred on the grounds both of estoppel by verdict and estoppel by record. If it be considered that there was one judgment and two decrees then it seems to me the appeal was barred by estoppel by record though not by verdict. It must always be remembered that the Court should lean in all cases of doubt

in favour of the right to proceed and if it was doubtful whether the Court meant to pass one judgment and one decree or two judgments and two decrees then the Full Bench was right in holding that there was one judgment and one decree in order to prevent the substantive right of appeal from being negatived on a purely technical ground. In *Dalipa* v. *Rani Suraj Kuar* (18) the facts were as follows:

The plaintiff brought one suit to contest a large number of alienations made by her mother and stepmother. The original suit was by order of the Court made three suits. All these suits were decided by the District Judge by one judgment. It seems that separate decrees were passed in each suit. The trial Court held in favour of the competency of the plaintiff to sue. One of the appeal was taken to the Divisional Court on account of the valuation of the suit. The other appeal went to the Chief Court. The Divisional Judge decided in favour of the competency of the plaintiff and no appeal was taken from that decision. It was argued in the Chief Court that by reason of the judgment of the Divisional Judge the appeal in the Chief Court was res judicata qua the persons who were parties before the Divisional Judge. The Chief Court held correctly, if I may so with all respect, that S. 2 did not apply to the facts of the case. It also held that the decision of the trial Court could not be res judicata because all the suits had been decided simultaneously by that Court and it further held that the decision of the Divisional Judge was not res judicata because he was not competent to decide the appeals pending before the Chief Court. It laid stress on the point that legal provisions in bar of any suit must be strictly interpreted in favour of the suit.

It is with some deference and reluctance that I venture to think that the learned judges were wrong in holding that the decision of the learned judges was not res judicata could be arrived at simply by substituting the word "appeal" for the word "suit" throughout S. 11. Then no doubt the reasoning of the learned judges in *Dalipa* v. *Rani Suraj* (18), would be correct. But with great deference I am unable to accede to this view. It seems to me that the principle of res judicata in India applies whenever the original Court is competent to decide the subsequent suit. The question whether the decision was arrived at in appeal or otherwise does not really arise. To illustrate: if *A* brought a suit against *B* which was dismissed by the trial Court but was decreed by the appellate Court and subsequently *B* brought a suit against *A* in which the same issue was involved, it could not be said that the judgment in favour of *A* in the first suit did not operate as res judicata. Therefore it seems to me that once the Divisional Judge had come to a decision on the common issue in the case and there was no appeal taken from that decision the matter became res judicata in all Courts. I would therefore hold that *Dalipa* v. *Rani Suraj* (18) was wrongly decided on the point.

In *Bhan Singh* v. *Gokal Chand* (3) the plaintiff sued for recovery of Rs. 825 principal and Rs. 412-8-0 interest on a *behi* entry. The first Court decreed Rs. 325 and interest at two per cent per mensem making the total of Rs. 448-8-0. Both parties appealed and the lower appellate Court wrote a judgment in the defendant's appeal covering both appeals and accepted the plaintiffs' appeal allowing Rs. 825 & Rs. 264 as interest total Rs. 1,089 and dismissed the defendants appeal. Separate decrees were given in the two appeals and a short judgment was also written in the plaintiffs' appeal referring to the other judgment. The defendants preferred a second appeal to the High Court attaching copies of both the judgments and of the decree in the plaintiffs' appeal but not of the decree passed in his own appeal. The High Court held that the decision qua the sum of Rs. 448-8-0 was barred as res judicata. It seems to me that in a case like this where there is only one suit and substantially the appellate Court disposed of both appeals by one judgment it should always be presumed in the absence of any direct indication to the contrary that the appellate Court consolidated the two appeals by virtue of its inherent power to do so. The defendants' appeal had been dismissed. Strictly speaking, the main judgment should have been in plaintiffs' appeal and the judgment in defendants' appeal should only have been for the purpose of dismissing his appeal qua the sum decreed against him by the trial Court. The reverse

procedure was followed and it seems to me this should have been taken as an indication of the appellate Court, having consolidated two appeals. The decree in plaintiffs' appeal included the sum of Rs. 448-8-0 which was the subject matter of defendants' appeal. The learned Judge seems to have held that there was an estoppel by verdict (see page 87 of the decision). I would point out in this connexion that if the decision of the learned Judge was correct on the point, the question as to whether interest should or should not be allowed to the plaintiff and its rate was also res judicata on the same ground. Yet in his decision the learned Judge proceeded to consider the question as to whether oral evidence was admissible to prove the agreement to pay interest and hold that the agreement was a question of fact and, therefore, could not be considered in second appeal. I am, therefore, of opinion that *Bhan Singh* v. *Gokal* (3), was not rightly decided and the principle of the presumption in favour of the right to proceed was not given sufficient weight on the facts of that particular case.

In *Mohammad Din* v. *Mt. Zepunnissa* (4), the plaintiff sued Z N. widow of A D. and G N. and R B. vendees from her for possession of their share in two houses by partition. The trial Court decided in favour of the plaintiffs and gave them a decree subject to the payment of Rs. 316 to Z. N. Two appeals were filed before the District Judge, one appeal by G N. and R B. vendees in which plaintiffs and Z N. were made respondents and the second by Z N. in which the plaintiffs were the sole respondents. The District Judge disposed of both appeals by a judgment in Z N's appeal and wrote a short judgment in the other appeal referring to this judgment. Two separate decrees were drawn up in each appeal. The District Judge accepted the appeals and dismissed the plaintiffs' suit. The plaintiffs then presented a second appeal to the High Court from the judgment and decree in Z N's appeal only impleading, however, G N. and R B. the vendees. No copy of the decree or judgment in the appeal of G N. and R B. the vendees was filed with this appeal. The High Court held that the appeal could not proceed against G N. and R B. the vendees because the decree in which G N. and R B. were parties had not been filed in the High Court. There was, therefore, according to the decision of the High Court no proper appeal before them. This was, therefore, not really a case of res judicata though the learned Judges went on to say that if the present appeal were heard and the decree in favour of Z N. set aside, there would still be subsisting the decree in favour of G. N. and R. B. which would operate as res judicata. It is not very clear what the meaning of the learned Judges was but if they meant that the appeal against Z N. would be infructuous the decision seems correct, but it is unnecessary to go further.

In *Ghania Lal* v. *Roshan Lal* (6), the plaintiffs brought a suit on the basis of certain accounts. The defendant claimed that nothing was due to the plaintiff on the accounts of the plaintiffs except a small item and that certain sums were due from the plaintiff to the defendant on other items not included in the account of the plaintiff and as a sum of Rs.34-9-0 was due to the defendants from the plaintiff. The trial Court dismissed the plaintiff's suit and gave a decree for Rs. 34-9-0 in favour of the defendant. There must have been originally only one judgment and one decree, though the fact is not clearly stated in the report. The plaintiff appealed against the decision dismissing the suit. He later on also filed a second appeal against the decision in favour of the defendant. The High Court pointed out that the plaintiff could have appealed to the District Judge in one appeal against both the decisions. The District Judge held that the appeal of the plaintiff qua Rs. 34-9-0 was time barred. In the other appeal he held that the decision of the trial Court was right in dismissing the plaintiff's suit. Two appeals were then taken in the High Court. The appeal as regards Rs. 34-9-0 was again held to be time barred in the High Court. The High Court then held that the appeal qua the plaintiff's suit could not proceed on the ground of res judicata because the correctness of the defendant's account could not be challanged by the plaintiff in that appeal by virtue of the decision in the other appeal. It is difficult for me to follow the decision. The District Judge had held that the appeal qua Rs. 34-9-0 was time barred. He, therefore, gave no

decision on the merits and the judgment and the decree of the trial Court stood. The appeal from the decision of the District Judge to the High Court was again held to be time barred and, therefore, the High Court gave no decision on the merits. On the merits, therefore, only the decree and judgment of the trial Court stood. The High Court itself pointed out that the plaintiff could have lodged one appeal against the entire decision of the trial Court. If, therefore, the plaintiff chose to drop appeal qua a portion of the judgment of the trial Court, I fail to see how the decision qua the other portion could be res judicata in the case. Further as the items involved in the plaintiff's suit were different from the items involved in defendant's suit I am again unable to see how the decision in the one could be res judicata in the other. I am, therefore, of opinion that 4 *Lahore Law Journal* 341 was wrongly decided.

In *Mt. Bhuri* v. *Mt. Asghari* (48), the plaintiff sued for Rs. 5,000 as fixed dower and obtained a decree for Rs. 3,000 in the trial Court. Both parties appealed to the District Judge who dismissed both the appeals. The defendant then presented a second appeal in the High Court unaccompanied by a copy of the decree dismissing the cross appeal of the plaintiff. The High Court held that there was no bar by operation of the law of res judicata against the appeal. The facts are not clearly stated in the report, but if it be taken that the defendant's appeal had been dismissed qua Rs.3,000 and the plaintiff's appeal had been dismissed qua Rs. 2,000 which was not decreed to her by the trial Court, there the decision is perfectly correct. *Kishori Lal* v. *Tilak Ram* (49), is a single Bench decision. The facts are similar to those of *Mt. Bhuri* v. *Mt. Asghari* (48) and the case was rightly decided, if I may say so with all respects. In *Mahomed Jan* v. *Dulichand* (5), the facts are not clearly stated in the judgment. In appears that there were two suits one for pre-emption by Muhammad Jan in which the defendants Duli Chand and Munshi Lal pleaded that thay had an equal right of pre-emption with Muhammad Jan because they had purchased a portion of a *katra* from one Chet Ram. Muhammad Jan based his right to pre-emption on the fact that he was the owner of the whole of the *katra*. Duli Chand and Munshi Lal also brought a suit for partition of the *katra* on the basis of the sale by Chet Ram against Muhammad Jan. The right of Chet Ram to sell any portion of the *katra* was disputed by Muhammad Jan. It is stated in the judgment that both suits were tried together on the ground that their decision depended on the question whether Chet Ram had a saleable interest in the *katra* and the suit for pre-emption was accordingly delayed for this reason. The trial Court dismissed the suit of Munshi Lal and Duli Chand holding that Chet Ram had no title in the katra and granted Muhammad Jan a decree for pre-emption. It is not clear if there were two judgments and two decrees or one judgment and two decrees in this case. If there were two judgments and two decrees then in a case like this there would, in my opinion, be an estoppel by verdict against Duli Chand and Munshi Lal who it appears, appealed only against the dismissal of their own suit, but not against the pre-emption decree obtained by Muhammad Jan. If, however, there was only one judgment but two decrees then it seems to me that there could be no estoppel by verdict and equally there could be no estoppel by record, because the mere fact that a decree for pre-emption stood qua certain property in the name of Muhammad Jan against Munshi Lal and Duli Chand could not be estoppel by record as regards different property to which Munshi Lal and Duli Chand claimed title. This ruling may be conveniently considered with *Zaharia* v *Debia* (1), on which it is based. The facts were that two suits were filed by two rival pre-emptors for possession of a house which had been sold. The suit of the first pre-emptor was dismissed and the second pre-emptor's suit was decreed. Both were impleaded in each other's suit which were decided on the same day. The first pre-emptor appealed to the District Judge against the decision of his suit but did not appeal from the decree in the second pre-emption suit. The District Judge held that the decree in favour of the second pre-emptor operated by way of res judicata and the appeal was therefore, barred. This contention was upheld in the High Court.

Now, if it were held in any case that there were two judgments and two

decrees then it seems to me that there would be both estoppel by record and estoppel by verdict in a case like this. If on the other hand there was only one judgment as is clearly stated in *Zaharia* v. *Debia* (1) then on the reasoning already given there would be no estoppel by verdict, but there would be estoppel by record. The only way in which estoppel by record could be avoided would be to hold that the suits were consolidated, the issues on the merits in them being identical, viz., whether the first and second pre-emptor had a right to pre-empt against the vendee and secondly which of them had the preferential right. The question is whether there can be a presumption that the Court intended to consolidate the suits when there is no express order of consolidation. It seems clear to me, firstly that the Court has power to consolidate suits though there is no express provision in the Code on the point. See in this connexion *Nanda Kishore* v. *Ram Golam* (27) and *Hukum Chand* v. *Kamalanand* (26) but the question still remains whether such an order can be presumed when there is no express order to consolidate. I may say at once that the fact in *Suleman* v. *Partab* (36) are not sufficiently given for me to hold that any such presumption could have arisen in that case. I assume, however, for the purposes of argument that if the issue were as I have stated them it would follow that the impleading of the two pre-emptors in each other's suit might imply an order of consolidation, and if there was only one judgment disposing of the two suits I would be prepared to hold that a presumption that the Court intended to consolidate the suits should be raised. It must be borne in mind that the result of the impleading of the two pre-emptors in each other's suits is ordinarily to make the two suits almost identical.

In *Zaharia* v. *Debia* (1) Mr. Justice Chamier remarks as follows :

> The case must be treated, in my opinion, as if two separate judgments had been prepared. There were, of course, two separate decrees. The Code of Civil Procedure requires a separate judgment and decree for each suit or appeal and two or more decrees cannot be challenged by one appeal. In the absence of a provision enabling the Court to consolidate the suits and appeals and pass one judgment and one decree instead of as many judgments and as many decrees as there are suits or appeals, I see no escape from the conclusion that in a case like the one before us the appellant must file two appeals if he wishes to avoid the bar of res judicata.

With all respect to the learned Judge who delivered that judgment it seems to me now clear that the Code of Civil Procedure is not exhaustive and therefore the absence of a provision enabling the Court to consolidate does not mean that the Court has no power to consolidate suits and appeals. I have already referred to two judgments in this connexion but I might also refer to *Kashi Prosad* v. *Secy. of State* (29) where appeals in different suits were by the order of the Court actually consolidated. I would follow, therefore, that if the learned Judge in *Zaharia* v. *Debia* (1) had considered that the absence of the provision in the Code of Civil Procedure did not debar the Court from consolidating the suits he might have been willing to presume in the case before him that there had been such an order of consolidation. The facts of *Zaharia* v. *Debia* (1) are not sufficiently clear for me to say that the presumption should have been drawn. My conclusion, therefore, is that in cases of this kind the Court should draw the presumption, if the subject-matter of the two suits is identical and the questions raised in them are also, in substance identical because of the principle that I have already stated, viz., that the Court should lean in favour of the right to proceed.

I confess, however, that it is with some hesitation that I hold that an order of consolidation should be impliedly presumed where none has actually been passed.

Mariamnisa v. *Joynab* (8) is a case in which two of the Judges considered that the rule of res judicata did not apply and one judge considered that the rule did apply. The facts were that M and J, two Muhammadan co-widows brought two separate suits for the recovery of their dowers from the estate of their deceased husband. A question was raised in these suits whether two houses belonged to the estate of the husband. They were claimed as her separate property by M. The suits were tried together by consent of parties and disposed of in one judgment. It was found by the trial Court that the two houses belonged to M. as her separate property. Two sepa-

rate decrees were drawn up in one of which it was stated that M's claim to dower would be recovered by her from the estate of her husband excluding the two houses. J appealed only from the decree in her own suit mainly on the ground that the finding that the two houses were M's separate property was erroneous. She preferred no appeal against the decree in M's suit. As the judgment was one and the same as stated at page 1102 of the report there could be no estoppel by verdict; nor on the facts of that case could there be any estoppel by record as J was not concerned with the question whether M should recover her right from the property of her husband excluding the two houses. The case was to some extent peculiar in its facts but I am of opinion for the reasons given above that the case was rightly decided.

It becomes, necessary, however, to further examine a view that was put forward by Mr. Justice Harrington in that case. The learned Judge held that there being only one judgment there could be no res judicata, and that it would be a legal fiction if the one judgment was regarded as two judgments. He further held that if by fiction it was regarded as two judgments then the first judgment would be the judgment on the merits and the second judgment would only be that by virtue of the first Judgment the point was res judicata and therefore that the judgment would be no bar to the hearing of the appeal.

In *Gurraju* v. *Venkateswara* (34) it was held in a case where the Court had actually proceeded to so decide the second suit that the second judgment and decree did not operate as res judicata during the interval preceding the appeal or the interval preceding the decision of the appeal, and that therefore the second judgment being not on the merits but on a mistaken view of the law could not bar the hearing of the question raised in the appeal against the decree in the first suit.

It would follow, therefore, if the reasoning of the learned Judges of the Madras High Court is correct, that a Court would be wrong in deciding a second suit on the ground that the judgment in the first suit acted as res judicata before the period for appeal had expired. This being so where the Court had not so decided it could not be presumed that the Court had erred in law and decided that the second suit was res judicata by reason of the judgment in the first suit where the Court had not actually done so. I would prefer to hold that in a case such as reported in *Gurraju* v. *Venkateswara* (34) the judgment and decree did not constitute res judicata not so much because the decision is wrong in law but because by reason of a supervient fact, namely, the fact that the judgment was no longer a judgment in the sense that the matters decided in it were no longer res judicata but had become res sub judice, the basis of the judgment and the decree in the second suit were gone, and therefore, they could not act as a bar to an appeal against the decree in the first suit. It is unnecessary, however, to pursue this matter further. I must not be taken to express dissent from the reasoning and decision in *Gurraju* v. *Venkatswara* (34).

The second question referred to the Full Bench can be shortly disposed of. If the appeal can proceed so can the cross objections and if the appeal cannot proceed neither can the cross objections. The fact that the respondent has put in cross objections cannot make any difference to the answer to the first question. Since writing the above judgment I have had the advantage of reading the judgment proposed to be delivered by Mr. Justice Tek Chand, with which Mr. Justice Campbell and Mr. Justice Addison have concurred. I regret that I am unable to agree with that decision and it seems to me necessary to explain my position with reference to the points of difference.

There are two points of difference, one which goes to the root of the matter and is a substantial point of difference and the other which may be said to be accidental to this case. Mr. Justice Tek Chand holds that the estoppel could not be created by a decree; it could only be created by a judgment. A decree sheet according to him is not such a record in the technical sense of the term as would create an estoppel. He refers to Spencer Bower's doctrine of res judicata at page 5, para. 10. So far as I have been able to understand the learned author it seems to me that he is there dealing

with the question of the mode of proof of res judicata and pointing out that the absence of a record will not prove the absence of an estoppel. He does not hold the contrary proposition that the presence of the record in the form of a decree is not conclusive proof of the estoppel. Now a decree is defined in the Civil P. C., as a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matter in controversy in the suit. I fail to see the difference between a "decision" and "an adjudication" for the purposes of res judicata and hence with much deference I venture to differ from the opinion of the learned Judges.

The second point on which there is a difference of opinion is really an accident as I shall presently explain. The point is why the principle of presumed consolidation which I am prepared to apply in certain cases as stated in my judgment is not applied by me in the circumstances of this case. The reason for that is found in issues framed in the case. Issue No. 5 in Mt. Bhull's case has no counterpart in Mt. Lachhmi's case. Issue No. 2 in Mt. Lachhmi's case has no counterpart in Mt Bhulli's case. As I have stated previously I am reluctant to presume an order of consolidation where none has actually been passed but in a case like the present where the Court whether rightly or wrongly did not envisage the suits as more or less indentical I am unable to see how an order of consolidation can be presumed. The point is not whether the Court should have consolidated the two suits but whether the appellate Court looking at the actions of the Court below can presume that the Court intended that there should be an order of consolidation. I, therefore, again with much reluctance venture to differ from my learned colleagues on this point.

Agha Haidar, J.—(After setting out the facts of the case and the questions referred to the Full Bench his Lordship proceeded.) There cannot be any doubt that the conflict of judicial pronouncement on the subject is very great. In the Lahore High Court and also in the Chief Court Punjab there have been divergent decisions. In Allahabad there are decisions both ways. The same is the case in the Calcutta High Court. In the Madras High Court however, there is no diversity of judicial opinion and the course of decisions has been uniform. I have not been able to find any case bearing on the question referred to us in the reports of the Bombay High Court. There is just one solitary decision of the Patna High Court, and also one case from Rangoon.

Before coming to the decision of this vast variety of judicial opinions on the subject I may observe that the law relating to res judicata is not confined to the four corners of S. 11 of the Code of Civil Procedure. Beyond the cast iron frame of S. 11 and its predecessor S. 13 of the Code of Civil Procedure and the case law which has accumulated under the phraseology employed in these two sections, there are general principles of the law of res judicata which lie embedded in text books of standard writers and in the vast volume of the case law on the subject and which are independent of the codified law. This has been recognised by the highest authority vide *Ram Kripal* v. *Rup Kuari* (14), *Hook* v. *Administrator General of Bengal* (15) and *T. B. Ramachandra Rao* v. *Ramachandra Rao*(16) and I need not cite numerous cases of the Indian High Courts in support of this proposition. I may observe at the outset that the situation which has arisen now that the litigation has reached the stage of appeal should be considered not strictly with reference to the language of S. 11 Code of Civil Procedure, but rather in this light of the more fluid and elastic principles of the general doctrine of res judicata.

So far as the Punjab decisions are concerned the most important of the case is that reported as *Jogul Kishore* v. *Chammo* (2). In this case there were two rival pre-emption suits and there were two decrees passed by the trial Court. An appeal was filed against one decree only and the other was allowed to become final. It was held by the Chief Court that it was not necessary to file two appeals and the decision in the cross case which had become final, was no bar to the decision of the common issue in the two suits which was covered by the appeal. The learned Judges further pointed out that there was no imperative necessity in law for a double appeal, in other words they seem to be of opinion that there was no express provision of

law requiring the filation of two appeals in a case of this description. The learned judges followed *Abdul Majid* v. *Jew Narain Mahton* (10) and two earlier Punjab cases *Fakhur-un-Nissa* v. *Rahim Bakhsh* (19) and *Rahim Bakhsh* v. *Fakhur-un-Nissa* (20).

Dalipa v. *Suraj Kaur* (18) is another case decided by the Chief Court of the Punjab, but it does not throw much light upon the question now under consideration. In any case the reasoning of the learned Judges does not seem to be very convincing, although their conclusion is against the contention raised by the respondent in his preliminary objection.

We now come to a single Judge case reported in *Bhan Singh* v. *Gokal Chand* (3). A suit was filed for a money claim. This suit was partly decreed and partly dismissed. Both parties appealed. The lower appellate Court wrote out the main judgment in the defendant's appeal and while decreeing the plaintiff's appeal dismissed the defendant's appeal. In the defendant's appeal a short judgment was written referring to the judgment in the connected appeal. The defendant came to the High Court in second appeal and filed copies of two judgments but only one copy of the decree in the plaintiffs' appeal and not in his own appeal. It was held by the learned Judge that the defendant's appeal qua the subject-matter of the other decree not appealed against was barred by res judicata. He held that *Jogul Kishore* v. *Chammo* (2) was distinguishable and further observed that :

> in the present case the two appeals in the lower appellate Court were distinct and related to two different subject-matters.

The distinction with due respect is not intelligible to me. The suit was originally for a money claim, and I fail to understand how, when the matter reached the lower appellate Court in the form of two appeals, it could be said that it involved two distinct subject-matters.

Muhammad Din v. *Mt. Zeb-ul-Nissa* (4) was cited by the respondent in support of his preliminary objection. In that case Muhammad Din and others brought a suit against Mt. Zeb-un-Nissa, Ghulam Nabi and Rahim Bakhsh for possession of 6/16ths share of the certain property by partition. Ghulam Nabi and Rahim Bakhsh were transferees from Defendant No. 1, Mt. Zeb-un-Nissa. The trial Court decreed the subject to the plaintiffs paying a sum of Rs. 316 to Mt. Zeb-un-Nissa. Two appeals were filed (1) Appeal No. 19 by defendant Ghulam Nabi and Rahim Bakhsh. To this appeal the plaintiff Muhammad Din, Mt. Zeb-un-Nissa and a lady Mt. Imam Bibi, were parties, respondents and (2) Appeal No. 20 by Mt. Zeb-un-Nissa, against the plaintiffs only.

The lower appellate Court wrote judgment in Appeal No. 20 and only a short judgment in Appeal No. 19 merely referring to the judgment given in Appeal No. 20. The lower appellate Court accepted both the appeals and dismissed the plaintiffs suit in its entirety. The plaintiffs filed a second appeal and along with the memorandum of appeal filed copies of the judgment and decree in Appeal No. 20 only. No copy of the decree in Appeal No. 19 which was decided in favour of Ghulam Nabi and Rahim Bakhsh was filed and the decision in that appeal was allowed to become final. The learned judges very properly decided that the second appeal filed by the plaintiffs against the judgment and decree in Appeal No. 20 was barred by res judicata in that the decree in Appeal No. 19 in favour of the defendants Ghulam Nabi and Rahim Bakhsh who were not parties to the second appeal had become final. On these facts the decision is perfectly correct and it would have been inequitable if, under the circumstances, the High Court had passed any decree or order which would have the effect of derogating from the valuable right which had accrued to Ghulam Nabi and Rahim Bakhsh by the decree passed in their favour and in Appeal No. 19 having become final. The reasoning adopted by the learned Judges is to the effect that if they were to set aside the decree, there would still be subsisting the decree in favour of Ghulam Nabi and Rahim Baksh which would operate as res judicata and the plaintiffs suit would still stand dismissed as against them. So this case is therefore no authority against the appellant in the present appeal.

The case reported as *Ghanuja Lal* v. *Roshan Lal* (6) quoted on behalf of the respondent in support of the preliminary objection was decided by a Bench of two learned Judges in a Letters Patent Appeal from the decision of a Single Judge.

Three out of two connected appeals before the learned Single Judge one was dismissed on account of being time barred, and it was observed that in both the connected appeals the common question was :—whether the defendant's account books were reliable or not. Now, one of the connected appeals was dismissed by the High Court as barred by limitation. Obviously on these facts the other appeal would be barred by res judicata as the decision of the crucial question as regards the correctness of the defendant's account books involved in the two appeals had been "finally decided." In any event the facts of this case are essentially different from those of the present reference and the learned Judge, who delivered the judgment of the Court after citing a number of authorities, rightly observed that each case depends upon its own peculiar facts and circumstances.

Suleman v. *Partap* (36) is a Lahore case which was decided by a learned Single Judge. In this case there were two rival suits for pre-emption. Both suits were decided on the same date and the suit filed by Suleman was dismissed and that by Kamal was decreed. Suleman appealed against the decree which had been passed in Kamal's suit in Kamal's favour. The lower appellate Court held that Suleman's appeal was barred by res judicata. The learned Judge of the High Court affirmed the decree after considering a number of authorities. The learned Judge, while discussiug the Full Bench case *Ghansham Singh* v. *Bhola Singh* (9), referred only to a solitary sentence in the judgment that a party who has got a decree in his favour was not bound to appeal against that decree. But this sentence occurs in a long paragraph of the judgment and should be read along with the whole context. The case, however, is an authority in support of the preliminary objection.

Mt. Bhuri v. *Mt. Asghari Begam* (48), is an important case. In this case there was one suit which was partly decreed and partly dismissed. Both parties, being dissatisfied appealed to the lower appellate Court and both appeals were dismissed. An appeal was filed by the defendant from the decree in her own appeal, and a preliminary objection was taken that the appeal was barred by the operation of the rule of res judicata in that there was no appeal filed against the decree in the connected appeal. *Muhammad Din* v. *Mt. Zeb-un-Nissa* (4) and *Bhan Singh* v. *Gokal Chand* (3) were relied upon in support of the preliminary objection. The appellant in support of his appeal relied upon *Jogul Kishore* v. *Chammo* (2) and *Ghansham Singh* v. *Bhola Singh* (9). The learned Judge held that the decision reported in *Jogul Kishore* v. *Chammo* (2) being a Full Bench decision of the Punjab Chief Court was binding upon them and that the appeal was not barred by res judicata. There is a slight mistake in the judgment delivered in this case. The learned Judges remarked that apparently *Jogul Kishore* v. *Chammo* (2) was not referred to at the time when the cases reported in *Bhan Singh* v. *Gokal Chand* (3) and *Muhammad Din* v. *Mt. Zeb-un-Nissa* (4) were argued. It is true that no authority was quoted in the case reported as *Muhammad Din* v. *Mt. Zeb-un-Nissa* (4); at least none is mentioned in the report but in the case of *Bhan Singh* v. *Gokal Chand* (3), the Full Bench decision in *Jogul Kishore* v. *Chammo* (2) was quoted but distinguished by the learned Judge. *Mt. Bhuri* v. *Mt. Asghari Begam* (48), is thus an authority in favour of the appellant and against the preliminary objection, in that it follows the Full Bench of the Punjab Chief Court and treats it as good law, inspite of the changes introduced in S. 13, Civil P. C., (old) which is now re-enacted in the shape of S. 11, Civil P. C., (Act 5 of 1908).

There is also a decision of the Lahore High Court reported as *Obedur Rahman* v. *Barbari Lal* (69 & 70). This is a decision by two learned Judges of this Court one of whom is a member of this Full Bench. In this case there were a number of connected appeals some of which had abated and others came on for hearing. A preliminary objection was taken that the abatement of those appeals had the effect of their dismissal, with the result that the decree of the trial Court against which those appeals had been filed had now become final and, therefore, the point in issue in the appeals pending in the High Court being the same as in the appeals which had already abated, the pending appeals were barred by res judicata. The preliminary objection was

(69 & 70) A.I.R. 1927 Lah. 1=7 Lah. 423.

overruled and it was held that where there has been an appeal, the matter is no longer res judicata but res sub judice and when an appeal is not finally heard and decided any matter thereunder-cannot be said to be res judicata. In this case no authorities were quoted by either side. At least none are mentioned in the judgment and the matter seems to have been treated as one of first impression.

Let us now turn to the state of case law in the Madras High Court. In that Court the current of decisions is uniform and the leading case is reported as *Panchanan* v. *Vaithinatha Sastrial* (7). There were two cross suits between a landlord and his tenant, and the questions in issue in both the suits were identical. The suits were tried together and judgment was given on the same day. The decree to be passed in each suit was in effect the same. Only one appeal was filed by the tenant against the decree in his own suit. He did not file an appeal against the decree in the landlord's suit. On an objection being raised the lower appellate Court held that the appeal before it was barred by res judicata, in that there was no appeal before the Court against the other decree which had become final in favour of the landlord. It was held by a Full Bench that, though technically the tenant's appeal ought to have been in both suits, yet the fact that the tenant appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the lower appellate Court from deciding upon the merits the questions raised in the appeal which was before it. The subject matter of the litigation in the two suits was the same, the evidence was the same, and the two suits were tried together and the reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his suit. It was further held that the doctrine of res judicata either under S. 13 or the general principles of res judicata had no application to the facts and circumstanstances of the case. The doctrine was held inapplicable when the very object of the appeal, in substance if not in form, was to get rid of the adjudication which was said to render the question which the appellate Court was asked to decide res judicata. This case has been uniformly followed in that Court vide *Ramsamy Chetty* v. *Karuppan Chetty* (57) and *Sinnana Kone* v. *Muthupalani Chetti* (58). Thus the decisions of the Madras High Court fully support the contention of the appellant and are against the preliminary objection.

There is a marked conflict in the authorities of the Calcutta High Court on the subject. The earliest case is reported as *Abdul Majid* v. *Jew Narain Mahton* (10). There two parallel suits were tried together with the consent of the parties. The point involved in the two suits was common viz., Whether the plaintiff A in the first suit which was in appeal before the High Court was a partner along with defendant B in a certain theka. The trial Court held that the plaintiff A was not a partner with the defendant B. The other suit which was brought by B for rent against A was decided against A and a decree was passed against him. A did not appeal against this decree but filed an appeal against the decree in the suit which he himself had brought. The lower appellate Court dismissed A's appeal on the ground that as he did not appeal against the decree which was obtained against him by B in the connected suit and which was now final, his appeal was barred by res judicata. The matter went up in second appeal to the High Court and a Bench of two learned Judges held that on general principles the view taken by the lower appellate Court was not correct and that there was no valid reason why the plaintiff-appellant should be deprived of his right to have the opinion of the appellate Court on a question which had been considered and decided by the trial Court against him and that S. 13, Code of Civil Proccdure, was no bar to the lower appellate Court deciding the points on the merits. The learned Judges had given other grounds also for their decision, but this reasoning appears to me sound and supports the appellant before us.

The next important case of the Calcutta High Court is reported as *Mariamnissa Bibi* v. *Joynab Bibi* (8). The matter came up before Rampini and Harrington, JJ., and there was a difference of opinion on the question of res judicata between the two learned Judges, with the result that under the provisions of S. 575 of the old Civil P. C. (Act 14 of

1882) the case was placed before third Judge Ghose, C. J., (Offg). The facts of this case are briefly these :

A Muhammadan died leaving him surviving two widows and some other heirs. Each of the two widows brought a suit for dower and asked for a declaration that the dower may be declared to be a charge upon the estate of her deceased husband. One of the widows Mt. Mariamnissa Bibi claimed that two of the properties were her own and did not form part of the estate left by her deceased husband. Joynab Bibi, the co-widow, disputed Mariamnissa Bibi's claim in regard to the said properties and alleged that they were only purchased benami in the name of Mt. Mariamnissa Bibi, by their husband. The suits were instituted in one and the same Court and the trial Judge apparently with the consent of the parties tried them together as if they were one suit, the evidence in one suit being considered as equally applicable to the other and decided them by one and the same judgment. Thus the question as to the ownership of these two properties and their liability to the claim for dower was raised in the issues framed in both the suits. The trial Court decided the issue of ownership of the two properties in favour of Mt. Mariamnisssa Bibi. Mt. Joynab Bibi appealed from the decree in her own suit in which this question of ownership had been decided against her but not from the decree in the suit in which Mt. Mariamnissa Bibi was successful. The lower appellate Court decided on the evidence that the two properties in dispute belonged to the estate of the husband of the two ladies. Mt. Mariamnissa Bibi came to the High Court in second appeal and raised the plea of res judicata on the ground that as Mt. Joynab Bibi did not appeal against the decree which decided that Mt. Mariamnissa Bibi was the owner of the two properties to the lower appellate Court that decree had become final and should operate as res judicata and bar Mt. Joynab Bibi's appeal in the lower appellate Court. Rampini, J., held that, although there was one judgment yet in the eye of law there were really two, and the judgment in Mt. Mariamnissa Bibi's appeal operated as res judicata and barred the suit of Mt. Joynab Bibi in the lower appellate Court. The learned Judge followed *Balkishen* v. *Kishan Lal* (35) and *Gururajammah* v. *Venkatakrishnama* (52) and did not accept *Abdul Majid* v. *Jew Narain Mahton* (10) as good law. Harrington, J., on the other hand held that there was only one judgment and, therefore it could not be said that the questions has been substantially in issue in a former suit and had been finally decided because the judgment deciding the question was the very judgment against which Joynab Bibi was appealing. The plea of res judicata raised by Mt. Mariamnissa Bibi was a highly technical plea and the learned Judge was perfectly justified in meeting it with an equally technical argument when he held that as there was only one judgment in the two suits and that judgment was in appeal it could not be said that any question in issue in that judgment had been finally decided. Ghose C. J. (Offg.) agreed with Harrington J. and held that when one judgment disposes of one issue which has been raised in two suits, it would be an anomaly to hold that the party against whom the issue is decided cannot question the judgment unless he files two appeals against it. Thus two out of the three learned Judges of the Calcutta High Court held that in the circumstances detailed above the doctrine of res judicata did not apply.

There are three recent decisions of the Calcutta High Court and it is noticeable that the judgments in two of these cases were delivered by Benches of which that eminent and learned judge, the late Mr. Justice Asutosh Mookerjee was a member. One of these cases is reported as *Isup Ali* v. *Gour Chandra Dala* (*A. I. R.* 1923 *Cal.* 496). The facts of the case are as follows: A, B and C brought a suit for confirmation of possession or recovery of possession against G. C. A few days after G. C. and his brother brought a suit against A, B and C as regards homestead land, being portion of the property involved in the previous suit filed by A, B and C. The relief in the first was valued at Rs. 348 and in the second suit Rs. 200 ; at the request of the parties the two suits were tried together as the disputed land and the cause of action were the same to a certain extent. A, B and C's suit was dismissed G. C. and his brothers' suit was

decreed. A, B and C filed only one appeal valuing it at Rs. 548 that is to say Rs. 348 and plus Rs. 200 and challenged both the decrees. G. C. above was made a respondent but not his brother. It was held that the decree enured to the benefit of G. C. as well as his brothers and and as the brothers were not respondents, they could not be prejudiced even if the decree of the trial Court were reversed. The appeal filed by A, B, and C, was held to be barred by res judicata.

Now on these facts there cannot be any doubt that the decision was perfectly correct. The array of parties in the trial Court was different from the array of parties in the appellate Court. The brothers of G. C. were not made parties respondents to the appeal and it rightly held that their position could not be worsened in any way by the result of the appeal. This being so, the rest of the judgment is more or less in the nature of obiter dicta as in my opinion on the facts stated above the case was rightly decided. I may further point out that this case is very similar to the cases reported as *Muhammad Din* v. *Mt. Zeb-un-Nissa* (4) and *Anwar Ali Sowdagar* v. *Amir Ali Sowdagar* (63) which were also correctly decided on their own facts.

The second case reported as *Midnapur Zimidari Coy.* v. *Nityukali Dasi* (51) is not on all fours with the facts covered by the present reference. The learned Judge is reported to have held that if the same question is in controversy between the same parties the two different litigations instituted one after another but pending at the same time, the final decision of the latter suit, if given earlier, operates as res judicata in the earlier suit whose final stage is reached later. This is not the case before us as two connected suits in the present case were heard simultaneously and disposed of together by one and the same judgment and that judgment itself is the subject of appeal. The case reported as *Gangadhar Kalwar* v. *Mt. Sakahitelini* (53) is no doubt against the appellant and supports the preliminary objection. In this case D brought a criminal charge against P for using abusive language. D's complaint was dismissed. P sued D for damages for malicious prosecution. D sued P for damages for using abusive language. The issue common in the two suits was whether P used abusive language to D. The trial Court found that P did not use abusive language with the result that it decreed P's suit and dismissed the suit brought by D. D appealed against the decree in the suit in which P was the plaintiff and D was the defendant but not in the suit in which D himself was plaintiff and P was the defendant. It was held that this appeal was barred by the rule of res judicata.

The result, therefore, is that so far as the Calcutta High Court is concerned there are out of five cases quoted before us, two cases which support the appellant's right to proceed with the appeal where there is really one case which lends support to the respondents' objection.

The Allahabad High Court also presents a diversity of judicial opinion on the subject, *Chhajju* v. *Sheo Sahai* (46) is a typical case in support of the preliminary objection. In that case A brought a suit for pre-emption and obtained a decree. In this suit his rival pre-emptor B was impleaded by a party defendant. B had also brought a similar suit to which A was under a party defendant. The decree in B's favour was a conditional one in that it provided that in case A failed to execute his decree B would have the decree in his favour, and execute it. A's decree was an ordinary decree for pre-emption. B filed an appeal challenging the amount of the sale price and further pleading that A had lost his right of pre-emption by colluding with the vendee. The lower appellate Court decreed the appeal of B. A filed a second appeal and urged that as the decree in his favour had not been appealed against in the lower appellate Court and had become final, B's appeal ought to have been dismissed as barred by res judicata by the Court below. This contention was upheld by the High Court in second appeal.

The Full Bench case reported as *Balkishen* v. *Kishen Lal* (35) is an important decision, though it does not apply to the question now before us. In that case one litigation had already gone up to the High Court and finally decided and where a second litigation involving the same question reached the High Court it was very rightly held that the previous litigation

having become final between the parties the High Court could not entertain the case which came before it subsequently and thus stultify its prior decision. This case was an authority for the proposition that the doctrine, so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The importance of this pronouncement lies in the fact that it apparently led to the enactment of explanation 1 to the present S. 11 of the Code of Civil Procedure. The next important case is reported as *Damodar Das* v. *Sheoram Das* (11). This was a suit for adjustment of accounts which was partly decreed and partly dismissed. Both parties appealed. The lower appellate Court disposed of both the appeals in one judgment and found in favour of the defendants for a sum of Rs. 1,400 odd and interest. It made a similar order in the plaintiffs' connected appeal which was numbered as 411. The plaintiff came up in second appeal to the High Court without instituting a second appeal against the decree in Appeal No. 411.

A preliminary objection was raised that the appeal before the High Court could not be sustained, on the ground that the decree in the connected Appeal No. 411 had become final and operated as res judicata. This objection was repelled by the learned Judges, and it was held that there was in fact but one decree settling the account between the parties, although it was written out in duplicate in both the appeals before the lower appellate Court. The learned Judges relied upon *Mariamnissa Bibi* v. *Joynab Bibi* (8) and *Panchanan* v. *Vathinatha Sastial* (7). Then we come to the important Full Bench case reported as *Zaharia* v. *Debia* (1). In this case there were two rival pre-emption suits in which each pre-emptor was made a defendant in the other suit. The two suits were tried together and one judgment was delivered in both, though copies of it were placed on the files of the two suits. Two separate decrees were also prepared, one in each suit. Only one appeal was filed and by the time the appeal came on for hearing limitation for filing the appeal had expired in the other case. The lower appellate Court dismissed the appeal as barred by res judicata and it was held by the Full Bench that *Chhajju* v. *Sheo Sahai* (46), and the cases subsequent to it like *Ram Lal* v. *Chhab Nath* (21) were correctly decided and the appeal was barred by res judicata. The learned Judge said that the case *Damodar* v. *Sheoram Das* (11) was only note of dissent up to that time so far as the course of decisions in that Court was concerned.

The main judgment in the Full Bench case was delivered by Sir John Stanley, C. J. who dissented from *Damodar* v. *Sheoram Das* (11), and also from *Abdul Majid* v. *Jew Narain Mahton* (10), *Mariam Nissa Bibi* v. *Joynab Bibi* (8) and *Panchanan* v. *Vaithinatha Sastrial* (7). The learned Chief Justice seems to have been much impressed by the argument that a decree, unless it be a decree which is a nullity by reason of, for example, fraud cannot be superseded except it be upon appeal in the regular sense. In answer to the argument addressed to him that in case the appeal was decreed by High Court it will have the effect of superseding the decree in the connected appeal in the lower appellate Court which had become final, the learned Chief Justice observed that if he were to accept this argument there would be two inconsistant decrees on the file of the Court giving rise to a most serious anomaly and in execution proceedings would cause a complete impasse. I shall show later on in another connexion that the position taken up by the learned Chief Justice here was not sound and his apprehensions were unfounded. There were at least, at the time two cases, of the Allahabad High Court which were apparently not brought to his notice. (1) *Mulla Mal* v. *Jamna Lal* (42) and (2) *Rai Sham Krishan* v. *Ugrah Narain Singh* (71). If these cases of his own Court had been brought to his notice his apprehensions about conflict in the execution proceedings would have been completely dispelled.

Now we come to the most important judicial pronouncement on the subject reported in the Full Bench of the Allahabad High Court. *Ghansham Singh* v. *Bhola Singh* (9). The Full Bench consisted of His Lordship the Chief Justice and four learned Judges. The judgment of the Court was delivered by the learned Chief Justice in accordance

(71) [1909] 6 A. L. J. 49 Reporter's Diary.

with Piggott, Walsh and Ryves, JJ. Mr. Justice Banerji delivered a separate judgment agreeing with the conclusions arrived at by the main judgment though his reasoning is somewhat different. The facts of that case are briefly these; B executed a mortgage in favour of G. G brought a suit on the foot of his mortgage and the said suit was decreed in part, i. e., the Court did not allow G his costs of the suit. On the other hand the Court decided the plea raised by B that interest was excessive against B. The result was that both B and G were dissatisfied with the decree. G and B both filed separate appeals. The appeal of G against B related only to costs and that of B against G related to the question of interest. The lower appellate Court decreed both the appeals but wrote only one judgment. Two decrees were drawn up in the two appeals the terms of which were practically identical. Though such decree was intended to be independent of the other and confined only to the appeal to which it related yet such was framed in terms which referred to and operated on both appeals. G appealed to the High Court against B from the decree of the lower appellate Court passed in the appeal filed by B against G but not against the decree in the appeal which he himself had filed against B. A preliminary objection was raised that the appeal before the High Court was barred by the rule of res judicata and all the authorities in the authorised reports and some at any rate from unauthorised reports were cited in argument and discussed. Thus the case was presented before the Full Bench in a manner in which the conflict on the subject was fully argued from every point of view. The learned Judge came to the conclusion that the case reported as *Damodar Das* v. *Sheoram Das* (11) was rightly decided and that the Bench which decided that case rightly treated that two decrees as being in substance one though drawn up in duplicate. As regards the Full Bench case of *Zaharia* v. *Debia* (1) the majority of the Full Bench held that that case has been treated as laying down a general rule to be followed in all cases in which an unappealed decree passed in contemporaneous proceedings arising not of the same dispute is outstanding in the lower appellate Court. They thought it necessary to lay down once and for all the practice for the guidance of the Courts in future and to negative the general applicability of the rule in *Zaharia* v. *Debia* (1).

The following passage is very important and settles the law so far as the Allahabad High Court is concerned.

> Without differing from that decision [*Zaharia* v. *Debia* (1)] as applied to the facts of that and cognate cases, we are of opinion that some of the reasoning and dicta contained in the judgments went further than were necessary, or than we ourselves are preferred to go, and that they have been misapplied in some of the subsequent cases. Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate Court and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of res judicata or at all, by reason of his failure to appeal from the decree which does not prejudice him. It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object, or to appeal against two duplicate decrees shere an appeal against one of them would be sufficient, and he is certainly under no obligation to do so. The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of appeal.

In conclusion the learned Judges held that the case reported in *Damodar Das* v. *Sheoram Das* (11) was rightly decided and that *Abdul Basit* v. *Ashfaq Hussain* (33), *Dakhni Din* v. *Syed Ali Ashga* (54), *Ram Charan* v. *Lachhman Parshad* (59), *Anant Das* v. *Udai Bhan Pargas* (47) and *Balhari Pande* v. *Shiva Sumpat* (55) must be treated as being no longer law. I may observe that after this Full Bench decision the authority of *Zaharia* v. *Debia* (1) is considerably shaken even if it is not overruled in so many words seeing that the Full Bench has definitely overruled these cases which were founded upon the authority of *Zaharia* v. *Debia* (1) and has rehabilitated *Damodar Das* *Sheoram Das* (11) which had been equally definitely overruled by *Zaharia* v. *Debia* (1).

I may also note that two judges of the Allahabad High Court sitting singly have followed the law as laid down in *Ghansham Singh* v. *Bhola Singh* (9) (1) *Ram Narain* v. *Nihal Singh* (61) and (2) *Bijai Bahadur* v. *Parmeshwari Ram* (60).

The learned Judge who decided the latter case, having regard to the principles enunciated in *Ghansham Singh* v. *Bhola Singh* (9) rightly observed that a Court should see that substantial justice is done and technicalities should be avoided. All parties being represented and the question involved in one appeal covering the whole controversy, it cannot be said that the appeal before the Court was barred by res judicata simply because there was no separate appeal filed in the connected case. There remain only two cases representing the two remaining High Courts on the subject *Dhani Singh* v. *Sri Chandra Choor Deo* (62). This is a decision by a Single Judge of the Patna High Court in which the appeal was held to be barred by res judicata as only one decree was appealed against out of the two decrees arising out of the two connected suits. The other case is reported as *Anwar Ali Sowdagar* v. *Ameer Ali Sowdagar* (63). There two connected suits were disposed of by one judgment which was placed on the file of one of the suits. A short judgment was recorded in the other suit which was decreed for reason, given in the last mentioned judgment the result being that one suit was decreed and the other was dismissed. A who lost both the suits, filed two appeals. One of them was dismissed in default. At the time of the hearing of the other appeal it was objected that by reason of two issues raised in that dismissed appeal, having become final, the remaining appeal was barred by res judicata. It was held following *Zaharia* v. *Debia* (1) that the principle of res judicata applied and the appeal was barred by the rule of res judicata. As already stated after the Full Bench decision in *Ghansham Singh* v. *Bhola Singh* (9), *Zaharia* v. *Debia* (1) is a spent force and the Rangoon case which is ostensibly based upon it, cannot be considered as sound law, and I respectfully dissent from it.

This is practically the whole relevant case law on the subject. The position, therefore, in the case before us is this. There is an appeal by Mt. Lachhmi against the decree in Suit No. 398 of 1920, and there has been no appeal from the decree in Suit No. 184 of 1920. There is only one judgment delivered in Suit No. 398 of 1920 and so far as Suit No. 184 of 1920 is concerned there is no proper judgment but only a short memorandum on its file referring to the judgment in Suit No. 398 of 1920. There being, therefore, one judgment the reasoning of Harrington, J., and Ghose, C. J. (offg.) in *Mariamnissa Bibi* v. *Joynab Bibi* (8) applies and the mere fact that there was no appeal against the decree in Suit No. 184 of 1920 does not operateas a bar to the appeal filed by Mt.Lachhmi.

There is another way of looking at the points raised in the reference to the Full Bench. So far as the array of the parties is concerned, the case is a very simple one and in fact it could not be simpler. We have got one plaintiff and one defendant in each suit and the parties are the same in both cases. The decree passed in the suit brought by Mt. Bhulli (184 of 1920) gives her larger rights than the decree in the suit brought by Mt. Lachhmi in that the said decree gives to Mt. Bhulli a declaration that she is the owner of half of the property as the heir of Dewa Singh and that the other half would remain in Mt. Lachhmi's possession in lieu of maintenance only. But the plea urged by Mt. Lachhmi in her memorandum of appeal (No. 80 of 1922) ground No. 1 fully covers the subject matter of the two suits and also of the decree given in favour of Mt. Bhulli. Mt. Lachhmi had a perfect right to institute her present appeal ; She paid the necessary Court fee ; she impleaded the proper party as a respondent and she filed her suit within the period of limitation against her solitary opponent, Mt. Bhulli. Is there any rule of law which under the circumstances of the present case would justify the dismissal of Mt. Lachhmi's appeal in limine ? By the mere act of the filation of appeal confiled with the cross objection filed by Mt. Bhulli under O. 41, R. 22 of Civil P. C., the matter in controversy between Mt. Lachhmi and Mt. Bhulli which formed the subject matter of the two suits, has become sub judice. It is an elementary proposition of the law of res judicata and embodied also in S. 11 of the Civll P. C., that before the matter in controversy between two parties can operate as res judicata it must be "heard and finally decided." having regard to the position of the parties to this litigation and the subject matter of their two suits which we

find now fully covered by the present appeal and the cross objections, it cannot be doubted for one moment that the controversy has not yet been set at rest and that the matter in dispute has not yet been "heard and finally decided." On this point I need refer only to two Privy Council cases reported in *Sheosagar Singh* v. *Sita Ram Singh* (38) under the latest case and the last word on the subject *Abdullah Asghar Ali Khan* v. *Ganesh Das*(39)without citing the numerous Indian decisions on the subject. Mt. Bhulli cannot complain that Mt. Lachhmi was trying to steal a march over her by obtaining a judicial pronouncement against her in her absence. She is impleaded as a party that it would be open to her to raise every concievable point in order to defeat her antagonist, Mt. Lachhmi. Mt. Lachhmi can have put right those points which had been decided to her detriment in the trial Court if she suceeeds in the present appeal and none of the parties to this litigation can suffer the slightest injury by the entertainment of this appeal by this Court and by its trial on merits.

An appeal after all is a continuation of the original proceedings stated in the trial Court and the decree passed by the appellate Court is a decree in the suit itself. On the filing of the appeal the judgment appealed against ceases to be res judicata and becomes res sub judice, vide *Guraju* v. *Venkataswara* (34) and the numerous cases cited as authorites, therein. The suit started by Mt. Lachhmi has not yet come to an end. It has only reached the stage of an appeal and unless there is some express provision of law there is no reason why the nominal progress of the appeal should be retarded by any technical rules of procedure which may be supposed to be deducible from the doctrine of res judicata. It was argued on behalf of the respondent that if the present appeal were to be entertained and decided on its merits and were ultimately successful there would be a conflict of decisions which would embarrass the execution department. Now, this argument loses its force when we realise that both these suits are of declaratory nature and none of the plaintiffs in the two suits has thought fit to sue for possession. Apart from this there is ample authority for the proposition that where there are conflicting decisions regarding the subject-matter in dispute between the parties the latest of them overrides the earlier and operates as res judicata, vide, *Mallu Mall* v. *Jamana Mal* (42), *Damber Singh* v. *Manawar Ali Khan* (41), *Rai Sham Kishore* v. *Ugrah Narain Singh* (71) and *Seshayya* v. *Venkatadri Appa Row Bahadur* (40).

The object of the rule of res judicata is to prevent multiplicity of suits. It is further founded upon the maxims *nemo debet bis vexari pro una et eadem causa* (no one shall he vexed twice for one and the same cause), and *interest reipublicae ut sit finis litium* (it is in the interest of the state that there should be an end to the litigation). Having regard to the facts and circumstances of the case I do not see that any one of these maxims would be infringed if Mt. Lachhmi's appeal is disposed of on its merits in its ordinary course. Mt. Bhulli would not, in any way, be vexed twice for the same cause, seeing that the litigation between the parties to the present appeal had been proceeding in its natural course without any break and the matter in controversy in the trial Court is only being examined by the higher tribunal in its further stage. No doubt it is in the interests of the state that there should be an end to litigation but the end should be normal and natural and not violent and unnatural as it would be if the preliminary objections were to prevail.

There is divergance of opinion among jurists on the question as to whether the rule of res judicata is a rule of substantive law or a rule of procedure. The preponderance of judicial authority seems to favour the view that it is a rule of procedure only. The facts that S. 11, Code of Civil Procedure, finds place in the Code of Civil Procedure seems to point in the same direction. Rules of procedure should be so construed as to advance substantial justice and technicalities should be avoided as far as possible. In the well known case of *Kendall* v. *Hamilton* (66) Lord Penzance has observed to the effect that proceeding after all is ancillary to justice and justice should not be subservient to the technicalities of procedure. The right of appeal is a very valuable right and when this right is clearly conferred by statute litigants should not be

deprived of it merely because there are some rules of procedure which may be inferred from the rules of res judicata. By making it obligatory upon a party to file several appeals in connected suits like those in the present case, the cost of litigation would become more prohibitive than it is at present. Such a contingency should be avoided. The Courts in India have to guide themselves by the rules of justice, equity and good conscience in the absence of any specific provision of law on a particular point. In this connexion I may quote the words of Mr. Justice Storey in his Equity Jurisprudence, paragraph 28 ;

> But Courts of equity were not so restrained. Although they had prescribed forms of proceeding, the latter were flexible, and might be suited to the different postures of cases. They might adjust their decrees, so as to meet most, if not all, of these exigencies, and they might vary, qualify, restrain and model the remedy so as to suit it to mutual and adverse claims,controlling equities, and the real and substantial rights of all the parties, nay, more, they could bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous, * * * * * So that one of the most striking and distinctive features of Courts of equity was, that they could adopt their decrees to all the varieties of circumstances, which might arise, and adjust them to all the peculiar rights of all the parties in interest. * * * * *

The Courts should take a broad view of the facts and circumstances of each case and apply the law to it in such a manner as to advance substantial justice and adjudicate upon the rights of the parties without multiplying the number of appeals. In the present case it is possible in our decree to adjudicate upon the whole litigation which forms the subject-matter of the controversy between the parties.

On the whole, in my opinion, having regard to all the facts and circumstances of the case and the weight of authority on the subject, I am disposed to answer question No. (1) in the negative. From what I have stated above it also follows as a corollary that the objections filed by Mt. Bhulli can be disposed of along with the main appeal filed by Mt. Lachhmi (First Appeal No. 180 of 1922). This is my answer to the reference.

In conclusion I may note that my learned brother Mr. Justice Tek Chand had very kindly sent me an advance copy of his judgment several days ago. I read it with great interest after finishing my own judgment. I am glad to find that I have not only come to the same conclusions independently but that also that there is a marked similarity in our reasoning as well as in our discussion of the case law on the subject.

By Court.—In accordance with the decision of the majority of the Full Bench (Campbell, Addison, Tek Chand and Agha Haidar, JJ., Dalip, Singh, J. dissenting) the first question referred is answered in the negative and the appeal is returned to the Division Bench.

G B. *Reference answered.*

A. I. R. 1927 Lahore 328

DALIP SINGH, J.

Sandhi—Defendant—Appellant.

v.

Khair-ud-din and *others*— Plaintiffs and Defendant—Respondents.

Second Appeal No. 2302 of 1926, Decided on 2nd February 1927, from a decree of the Dist. J., Jullundur, D/- 14th July 1926.

Punjab Pre-emption Act, S 5—"Shop" does not include "business premises" in the general sense of the word—Place where a carpenter works is not business premises nor a shop.

A shop is primarily a place where goods are bought and sold and does not include "business premises" in the general sense of the word. The fact that a carpenter works in the place where he resides does not turn the building into business premisee or into a shop. [P. 329, C. 1]

Ghulam Mohy-du-din—for Appellant.

Jagan Nath Bhandari—for Respondents.

Judgment.—This was a suit for pre-emption of a certain building. The plaintiff's right to pre-empt was admitted but the vendee contended that the building was a shop and not a house. The learned District Judge held that the building was used for residential purposes but at the same time the vendor and the vendee were both carpenters and used to work as carpenters in this building prior to and after the sale. He held that there was not a tittle of evidence that goods were bought and sold here. He, therefore, held that the building was a house.

In second appeal it is contended from the situation of the place which is not far from a bazar and which has shops round it, and on the authority of

Umar Jhabhan Lal v. *Muhammad Umar* (1) and *Jha Bakhsh* v. *Abdul Karim* (2) that the place is a business premises and, therefore, a shop. It seems to me that the rulings which lay down that a shop is primarily a place where goods are bought and sold are correct and that to extend the meaning to "business premises" in the general sense of the word is to make an unwarrantable extension of the meaning of the word "shop"; but in any case, I do not think that the fact that a carpenter works in the place where he resides turns the building into business premises or into a shop.

The appeal fails and is dismissed with costs.

R.D. *Appeal dismissed.*

(1) A. I. R. 1925 Lah. 544=6 Lah. 359.
(2) [1898] 70 P. R. 1898.

A. I. R. 1927 Lahore 329

BROADWAY AND ZAFAR ALI, JJ.

Mamun and *others*—Appellants.

v.

Mt. Jowai and *others* — Plaintiff & Defendants—Respondents.

First Appeal No. 2098 of 1922, Decided on 4th November 1926, from the decree of the Senior Sub-J., Shahpur, D/- 3rd July 1922.

Custom (Punjab)—Succession — Agriculturists —Male line dying is to be treated as never existed.

The general principle governing succession to an estate among agriculturists is that where the male line of descendants dies out it is treated as never having existed, so that succession is then reckoned with reference to the last male owner who dies leaving descendants. *A. I. R.* 1923 *Lah.* 476, *Ref.* [P. 330, C. 2]

G. S. Salariya—for Appellants.

Nanak Chand and *Shambu Lal*—for Respondents.

Broadway, J.—Hashu and Mt. Jowai were husband and wife and Sahibu was their son who married Mt. Bano. On the death of Hashu, Sahibu succeeded to the family estate. He died without issue, leaving him surviving his widow Mt. Bano and his mother Mt. Jowai. The family property was taken possession of by the widow and the mother in equal shares. This state of affairs continued for some years when Mt. Bano remarried. The revenue authorities recognised the right of Sahibu's collaterals, or agnates, to that portion of Sahibu's estate which had been held by Mt. Bano, with the result that Mt. Jowai instituted a declaratory suit asking for a declaration to the effect that she was the owner of the property recently held by Mt. Bano. She impleaded one Ghulam Rasul to whom a considerable portion of that property had been given on lease by Mt. Bano. Ghulam Rasul, however, had attorned to Mt. Jowai. The suit was contested by Mamun and others, collaterals of Sahibu, on various grounds, one of them being that the suit for a declaration did not lie. The value of the property was also challenged. No evidence was led with regard to the property and the value placed on the suit was held to be that entered in the plaint. It was also held on the evidence on the record that as Mt. Jowai was in possession through tenants as well as partly through herself, the suit as brought was competent. It was further held that having regard to the custom prevalent in this district among Gondals (the parties being Gondals), the mother was entitled to the decree prayed for. She was accordingly granted a decree. Against this decree Mamun and others, the collaterals, have preferred this appeal through Mr. Salariya whom we have heard at great length.

Mr. Salariya has attacked the decree of the Court below on two grounds, firstly, as to the competency of the suit as laid, and, secondly, as to the view taken of the custom as stated in the Riwaj-i-am of the Shahpur district. With regard to the first point there can be no doubt that the evidence on the record establishes the fact that Mt. Jowai is in possession of the bulk, if not all, of the property which had been held by Mt. Bano prior to her remarriage. In my judgment the decision on this point is perfectly correct.

Turning to the second point: Mr. Salariya has contended that the view of the Court below was wrong having ragard to the answer given to Question No. 11 of the Riwaj-i-am of the Shahpur district. The question is as follows:

If the estate devolves upon the widow, define her interest therein. What rights has the widow to alienate by sale, gift, mortgage or bequest?

(*i*) Are there any special circumstances or expenses under or on account of which alienation is permissible? If so, what are these?

(*ii*) Is there any distinction in respect of moveable or immovable, ancestral or acquired property, or in respect of alienation to the kindred of the deceased husband?

(*iii*) Supposing alienation to be permissible, whose consent is necessary to make it valid?

The answer given by 'all Mussalmans' was as follows:

If the estate devolves upon the widow, she is the sole owner of the whole estate for the time being, but her interest is a life-interest only, and on her death the whole estate reverts to her husband's agnates, or to his unmarried daughters till their marriage * * *.

Mr. Salariya contended that by this answer it has been established that the custom among the Gondals is that on the death of a sonless proprietor leaving a widow she succeeds to the estate, holds during her life or up to the time of her remarriage and that on her death or remarriage the estate reverts to the husband's agnates and that having regard to the fact that the mother is not mentioned in the question or in the answer, the mother has no right to succeed once a widow has taken. As pointed out by the Court below Question No. 11 is merely an amplification of Question No. 10, the answer to which shows that when there are no male lineal descendants through males, the widow inherits the whole of the property of the deceased. These questions and answers appear in section V of the Riwaj-i-am of the Shahpur district which deals with the matter of succession. After dealing with succession where there are male lineal descendants, the question of succession in the absence of male lineal descendants is taken up. This is followed by the succession of parents which is dealt with in Question No. 21 which is to the following effect:

When a man dies leaving no male lineal descendants, no widow and no daughters or daughter's sons, upon whom will the inheritance successively devolve?

The answer to this question is general and shows that the mother was recognised as one of the heirs, though postponed to the father and the brothers and their male lineal descendants. Mr. Nanak Chand, for the respondent, has urged that the correct interpretation of this Riwaj-i-am is that when a man dies leaving no male issue but a widow and a mother, the estate would devolve upon the widow and that on her death or remarriage the estate in its entirety would go to the mother who would hold during her life. Now, the general principle governing succession to an estate among agriculturists seems to be that where the male line of descendants dies out it is treated as never having existed, so that succession is then reckoned with reference to the last male owner who dies leaving descendants. In the present case it is clear that on the death of Sahibu without issue his widow was entitled to take the entire estate and on her remarriage, following the principle just enunciated, we have to refer back to Haslu, and Mt. Jowai will, therefore, be entitled to the property during her life. In my judgment, the view taken by the learned Senior Subordinate Judge is correct, and I would dismiss this appeal with costs. I may note that the view expressed by me appears to be in consonance with certain remarks to be found in *Mt. Sant Kaur* v. *Sher Singh* (1).

Zafar Ali, J.—I agree.

R.D. *Appeal dismissed.*

(1) A. I. R. 1923 Lah. 476=4 Lah. 392.

A. I. R. 1927 Lahore 330

ADDISON, J.

Khushal Singh and *others*—Plaintiffs—Appellants.

v.

Labh Singh and *others*—Defendants—Respondents.

Second Appeal No. 1905 of 1926, Decided on 1st February 1927, from the decree of the Dist. J., Sialkot, D/- 24th March 1926.

(*a*) *Civil P. C., O. 32, R. 7— Sanctioning compromise—Extent of enquiry by Court on minor's behalf depends on circumstances.*

The question how far a Judge can go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances of each case and where the Judge exercises his discretion in the judicial manner it cannot afterwards be called in question in subsequent proceedings. It is not practicable to lay down a definite or hard and fast rule as to what particular materials a Judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion and that discretion may vary in different cases. [P. 332, C. 1]

There is no authority for the proposition that a Judge is bound to gauge the chances of success of the minors and weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender. *A. I. R. 1926 Bom. 291, Foll.* [P. 332, C. 1]

(b) *Civil P. C., O. 32, R. 7—Court need not expressly state that it has applied its mind.*

It is not necessary that the order granting leave for a compromise on behalf of a minor should expressly state that the Court had considered the terms of the compromise and thought them beneficial to the minor and that it was sufficient if the facts and circumstances showed that the Court did as a matter of fact apply its mind to the terms of the compromise and considered them beneficial to the minor: 36 *P. R.* 1917, *Foll.* [P. 332, C. 1]

Fakir Chand for *Badri Das*—for Appellants.

Shamair Chand—for Respondents.

Judgment.—Jiwan Singh purchased certain land early in August 1890. On the 22nd August 1890 he sold by a registered deed a half share in the land to Kirpa Ram. Jiwan Singh was Kirpa Ram's wife's brother. Kirpa sued the four sons of Jiwan Singh for possession of his half share in the land in the Court of the Munsif at Pasrur in the Sialkot district on the 28th January 1907, alleging in the plaint that he had been given possession at first but had been dispossessed by Jiwan Singh some eight years before he instituted the suit. Of the defendants Amar Singh was a major and appeared on his own behalf and on behalf of his three minor brothers. Amar Singh confessed judgment on his own behalf and on behalf of his minor brothers and the Munsif sanctioned the compromise. The plaintiff agreed to give up costs as judgment was confessed.

The present plaintiffs, who are the three sons of Jiwan Singh other than Amar Singh, instituted the present suit on the 1st July 1925, to recover possession of 3/4ths of the land which went to Kirpa Ram by the decree in 1907. The plaint stated that the decree was not binding upon them as permission was not expressly given on their behalf by the Court to the compromise and as Amar Singh, their brother, colluded with the decree-holder, the ground stated being that he should have defended the suit as it must have been time barred. Various pleas were taken but the trial Court only decided two of them, namely, that there was no evidence to establish that Amar Singh acted dishonestly, i. e. collusively, and that the provisions of law regarding sanction for the compromise had been complied with and that the previous decree was therefore binding on the plaintiffs. On first appeal it was admitted that there was nothing to establish any collusion or dishonesty on the part of Amar Singh. It was merely contended that the provisions of the law were not complied with in respect of the sanction required for the compromise. The learned District Judge agreed with the trial Court and dismissed the appeal, thus maintaining the order of the trial Court dismissing the suit. Against his decision this second appeal has been preferred.

It would appear that the present suit is at least partly time barred, as Lal Singh, one of the plaintiffs, must certainly be over 21 years of age. This point, however, has not so far been decided. It was also admitted before me that there was no evidence of dishonesty or collusion on the part of Amar Singh and the only point argued was that the provisions of S. 462 of the old Civil Procedure Code had not been complied with.

The land in question was the self-acquired property of Jiwan Singh so that the only obvious defence Amar Singh could have raised in the first suit was that it was barred by limitation. It must be remembered, however, that Kirpa Ram had a half share in the land and it would have been upon the defendants in the first suit to prove that the possession of Jiwan Singh, who was a co-sharer, became adverse by some overt act more than 12 years before the suit. This is always a difficult proposition to establish and, as it was alleged in the plaint that Kirpa Ram had only been dispossessed some eight years before he brought his suit, it would appear that the compromise was eminently reasonable especially as costs were given up by Kirpa Ram. Further, the record shows that the Court did apply its mind to the question whether it should sanction the terms on behalf of the minors and this implies that its leave was asked under Section 462 of the old Code of Civil Procedure though there is no formal application on the record for leave. The order passed by the Court was as follows:-

> Amar Singh defendant is a major and he is well-wisher of the other minor defendants; for this reason I sanction the compromise

It was contended, however, that the Court should have made an enquiry into the question whether the suit was time barred. It must be presumed that it asked the parties about this and that, in my opinion, was sufficient. No other

enquiry was possible unless the whole question had been tried and all the evidence produced.

It was held in *Dhairya Singh Gordhan Das* v. *Kisandas Tribhovandas* (1) that the question how far a Judge should go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances of each case and where the Judge exercises his discretion in the judicial manner it cannot afterwards be called in question in subsequent proceedings. It is not practicable to lay down a definite or hard and fast rule as to what particular materials a Judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion and that discretion may vary in different cases. This authority of a Division Bench of the Bombay High Court applies with particular force to the present case. The same ruling continued that there was no authority for the proposition that a Judge is bound to gauge the chances of sucess of the minors and weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender. I have already shown that the chances of the minors were slender, but had it been otherwise, it would not have affected the question.

Another important ruling is *Mt. Janki* v. *Naunihal* (2) it was held that it was not necessary that the order granting leave for a compromise on behalf of a minor should expressly state that the Court had considered the terms of the compromise and thought them beneficial to the minor and that it was sufficient if the facts and circumstances showed that the Court did as a matter of fact apply its mind to the terms of the compromise and considered them beneficial to the minor. The words of the order I have already quoted establish that the Court did apply its mind to the question of the benefit of the minors and that it could not have had more facts and circumstances before it unless it had heard the whole evidence on the one obvious point that arose in the case, namely, that of limitation. In the ruling quoted the Judgment of the Calcutta High Court in *Midnapore Zamindari Co.* v. *Govinda Mahto* (3), was approved. It lays down the rule that when a compromise is permitted it is to be presumed in the absence of evidence to the contrary that the Court did its duty in the matter and was satisfied that the compromise was for the benefit of the minors. I agree with the rulings to the effect that the attention of the Court must be drawn to the fact that the minors' interests are affected by the compromise but it is clear in the present case that this was done and that the Court considered all the possible material which it could have before it at that time and then sanctioned the compromise. The decision of the learned District Judge was, therefore, correct and I dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) A. I. R. 1926 Bom. 291.
(2) [1917] 36 P. R. 1917=39 I. C. 53=9 P. L. R. 1917.
(3) [1908] 8 C. L. J. 31.

A. I. R. 1927 Lahore 332

FFORDE AND ADDISON, JJ.

Lekal and *others*— Accused — Petitioners.

v,

King-Emperor—Opposite Party.

Criminal Revision No. 1169 of 1926, Decided on 3rd March 1927, from the order of the S. J., Ludhiana, D/- 16th June 1926.

Evidence Act, S. 33—Provisions are not affected by Criminal P. C., S. 350.

The general provisions of S. 33 of the Evidence Act are in no way affected by S. 350 of the Criminal P. C. [P. 333, C. 1]

Durga Das for *Moti Sagar*—for Petitioners.

Des Raj Sawhney—for the Crown.

Fforde, J.—There appears to be some confusion about this reference. It is alleged by the learned Judge who referred it that the only point argued before him was that the conviction was mainly based upon the dying declaration of Gulzara. In point of fact the learned appellate Judge has stated that it is not necessary to discuss whether this statement was admissible or not, though he was of opinion what it was admissible under the provisions of S. 32 of the Evidence Act. But what he has admitted is the statement made by Gulzara before

the first Magistrate who tried the case. When the case was heard de novo by the Magistrate to whom it had been transferred Gulzara was dead, and the evidence which he had given in the first judicial proceeding was proved and relied upon by the learned Magistrate to whom the case had been transferred. The petitioner in the trial before the learned Magistrate had asked, in accordance with the provisions of S. 350 of the Criminal P., C. that the witnesses who had given evidence against him in the first judicial proceeding should be resummoned and reheard. As the witness Gulzara was dead it is obvious that he could not be resummoned. The other available witnesses were resummoned and their evidence was retaken. The procedure adopted has been strictly in accordance with law. The authorities cited have no bearing on this matter whatsoever. I am quite unable to follow the reasoning of Chevis, J., in *Saheb Din* v. *Crown* (1). The general provisions of S. 33 of the Indian evidence Act are in no way affected by S. 350 of the Criminal P. C.

These petitions are quite unsustainable and must be rejected.

Addison, J.—I agree.

G.B. *Petition rejected.*

(1) A. I. R. 1922 Lah. 49=3 Lah. 115.

A. I. R. 1927 Lahore 333

ZAFAR ALI AND JAI LAL, JJ.

Abdullah and *others*—Defendants—Appellants.

v.

Allah Diya—Plaintiff—Respondent.

First Appeal No. 2018 of 1922, Decided on 25th January 1927, from the decree of the Senior Sub-J., Ambala, D/- 1st July 1922.

(a) *Contract Act, S. 239—Sharing in profits is essential to the constitution of partnership.*

An agreement to share profits is essential to the constitution of a partnership. Where by an agreement each party is entitled to a certain share in cutting and removing trees from a State forest irrespective of the consequences that may accrue from the sale of the trees, the agreement does not make the contract a partnership. [P 334 C 1, 2]

(b) *Contract Act, S. 23—Conditions prescribed by statute for conduct of business for merely administrative purposes — Agreements entered into in course of such business are valid.*

When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e. g., the convenient collection of the revenue: 26 *Mad.* 156; 2 *All.* 411 and 24 *Bom.* 622, *Foll.* [P 334 C 2]

(c) *Contract Act, S. 73—Defendant receiving money under contract but refusing to carry it out—Defendant is not only liable for returning the money but damages also—Market rate is fair basis for estimating damages.*

Where the defendant receives the plaintiff's money under a contract and then dishonestly refuses to carry out that contract, he is liable not only to return the money but also to pay damages for breach of the contract, or in other words wrongful use of the plaintiff's money and it is but fair to estimate damages on the basis of interest at the market rate. [P 335 C 2]

Tek Chand, Jagan Nath Bhandari and *Hem Raj Mahajan*—for Appellants.

G. C. Narang and *D. R. Narang*—for Respondent.

Judgment,—This first appeal has arisen out of an action brought by Allah Diya, Khoja of Ambala City, against Abdullah and his son and son-in-law of the same city for the recovery of Rs. 7,000: The facts are briefly as below:

On the 7th October 1920, Allah Diya, plaintiff, Abdullah, defendant and one Rahmat Ullah executed an agreement in three parts with the object of obtaining contracts for cutting and removing bamboos from the jungles of the Rewah State. It appears that the State had invited tenders for the purpose, and tenders had already been filed separately by the three contracting parties as well as by certain relations or partisans of Abdullah and Allah Diya respectively. The agreement that Allah Diya, plaintiff, Abdullah, defendant, and Rahmat Ullah made was to the effect that whosoever from among them or their partisans should succeed in obtaining contracts they would all participate therein in certain shares. It so happened that the tenders of Habib Ullah and Ibrahim, the son and son-in-law of Abdullah, were accepted. A sum of Rs. 1,000 had already been deposited by them with their tenders and Rs. 5,000 more were paid in the Treasury of the State to obtain the necessary permits. The plaintiff's case was that Rs. 2,700 out of the said sum of

Rs. 5,000 were contributed by him but that the defendant subsequently refused to recognize him as their partner and denied receiving the said amount of Rs. 2,700 from him. He, therefore, sued to recover Rs. 2,700 plus Rs. 4,300 stating that he would have made a profit of Rs. 4,300 if the defendants would have allowed him to take bamboos of his share.

The defence was that the plaintiff himself had resiled from the agreement and had refused to work as a partner and that he never made the alleged payment of Rs, 2,700 and that the agreement was void as one of the conditions on which the State granted the contract was that the contractors would take no co-partners or shikmi contractors. The trial Court came to the conclusion that the defendants did receive from the plaintiff the sum of Rs. 2,700 and did subsequently break their part of the contract and that the plaintiff was entitled to recover that sum with Rs. 1,350 as interest by way of damages but that his claim to profits was premature and could not be allowed. A decree for Rs. 4,050 has accordingly been granted to the plaintiff with costs in proportion to that amount. The defendants have appealed through Mr. Tek Chand.

The plea of jurisdiction which the trial Court overruled was again raised in the memorandum of appeal, but Mr. Tek Chand ultimately abandoned it before us as it was clearly untenable. The parties being residents of Ambala they were decidedly subject to the jurisdiction of the civil Courts of that place for the purpose of this suit.

Mr. Tek Chand has, however, raised another law point viz., that the suit was incompetent inasmuch as the only remedy open to the plaintiff was to sue for dissolution of partnership and accounts. This objection also which has for the first time been taken in this Court is untenable because there was no partnership as defined in S. 239 of the Indian Contract Act and the parties to the agreement were not partners within the purview of that section. The agreement gave each party a certain share in the bamboos that were to be obtained from the jungles of the State and if the agreement had been carried out each would have got a certain quantity of bamboos irrespective of the consequences that might have accrued by sale thereof in the market. Thus no business was contemplated entitling the contracting parties to share the profits thereof if any. On the other hand, each party was to get and deal with his share of the bamboos as his own personal concern. In the plaint, no doubt, the written agreement is described as a deed of partnership and the bargain too is referred to as "partnership"; but by the use of the word 'partnership' the nature of the transaction could not be altered. The illustrations to S. 239 clearly indicate that an agreement to share profits is essential to the constitution of a partnership, and as in the present case there was no such agreement there was no partnership of which a dissolution could be claimed.

Another law point which Mr. Tek Chand argued before us was that the agreement was void being in violation of one of the conditions on which the contract was obtained from the State and according to which the contractor was precluded from taking anybody as his partner without the sanction of the State. But there is nothing to indicate that the agreement in question was forbidden by law. All that can be said of the condition is that it was imposed for administrative purposes. The State might have refused to recognize the partners under the agreement but none of them was competent to wriggle out of it on that ground. The principles of English Law on this point which are followed in India have been stated by Pollock and Mulla thus :

> When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e. g., the convenient collection of the revenue.

The above principles were followed in *Bhikanbhai* v. *Hira Lal Ramdinshet Marwadi* (1), where the question arose as to whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act 1875, to sub-

(1) [1900] 24 Bom. 622=2 Bom. L. R. 483.

let the tolls was valid and binding between the lessee and sub-lessee. S. 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sublet the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sub-lease. It was contended on behalf of the defendant that the sub-lease was unlawful as it was made without the permission of the Collector, and that the lessee was not, therefore, entitled to recover the amount claimed by him. But this contention was overruled, and it was held that the plaintiff was entitled to succeed. Parsons, J., after citing the passage set forth above, said:

> In our opinion this case falls within the latter class because the Statute itself does not forbid or attach a penalty to the transaction of subletting, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals.

Ranade, J., said:

> As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under S. 23 of the Contract Act.....As no penalties are prescribed under the (Tolls) Act, the agreement does not prima facie fall under the first clause of S. 23.

The same view was held in similar cases by the Madras and Allahabad High Courts, vide *Abdulla* v. *Mammod* (2) and *Gauri Shankar* v. *Mumtaz Ali Khan* (3). We, therefore, overrule this contention also.

Mr. Tek Chand's third point is that the alleged payment of Rs. 2,700 was not proved and he points out that according to the postscript to the agreement the plaintiff should have obtained a receipt for the amount paid and he contends that in the absence of a receipt the oral evidence on the point is unworthy of credit. He further makes capital of the circumstance that the plaintiff in his examination by the trial Court before settlement of issues stated that he made the payment on the 14th October, while, as a matter of fact, the deposit in the treasury of the State was made on the 13th October. But the plaintiff stated in the next breath that the payment by him was made on the very day on which the money was deposited in the treasury and thus it becomes clear that he had forgotten the correct date of the payment and so mentioned 14th instead of 13th October. The oral evidence in support of the payment is very strong and includes the testimonies of two of the witnesses examined by the defendants themselves, namely, Ragunandan and Nand Kishore both of whom are Lambardars and appear to be respectable men. They were corroborated on this point by several witnesses produced by the plaintiff. The trial Court having given credence to all this evidence we see no reason for disbelieving it.

Lastly, Mr. Tek Chand contended that the Court below had erred in law in allowing plaintiff interest by way of damages for he himself had claimed profit (to which he was found not entitled) and not interest. But as the defendants received the plaintiff's money under a contract and then dishonestly refused to carry out that contract they were undoubtedly liable not only to return the money but also to pay damages for breach of the contract, or in other words wrongful use of the plaintiff's money. It was but fair to estimate damages on the basis of interest at the market-rate. The Court below, however, erred in allowing interest "at a very high rate." We are of opinion that Rs. 9 per cent. per annum for three months, i. e., up to the date on which the suit was instituted, and Rs. 6 per cent. after that till realization will be quite sufficient.

We, therefere, accept the appeal to this extent and modify the decree of the trial Court accordingly. The defendants will pay plaintiff's costs on Rs. 2,760-12-0 (Rs. 2,700 plus Rs. 60-12-0 interest for three months) throughout.

R.D. *Decree modified.*

(2) [1903] 26 Mad. 156.
(3) [1879] 2 All. 411 (F. B.).

A. I. R. 1927 Lahore 336

DALIP SINGH, J.

Dhari Mal—Surety Judgment-debtor—Appellant.

v.

Kanshi Ram and *another*—Decree-holder & Judgment-debtor—Respondents.

Miscellaneous First Appeal No. 137 of 1927, Decided on 12th February 1927, from an order of the Senior Sub-J., Amritsar, D/- 3rd January 1927.

Civil P. C., S. 55 (4)—Surety-bond under S. 55 (4) is in favour of Court—Decree-holder granting time to judgment-debtor—Surety is not discharged under Contract Act, S. 135.

When the Court acts under S. 55 (4) of the Civil P. C., the surety bond is in favour of the Court though the ultimate beneficiary may be the decree-holder, and where the decree-holder grants time to the judgment-debtor a surety under S. 55 (4) is not discharged under Contract Act, S. 135. [P. 336, C. 2]

Nawal Kishore—for Appellant.

M. L. Puri—for Respondents.

Judgment.—The facts of this appeal are as follows: On the 28th January 1926, the judgment-debtor was brought to Court under an application for arrest. On that date under S. 55 (4) of the Civil P. C. a surety bond was executed on the condition that the judgment-debtor would apply for insolvency within one month. The judgment-debtor applied for insolvency on the 22nd February 1926. On the 10th July 1926, with the consent of the decree-holder, the judgment-debtor was allowed three months in which to pay the decretal amount and the insolvency application was allowed to be withdrawn. There is nothing to show that all this took place with the knowledge or consent of the surety. On the 7th December 1926, the decree-holder applied to Court asking that the surety be ordered to produce the judgment-debtor and that the decretal amount might be realised from the surety if he failed to produce the judgment-debtor. On the 22nd December 1926, the surety failed to produce the judgment-debtor as ordered and accordingly the Court passed an order against the surety. The surety has come on appeal.

His counsel contends that there were no proceedings under the decree pending at the time and that, therefore, the surety could not be called upon to produce the judgment-debtor on that date. The record, however, shows that the application for execution was still pending and I see no force in this contention.

Next, it is urged that by granting time to the judgment-debtor the decree-holder had altered the position of the parties to his own advantage and to the detriment of the surety and that, therefore, under S. 135 of the Contract Act the surety is discharged from obligation. There would be great force in this argument if S. 135 of the Contract Act could be held to apply. It seems to me, however, that when the Court acts under S. 55 (4) of the Civil P. C. the bond is in favour of the Court though the ultimate beneficiary may be the decree-holder. In this particular case the Court might have exercised a wise discretion in refusing to act on the application of the decree-holder against the surety, but I cannot hold that the Court was wrong in holding that the surety was not discharged by the action of the decree-holder.

It is next contended that the terms of the security bond are such that the surety has been released. The relevant portion is as follows: "*agar mudyun darkhast diwalya na dewega aur adalat main hazar na hoga to main baqaya zar-e-digri jis kadar digridar ka hoga bhar dunga.*" Counsel contends that the use of the word *aur* which is equivalent to 'and' shows that the surety was only liable if both the conditions were not fulfilled and that as the judgment-debtor had applied for insolvency within a month one of the conditions had been fulfilled and hence the surety was not liable. Counsel for the respondent urges that the intention of the parties is clear and that the Urdu idiom is different from the English and the word '*aur*' must be taken in the context as equivalent to English word 'or'. It seems to me that the argument of counsel for the appellant is correct and though, ordinarily speaking I might have been willing to stretch the point in favour of the decree-holder, yet, in the circumstances of this case I am not prepared to make the surety liable if on the terms of the bond he is not liable. I, therefore, hold that the surety is not liable under the terms of the bond and I accept the appeal and set aside the order of the Senior Sub-Judge as against the surety. There will be no order as to costs.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 337

ADDISON, J.

Radha Kishan — Decree-holder — Petitioner.

v.

Hari Singh and *others*—Judgment-debtor and Auction-Purchasers — Respondents.

Civil Revision Petition No. 68 of 1927, Decided on 19th January 1927, from an order of the Sub-J., 1st Cl., Lahore, D/- 25th May 1926.

(a) *Civil P. C., O 21, R. 85—Sale confirmed—Executing Court setting it aside on the ground of non-payment of the balance of purchase-money within 15 days and remitting an issue to tribunal under Sikh Gurdwaras Act—Order is not appealable—Civil P. C., S. 47—Execution.*

Where the executing Court passed an order in spite of the fact that the sale had been confirmed, setting aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid within 15 days and remitted to the tribunal constituted under the Sikh Gurdwaras Act an issue as to whether the property under attachment belonged to the Gurdwara,

Held: that no appeal lay as it could not be a matter arising under S. 47. [P 337, C 2]

(b) *Execution—Powers of Court—Sale confirmed—Court cannot set aside.*

The executing Court has no jurisdiction to set aside a sale which has once been confirmed. [P 338, C 1]

(c) *Civil P. C., O. 21, R. 85—Time for paying balance purchase-money may be extended with all parties' consent.*

Time can be extended for payment of the balance of the purchase-money with the consent of all the parties concerned; *A. I. R. 1923 Mad. 48, Foll.* [P 338, C 1]

Des Raj Sawney—for Petitioner.

Tirath Ram and *M. L. Puri*—for Respondents.

Judgment.—On the 15th July, 1925, a decree-holder had a one-half share of five shops, alleged to belong to his judgment-debtor, auctioned for Rs. 11,100. One quarter of the sale-money, namely, Rs. 2,775, was deposited by the auction-purchaser. In the meanwhile, Indar Singh and Waryam Singh sued for a declaration that the property was waqf. This suit was dismissed. It would also seem that Jaswant Singh son of the judgment-debtor, instituted a suit about this property which was dismissed. Pending these suits, it was agreed that the balance of the purchase-money should not be paid in by the auction-purchaser. After the suits were decided the matter again came before the Executing Court on the 5th March 1926. On that date the objection of the judgment-debtor under O. 21, R. 90, Code of Civil Procedure, was dismissed. The auction-purchaser had, however, died and his sons asked for a little further time to pay in the balance of the purchase-money as they were finding difficulty in realising the assets of their father, lying in a Bank and other places. The sons of the auction-purchaser stated that they would pay in the money within the time granted. Accordingly, time was given and the sale was confirmed under O. 21, R. 92 of the Civil Procedure Code. Against the decision no appeal was ever instituted.

In the meantime, in the interval between the confirmation of the sale and the time given to the sons of the auction-purchaser to pay in the balance of the purchase-money the Shromani Gurdwara Prabandhak Committee presented an application to the Court stating that the sale had been confirmed, but in spite of this the confirmation should be set aside as the auction-purchaser had not deposited the remaining sale-money within 15 days. The Committee further asked that proceedings should be taken under Ss. 21 and 32 of the Sikh Gurdwaras Act as they claimed that the property belonged to the Gurdwara Shahid Ganj, Bhai Taru Singh, which had been declared to be a Sikh Gurdwara under the Act. On the 25th May, 1926 the Executing Court, in spite of the fact that the sale had been confirmed, set aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid within 15 days and remitted to the tribunal constituted under the Sikh Gurdwaras Act an issue as to whether the property under attachment belonged to the Gurdwara Shahid Gunj, Bhai Taru Singh. The application of the Committee purported to be under Ss. 31 and 32 of the Sikh Gurdwaras Act.

Against this decision the decree-holder had presented this appeal. It was contended that no appeal lay as it could not be said to be a matter arising under S. 47 of the Civil Procedure Code and as appeal was not provided by O. 43, R. 1 (j). This contention is correct, but in the special circumstances of this case I allowed the appeal to be argued as a revision.

It is quite clear that the Executing Court had no jurisdiction to set aside a sale, which had once been confirmed. An appeal lay from its order confirming the sale and it had no further jurisdiction after the confirmation of the sale. Obviously the Shromani Gurdwara Prabandhak Committee could not be allowed at that stage to present an application under O. 21, R. 58 of the Civil Procedure Code. Time can be extended for payment of the balance of the purchase money with the consent of all the parties concerned. This consent was given in the present case. This has been laid down in *Varankkotillath Subramanyam Nambudri* v. *Vykunda Kammathi* (1). There was thus no illegality in the circumstances described above in extending the time for the payment of the purchase money.

Counsel for the auction-purchaser stated before me that the representative of the auction-purchaser had no objection to paying the balance of the purchase money, provided that the decree-holder should not take the money out of Court until he had given security to the satisfaction of the Court to refund the money in case any suit or proceeding under the Sikh Gurdwaras Act at the instance of the Shromani Gurdwara Prabandhak Committee was successful. This was accepted by the decree-holder. Counsel for the Committee asked that the position of the Committee should be safeguarded and stated that if this was done he had no objection to the revision being accepted. In my opinion the Executing Court had no jurisdiction to entertain the application of the Committee after having confirmed the sale. No appeal having been preferred against that order the application of the Committee should have been dismissed in limine on that ground. Of course the Committee has still power to institute a suit or to take proceedings under the Sikh Gurdwaras Act if it so desires.

I accordingly accept this revision and set aside the order of the Executing Court, dated the 25th May 1926, in its entirety. The representatives of the auction-purchaser will now pay into Court the balance of the purchase-money and, if this is not done, the Court has full power to see that it is collected. The decree-holder will, however, not be allowed to take the auction-money out of Court until he has given security to the satisfaction of the Executing Court to refund the money if in any suit or proceeding under Sikh Gurdwaras Act the property is declared to belong to the Gurdwara Shahid Ganj Bhai Taru Singh. The Shromani Gurdwara Prabandhak Committee can, if it so desires, institute a suit in connexion with the property auctioned or take such proceedings before the Sikh Gurdwara tribunal as are competent. The last-named Committee will pay the costs of the petitioner in this Court.

The records now go back to the executing Court to continue the execution in accordance with law.

R.D. *Order set aside.*

(1) A. I. R. 1923 Mad. 48.

A. I. R. 1927 Lahore 338

BROADWAY, J.

Misri Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1394 of 1926, Decided on 31st January 1927, from an order of the S. J., Delhi, D/- 23rd July 1926.

(*a*) *Interpretation of statutes—Act should be construed strictly but benefit of doubt should be given to subjects.*

The general principle is to construe an Act strictly and where there is any doubt such doubts should be given in favour of the subject.. [P 340, C 2]

(*b*) *Punjab Gambling Act* (3 *of* 1867), *S.* 5—*Confiscation of all money found on person of a man arrested in a gaming house would be unsafe.*

It would be unsafe to direct confiscations of all moneys or valuables such as gold, watches and ornaments found on the person of a man arrested in a gaming house. (*Case Law reviewed.*) [P 340, C 2]

Raj Krishna—for Petitioner.

Ram Lal—for the Crown

Judgment.—This and the two connected Petitions Nos. 1483 and 1526 of 1926 arise out of certain proceedings taken under the Gambling Act 3 of 1867 in the Court of Mr. Muhammad Ariff. Magistrate, First Class. It appears that a raid was made by the Delhi Police on the 16th October 1925, on certain premises with the result that thirty-six persons were arrested

and sent up for trial under Ss. 3 and 4 of the Gambling Act 3 of 1867. The result of the prosecution that followed was that the majority of the persons charged were convicted and sentenced to various punishments. One of the persons so arrested was Misri Lal who was found guilty under S. 4 and sentenced to pay a fine of Rs. 100. He is the petitioner in Criminal Revision No. 1394 of 1926. Baij Nath, Mannu Lal, Ganga Parshed and Tota the petitioners in Criminal Revision No. 1526 of 1926 were also sentenced under S. 4 of Act 3 of 1867 to various fines and Hem Chand the petitioner in Criminal Revision No. 1483 of 1926 was sentenced to a fine of Rs. 100 and a note for Rs. 100 found on his person was ordered to be confiscated. On appeal the sentences were upheld in the case of all the petitioners with the exception of Hem Chand and Baij Nath whose sentences of fines were reduced owing to the fact that money found on their persons had been confiscated.

So far as the conviction of these petitioners are concerned I see no reason to interfere. It has been urged that the evidence of Kabal Singh shows that when the Police entered the premises they were followed if not accompanied, by a certain number of spectators and that the present petitioners were amongst those spectators. Having regard to the provisions of S. 4 in my judgment it was for them to establish conclusively that they were spectators and the evidence on the record lamentably fails in this respect. It must, therefore, be held that they have been rightly convicted of being present in this gaming house for the purpose of gaming. For Misri Lal Mr. Raj Krishna urged that his youth was in his favour inasmuch as he is only 16½ years of age. I am unable to see that this is any excuse. If a youth of that age attempts to see life in this manner steps must be taken to prevent him and he has not been sentenced for any term of imprisonment so long as his fine is paid up. Mr. Bishan Narain Mathur for Hem Chand has also pleaded the youth of his client. But here again I am unable to see that the fact that he is young and a student and a son of a respectable gentleman is any excuse for his presence in a gaming house for the purpose of gaming.

The only question that requires consideration is whether the order forfeiting the money found on the persons of two of these petitioners was warranted in law. It has been urged by the learned Assistant Legal Remembrancer that having regard to the provisions of Ss. 4, 5 and 8 the order was legal and should not be interfered with in revision. He has also urged that owing to the fact that the learned Sessions Judge has taken into consideration these confiscation orders and has reduced the fine imposed on these petitioners because of their money having been forfeited whether the order of forfeiture is strictly legal or not this Court should not in its revisional jurisdiction interfere.

Various authorities have been cited and of these two only are of this Court. One is *Jiwan* v. *Queen-Empress* (1) a decision by Mr. Justice Chatterji, which, however, does not touch the point. What was decided in that case was that an order of confisaction could only be passed after a conviction had been had. It was not decided whether money found on the person could be confiscated. The second case was *Khair Din* v. *Emperor* (2) in which Mr. Justice Harrison held that money found in such circumstances was not liable to be forfeited. This decision is based upon certain authorities which have also been referred to by the learned counsel in *Tulla* v. *Emperor* (3). Lindsay, J., held that the law does not contemplate the confiscation of the money found on the person of the accused and a reference was made to *Maturwa* v. *Emperor* (4). This last case, however, was one under S. 13 of the Gambling Act and therefore, does not appear to have any value. Lindsay, J., apparently did not have brought to his notice a decision of the Allahabad High Court by Mr. Justice Rafique to be found at page 272 of the same volume *Emperor* v. *Kifayat* (5). It would appear that Mr. Justice Rafique's view was not in accord with that expressed by Mr. Justice Lindsay. In *Mahadaya* v. *Emperor* (6)

(1) [1898] 5 P. R. 1898 Cr.
(2) A. I. R. 1926 Lah. 290.
(3) [1919] 41 All. 366=54 I. C. 250=17 A. L. J. 368.
(4) [1918] 40 All. 517=46 I. C. 156=16 A. L. J. 428.
(5) [1919] 41 All. 272=49 I. C. 165=17 A.L.J. 64.
(6) [1910] 7 A. L. J. 404=6 I. C. 586=11 Cr. L. J. 373.

Knox, J., differentiated between convictions under S. 4 and S. 13 of the Act and came te the conclusion that in cases nnder S. 4 it was legal to forfeit moneys found on the persons as in the present case. In most of these cases reference has been made to *Emperor* v. *Walli Mussaji* (7) where it was held that the power of seizing money found in a gaming house under S. 8 of Bombay Act 4 of 1887 does not extend to money found on the persons of those who may at the time be in such gaming house. To the same effeet is a decision in *Sadashiv Bab Habbu* v. *Emperor* (8). Now S. 8 of Bombay Act 4 of 1887 is in very similar terms to S. 8 of Act 3 of 1867 and the views expressed by Judges of the Bombay High Court, therefore, afford a very good guide for construing S. 8 of the Act now under consideration. Finally reference was made to *Lachmi Narain Marwari* v. *Emperor* (9), where Bucknill, J., considered the provisions of Act 3 of 1867 and came to the conclusion that the private property of an individual who is found gaming in a gaming house could not be seized and forfeited unless it was quite clear that there was attached to such private property the taint that it was reasonably suspected to have been used or intended to be used for the purpose of gaming. Now S. 5 authorises the seizure of all instruments of gaming and all money and securities for money and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein.

It has been urged by Mr. Ram Lal that the word 'therein' does not mean merely within a gaming house but includes the private property found on the person of an accused while he was in the gaming house. No doubt, strictly speaking, Mr. Ram Lal's contention is correct, but after a consideration of the authorities referred to it seems to me that a stricter interpretation must be given to the word 'therein' as used in S. 5. This is emphasized by Stuart, J., in *Ram Sakhi Ram* v. *Emperor* (10). He says:

> This section justifies the seizing and forfeiting of money found on the table or on the floor or other places in the house, but not on the persons of the men arrested therein. The reason for this distinction is tolerably obvious. A man found in a common gaming house is liable to have certain money confiscated, but is not liable to have everything found upon his person confiscated. A man might have currency notes for Rs. 10,000 in his pockets and he might be gambling with two anna bits. The law does not contemplate confiscating Rs. 10,000 when the Rs. 10,000 is not being used for the purpose of gaming.

I am aware that the view I am taking is open to a certain amount of criticism, but the general principle is to construe an Act strictly, and where there is any doubt, such doubts should be given in favour of the subject. Here it seems to me that it would be unsafe in a case of this nature to direct confiscations of all moneys or valuables such as gold, watches and ornaments found on the person of a man arrested in a gaming house and I would, therefore, accept the revision petitions of Baij Nath and Hem Chand to this extent that I would direct the return to them of the moneys found on their persons. In all other respects all the three petitions are dismissed.

R.D. *Petitions dismissed.*

(7) [1902] 26 Bom. 641=4 Bom. L. R. 427.
(8) [1920] 44 Bom. 686=55 I. C. 864=22 Bom. L. R. 197.
(9) A. I. R. 1924 Patna 42.
(10) A. I. R. 1921 All. 241.

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FFORDE AND CAMPBELL JJ.

Ahmad—Plaintiff—Appellant.

v.

Pahlwan and *another*—Defendants—Respondents.

First Appeal No. 1290 of 1922, Decided on 3rd February 1927, from the decree of the 1st Cl., Sub.-J., Jhang, D/- 11th March 1922.

(a) *Riwaj-i-am—Entry as to custom is prima facie evidence unless rebutted.*

An entry in a Riwaj-i-am, though unsupported by instances, is a strong piece of evidence, which it lies upon the opposite party to rebut, in favour of the truth of the statements of custom which it contains: 44 *Cal.* 749 (*P. C.*) and *A.I.R.* 1927 *Lah.* 241, *Foll.* [P 342 C 2]

(b) *Custom—Punjab—Sials of Jhang District—Sonless proprietor can make gift to one collateral to the exclusion of other collaterals.*

Among Sials of the Jhang District a male sonless proprietor is empowered by custom to make a gift in favour of a collateral in the presence of other collaterals. [P 343 C 2]

C. H. Oertel—for Appellant.

Muhammad Hussain and *G. S. Salariya*—for Respondents.

Campbell, J.—The plaintiff Kamir sues for a declaration that a gift of ancestral land by Pahlwan, his sonless brother, to Amir, a second cousin once removed, shall not affect his reversionary rights. The parties are Diraj Sials of the Jhangt District.

The trial Court dismissed the suit holding that (a) the donor had by custom unrestricted power of alienation ; (b) that if he had not unrestricted power the gift was valid by custom because it had been made in return for services and (c) that under the Riwaj-i-am of the district the gift is one recognized by custom.

On neither (a) nor (b) do I agree with the trial Court. For some obscure reason the burden was laid upon the plaintiff of proving that

> there exists village community and the Defendant No. 1's rights of disposition were restricted.

The parties belong to the agricultural tribe of Sials and the presumption is that they observe the rules of custom declared in the Riwaj-i-am to be in force in that tribe. The land in suit lies in three villages but Diraj is the home of the parties and the land in the other two villages was acquired by the family by purchase. Whether there is a tribal bond or not in these other two villages is wholly immaterial to the question of whether the Sials of Diraj are to be governed by customary rules restricting alienations, and none of the evidence given about Diraj justifies the conclusion that the Sial community in that village has been disintegrated and has ceased to exist.

As regards (b) there is no evidence that Amir, the donee, occupied the position towards the donor which is described in the extract from 92 *P.R.* 1904 quoted by the trial Judge. On the contrary the evidence shows the situation to have been as follows: Nura, son of Kamir, the plaintiff, had a wife, Mt. Sattan, whom he and his father, the plaintiff, had turned out of doors shortly before her confinement. The woman was sheltered by Pahlwan, the donor, and in his house she gave birth to a girl, Janat, whom Pahlwan brought up. With the object of providing for this girl at the expense of the plaintiff, who had illtreated her mother, Pahlwan selected a collateral, Amir, as a husband for her, and made a gift of the land in suit to him in consideration of his marrying her, as he did a few months after ths gift was made. The object of the gift was to benefit the girl and to deprive her grandfather, the plaintiff, of the prospect of inheriting the land. There were two persons who could have testified to services had any been rendered, the donor and the donee, but neither put himself into the witness box. In these circumstances the mention of services in the deed of gift was no evidence at all, and the vague reference to services made by the three witnesses mentioned by the learned Subordinate Judge were of no value.

The learned Subordinate Judge states that the Riwaj-i-am of the district in the answer to question 12 on page 59, is in favour of the validity of a gift by a sonless proprietor in favour of a collateral to the exclusion of other collaterals. He has omitted to place a copy of this entry on the record, but we have referred to the original which is in this Court's library. The entry specified does not in fact help the defendants, because it is one relating to gifts to strangers, and lays down that for such a gift by a sonless proprietor the consent of brothers and nephews is necessary although that of uncles and cousins is not necessary. The gift with which we are dealing is one not to a stranger but to an agnate and the relevant passage in ths Riwaj-i-am is the answer to question 2 under the head "Wills" which runs as follows:

> The limit imposed on the power of a proprietor referred to in question 1 (i. e., to make a will) is that he cannct totally disinherit a son. He can, however, allot his sons unequal shares and can disinherit a particular brother or nephew. But he cannot make a will in favour of a person outside the family. We make no distinction between a gift and a will.

Thus the gift now in suit is one which the donor is declared entitled to make under the Riwaj-i-am. He has disinherited his brother, the plaintiff and has gifted his property elsewhere in the family.

The earlier Riwaj-i-am of the Jhang District which is also in the Court Library is still more positive in favour of the defendants. It declares that a proprietor of land, even if he has male issue, can make a gift without the consent of his sons, since he is a full owner. Five Sial instances are cited. Later on there is a qualification that the gift must be to a collateral and not a stranger and two Sial instances are

given of gift by sonless proprietors. This record was the one before their Lordships of the Privy Council in *Beg* v. *Allahditta* (1) when they held that an entry in a Riwaj-i-am unsupported by instances is a strong piece of evidence, which it lies upon the opposite party to rebut, in favour of the truth of the statements of custom which it contains.

Mr. Oertel for the plaintiff has argued that the current Riwaj-i-am entry, stating as it does an exception to the general rule of custom and being unsupported by instances, is of very little evidentiary value. He relies upon certain decisions by this Court and by the Chief Court subsequent to *Beg* v. *Allahditta* (1) which certainly support him. Those cases, however, have been considered recently by the present Bench in *Labh Singh* v. *Mt. Mango* (2). We held there, for reasons which I need not repeat, that the proposition is one which could not properly be laid down in the face of what their Lordships of the Judicial Committee ruled in *Beg* v. *Allahditta* (1). One case now cited by Mr. Oertel was not put before us then, namely, *Pir Bakhsh* v. *Mt. Abo* (3), but there the decision was to the effect that, if the Riwaj-i-am entry was to be interpreted in the manner desired by the appellants, its presumptive force had been rebutted by other evidence. The head-note is to some extent misleading.

The Riwaj-i-am entry quoted above cannot be said to be altogether unsupported by instances, for instances are given of unequal distributions by will among collaterals of the same degree, but even if it be taken to be an entry unsupported by instances it is in my opinion the only piece of evidence in the case of any value on the question whether the gift of the property in suit was one permissible under the custom applicable to the parties. According to the rule laid down in *Beg* v. *Allahditta* (1) the decision of the suit must go in accordance with it.

I wish in conclusion to notice that the present Riwaj-i-am of the Jhang District has been held to be a reliable record by this Court in *Smail* v. *Ahmada* (4) where it was decided that among Jats of the Jhang District a male proprietor is empowered by custom to make a gift in favour of a collateral in the presence of other collaterals, and the main basis of the decision was the answer to question 2 quoted above, which is the same both for Jats and for Sials.

I would dismiss the appeal with costs.

Fforde, J.—I agree.

G.B. *Appeal dismissed.*

(1) [1917] 44 Cal. 749=38 I. C. 354=44 I. A. 89 (P. C.).
(2) A. I. R. 1927 Lah. 241.
(3) 6 Lah 332=A. I. R 1925 Lah. 306.
(4) A. I. R. 1923 Lah. 517=4 Lah. 189.

A. I. R. 1927 Lahore 342

ADDISON, J.

Pal Singh—Plaintiff—Petitioner.

v.

Harnam Singh—Defendant — Respondent.

Civil Revision Petition No. 528 of 1926, Decided on 13th January 1927, against the order of the Sub-J., 4th Cl., Nawanshahr, Dist. Jullundur, D/- 27th April 1926.

(a) *Limitation Act, S. 5 and Art.* 164—*Scope.* Section 5 does not apply to application under Art. 164. [P 343, C 1]

(b) *Limitation Act, Art.* 164—*Court cannot extend* 30 *days time—Entertaining application after expiry of limitation is illegal assumption of jurisdiction within Civil P. C., S.* 115.

The Court has no discretion to enlarge the thirty days allowed by Art. 164 within which the defendant can apply to set aside the ex-parte decree and in entertaining the application after the expiry of limitation, the Court assumed illegally a jurisdiction which it did not possess: *A. I. R.* 1926 *Lah.* 379, *Foll.* [P 343, C 1]

Fakir Chand—for Petitioner.

A. R. Khosla—for Respondent.

Judgment.— On the 20th January 1926, the plaintiff Pal Singh obtained an ex parte decree for Rs. 75 against his brother Harnam Singh. The suit was one for recovery of Harnam Singh's share of the expenses incurred by the plaintiff in connexion with their father's death. Two other brothers were joined as proforma defendants and when they appeared they stated that they had paid their share to the plaintiff. On the 8th March 1926, the defendant applied to have the ex parte decree against him set aside on the ground that he was under the impression that the suit in question had been fixed for the 8th June 1926. He, however, had come to know that it had been decreed as an attachment was issued against him. The Judge thought

that the defendant might have laboured under a misapprehension as regards the date and set aside the decree on payment of a small amount as compensation. Against this order this revision has been admitted.

Harnam Singh had been present at certain hearing of the suit after it was first instituted. He was also served in the suit. The last hearing which he attended was that of the 25th of November 1925. On that date the suit was fixed for the 11th December 1915, when he was absent. The suit was then adjourned to the 20th January 1926, because the pro forma defendants, that is, the other two brothers of the plaintiff, had not been served. They were present on the 20th January 1926, and Harnam Singh was again absent just as he had been absent on the 11th December 1925. It was then that the suit was decreed ex parte against him.

It is obvious that S. 5 of the Limitation Act does not apply. The Court has no discretion to enlarge the thirty days allowed by Art. 164 of the Limitation Act within which the defendant could apply to set aside the ex parte decree. He had only one month from the date of the decree and in entertaining the application, I must hold the Court assumed illegally a jurisdiction which it did not possess. This follows from *Piroj Shah* v. *Qarib Shah* (1). The application was clearly time-barred and, therefore, did not lie.

I accept the petition and setting aside the order of the Judge Small Cause Court dismiss the application to set aside the ex parte decree which must stand. The petitioner will have his costs here.

R.D. *Petition accepted.*

(1) A. I. R. 1926 Lah. 379=7 Lah. 161.

A. I. R. 1927 Lahore 343

CAMPBELL, J.

Behari Lal—Convict—Petitioner.

v.

Crown—Opposite Party.

Criminal Revision Petition No. 1758 of 1926, Decided on 1st February 1927, from the order of the S. J., Gujranwala, D/- the October 1926.

Evidence Act, S. 25—House searched—Possession of house being in question—Fact of accused's having put his signature on recovery list is inadmissible.

Where a house was searched and the accused put his signature on the recovery list:

Held: that the fact of the accused putting his signature on the recovery list is not admissible in evidence against him in a case in which the possession of the house was in question because it would be an incriminating statement of the nature of a confession to a police officer and could not be proved by reason of the prohibition contained in S. 25, [P 343 C 2]

Niamat Rai—for Petitioner.

R. C. Soni—for Opposite Party.

Campbell, J.— The petitioner has been convicted of offences under S. 61 of the Excise Act, and the Magistrate's decision was endorsed on appeal by the Sessions Judge. He has come to this Court on revision, the contention being that there is no evidence to support the finding that the house in which the incriminating articles are alleged to have been found belonged to, or was in possession of the petitioner.

The final conclusion of the learned Sessions Judge is that the prosecution evidence, coupled with the fact that the accused put his signatures on the list of recovery, conclusively proves that the accused was in possession of the house from which the articles were recovered. I consider it very doubtful whether the fact of the accused putting his signature on the recovery list as admissible in evidence against him in this case. If it is evidenced that the premises searched belonged to him, this would be an incriminating statement of the nature of a confession to a police officer and could not be proved by reason of the prohibition contained in S. 25 of the Indian Evidence Act. The rest of the prosecution evidence consists of the statements of Sub-Inspector Ram Rang, Dayal Singh and Suchet Singh. All three describe the search of the building where the excisable articles were discovered and speak generally of the place as the accused's house. None of them, however, is resident of the village, and no reasons are given for calling it the accused's house. The Sub-Inspector has stated that on arriving in the village with a raiding party he saw the accused running through the bazar in a suspicious manner and that he pursued the accused and found him about to unlock the house in question. He was prevented by the

Sub-Inspector and the key was taken from him and the house was guarded. In due course, after the search of other houses, this place was searched and lahan and other articles were found in it.

The fact that the accused was trying to unlock the house does not prove conclusively that it was his house. He clearly denied when he was examined in Court, that the house was his and he produced a number of defence witnesses to prove that he did not live in the village. One of the witnesses was the Patwari who stated that the house belonged to Multani Ram, a cousin of the petitioner. This, at any rate, would be one explanation for the accused's alleged behaviour in trying to get into the house when he saw an excise raiding party in the village.

It appears to me that it would have been perfectly possible for the prosecution to prove positively who occupied this particular house, The failure to do so creates a flaw in the case which must be fatal to it.

I accept the petition and acquit the petitioner who will be released and his fine, if paid, will be refunded.

R.D. *Petition accepted.*

A. I. R. 1927 Lahore 344

SHADI LAL, C. J., AND BROADWAY, J.

Damodar Das—2nd Party—Appellant,

v.

Mt. Jatti—1st Party—Respondent.

Letters Patent Appeal No. 149 of 1925, Decided on 19th January 1927, from the judgment of Abdul Raoof, J., D/- 12th May 1925, in Civil Appeal No. 2201 of 1924.

Guardians and Wards Act, Ss. 39, 41 (3) and 45—Sections apply to guardians appointed by Will—Action under S. 45—Court should enquire into their possession.

The provisions of the Act apply to guardians appointed by Will and action can be taken in regard to them under Ss. 39, 41 (3) and 45, but before taking action under S. 45 the Court should make an enquiry in order to ascertain whether such guardians had any property of the minors in their possession and control which they were withholding and for which they were accountable. [P 344 C 2]

L. C. Mehra—for Appellant.

Nawal Kishore—for Respondent.

Broadway, J.—The appellants in these two connected Letters Patent Appeals, Damodar Das and Mangat Rai, were appointed executors under a Will executed by Vaishno Dass on the 17th March 1917. From the terms of the Will it is clear that these two persons were also appointed guardians of the property and persons of the testator's minor children. It has been urged that the provisions of the Guardians and Wards Act do not apply to guardians appointed by Will. I agree, however, with the learned Judge in Chambers that the provisions of the Guardians and Wards Act apply to such guardians and that action can be taken in regard to them under Ss. 39, 41 (3) and 45. It seems to me, however, that before taking action under S. 45 of the Act the Court should make an enquiry in order to ascertain whether such guardians had any property of the minors in their possession and control which they were withholding and for which they were accountable. It appears that no real enquiry was made by the Court of first instance in this case. So far as Damodar Das appellant is concerned, it is clear that he has been deliberately avoiding appearance in Court and has conducted himself contumaciously throughout. In these circumstances an enquiry as far as he was concerned was not possible and the Court was right in proceeding to deal with him under S. 45 of the Act. I would, therefore, dismiss his appeal with costs.

The case of Mangat Rai, however, is on a different footing. He has been appearing regularly throughout the proceedings and has filed in Court such accounts and documents as he said were in his possession. He has also stated that the account books of his co-guardian Damodar Das contain a full and complete account of their dealings with the estate of the minors and repeatedly asked that Damodar Das' account books should be brought into Court and examined. In these circumstances I would accept Mangat Rai's appeal and set aside the order directing him to pay a fine of Rs. 100. The Court should enquire into the allegations made by Mangat Rai and proceed under S. 45 if after an enquiry it is considered necessary. He is entitled to his costs in this Court.

Shadi Lal, C. J.—I concur.

R.D. *Order accordingly.*

A. I. R. 1927 Lahore 345

BROADWAY AND AGHA HAIDAR, JJ.

Mt. Ram Rakhi and *others*—Defendants—Appellants.

v.

Mula Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1475 of 1922, Decided on 17th February 1927, from a decree of the Dist. J., Jhelum, D/- 24th January 1922.

(a) *Custom (Punjab)—High class Hindus, Khatris—Onus of proving that they are governed by custom is on propounder.*

The onus of proving that a party is governed by custom and not by personal law, in case of high class Hindus, such as Khatris, lies on the person alleging it. [P 345 C 2]

(b) *Custom (Punjab)—Applicability.*

Wadhawan Khatris of mauza Ara in the Kharian Tahsil of the Gujrat District are governed by custom in matters of alienating property. [P 346 C 1]

Mool Chand—for Appellants.

Badri Das—for Respondents.

Broadway, J.—The parties to this case are Wadhawan Khatris of Mauza Ara in the Kharian Tahsil of the Gujrat District. (After giving pedigree the judgment proceeded.) The plaintiffs are the reversioners of Atma Singh ahd Amar Singh. They challenged in one suit a gift made by Mt. Gurdevi, widow of Amar Singh, on the 22nd of October 1912, of Amar Singh's estate to Mt. Ram Rakhi, Rala Ram and Fakir Chand, and, in another suit a gift made by Atma Singh on the 30th of April 1915, of all his estate to Mt. Ram Rakhi and Rala Ram. The plaintiffs in these two cases claimed that they were governed by custom and that the alienors Mt. Gurdevi and Atma Singh were not empowered to make the gifts they had made. The pleas set up by the defendants were firstly, that they were governed by Hindu Law, and, secondly, that by custom a sonless proprietor was entitled to gift his property to other member of his family generally and the widow of a sonless proprietor could gift the property to her daughter and daughter's sons. The trial Court held that the parties were governed by custom and not Hindu Law and that the defendants had failed to prove the custom set up by them giving Atma Singh and Mt. Gurdevi the right to make the gifts they had made. The suits were accordingly decreed. The learned District Judge, who dealt with the appeals, was Mr. Bhide who was succeeded by Mr. Malan who on the motion of the defendants granted a certificate in each case as required by S. 41 (3) of the Punjab Courts Act.

First, I would note that the certificates granted are somewhat peculiarly worded; for instance, in the certificate one of the questions said to be involved and for a consideration of which it was granted is "whether the adoptions of Ralla Ram and Fakir Chand are valid under Hindu Law or custom," this despite the fact, that it had been found, as a matter of fact, by Mr. Bhide that no adoption had taken place. The question whether an adoption was or was not valid under Hindu Law or custom, therefore, was of purely academic interest and could not be re-opened in second appeal.

Dealing with the case itself, it is clear to my mind that the learned District Judge has approached the case from a correct point of view. It has been urged by Mr. Mool Chand for the appellants that the onus of proving that the parties were governed by custom rested on the plaintiffs, and he has cited an authority in support of his allegation. As a matter of fact this proposition was not disputed by Mr. Badri Das for the respondents, and a reference to the judgment of the learned District Judge shows, that that is the position that was taken up by him when dealing with the case. Admittedly the onus lay on the plaintiffs to prove that they, as high caste Hindus, were governed not by personal law but by custom, and the Courts below have found that this onus they have discharged. In arguing his case before us Mr. Mool Chand attacked this finding, but at the same time drew our attention to the evidence on the record which leaves no doubt in my mind, that the view taken by the learned District Judge was amply supported by evidence. In dealing with the question of custom our attention has been drawn to certain documentary evidence as old as 1860 and 1861 in which it is clearly evident that the parties' predecessors considered themselves to be bound by agricultural custom. I would, therefore, hold that the learned, District Judge is right and

that the parties in this case are governed by custom.

Now, the general custom of the Province admittedly restricts the right of making gifts and alienations in the case of sonless proprietors and widows. It was clearly for the defendants, therefore, to prove a custom allowing such alienations to be made. The learned District Judge states in his judgment that "no instances of gifts have been proved." Mr. Mool Chand has drawn our attention to the statement of one witness only, namely, D.W. No. 8, Thakar Singh, aged 63 years. (After considering evidence as to custom his Lordship proceeded.) The learned District Judge is right in holding that the defendants have failed to prove any custom which departs from the general custom of the Province and which enlarges the powers of alienation given by custom to childless male proprietors, and the same applies to the case of the gift by Mt. Gurdevi. No instance has been brought to our notice of a gift by a widow of her husband's estate to the daughter or daughter's son. Reference was made to a gift to a Brahmin by a widow, but that was in the presence of the widow's sons and obviously with their consent and made as an act of piety.

Before concluding I would point out that the plea raised as to adoption by Atma Singh of Rala Ram was decided against the appellants, and as the decision on that point was one of fact Mr. Mool Chand very properly and frankly admitted that he could not ask us to go into the matter in second appeal. The same is the case at to the finding on the question on the entire property gifted in both the cases being ancestral.

I would, therefore, dismiss both the appeals with costs

Agha Haidar, J.—I agree.

R.D. *Appeals dismissed.*

A. I. R. 1927 Lahore 346

ADDISON, J.

Jawala Singh—Plaintiff—Appellant.

v.

Sundar Singh and *others*—Defendants—Respondents.

Appeal No. 1857 of 1926, Decided on 2nd February 1927, from the decree of the Senior Sub-J., Sargodha, D/- 4th May 1926.

(a) Civil P. C., S. 144—Mesne profits from date of decree up to disposal of appeal are recoverable in execution—Separate suit not necessary—Mesne profits.

An order for mesne profits, accruing after decree, is not one for restitution under S. 144; but in the exercise of their inherent powers, Courts have often applied the principles of that section to cases which were not strictly within the terms of that section. An executing Court has therefore ample power to make an order to prevent what would be essentially a miscarriage of justice and a separate suit is not necessary: 41 *Mad.* 316; 61 *P. R.* 1917 and *A. I. R.* 1922 *Cal.* 28, *Rel. on.* [P 347, C 1]

(b) Civil P. C., S. 2 (12)—Mesne profits accruing after decree, recoverable in execution proceedings—Separate suit is not necessary.

Where execution of a decree for possession of immovable property is stayed on the judgment-debtor giving security for mesne profits accruing from the date of the decree up to the disposal of an appeal therefrom,

Held: that the order certainly meant that such mesne profits (as would be determined by the executing Court) would be realised in the execution proceedings and that no further proceedings by way of a separate suit would be necessary.

[P. 347, C 2]

Shamair Chand—for Appellant.

Fakir Chand—for Respondents.

Addison, J.—Jawala Singh obtained a decree on the 31st August 1920 against Sunder Singh for joint possession of half of certain immovable property together with Rs. 500 as mesne profits and costs. The judgment-debtor preferred an appeal in the High Court which was dismissed with costs on the 13th February 1924. When the appeal was presented the defendants prayed for stay of execution, and this was granted by order of this Court on the 25th November 1920 as far as possession of the immovable property was concerned subject to the appellant furnishing security for such mesne profits as might accrue due between the date of the decree and the date of the final disposal of the appeal. Accordingly the appellant judgment-debtor gave security to this effect in the executing Court and the result was that the plaintiff decree-holder was kept out of possession, to which he was entitled immediately, because of the undertaking given by the appellant and his surety.

The decree-holder after the appeal had been dismissed in this Court, then applied to the executing Court for mesne profits from the date of the decree. His application was dismissed with costs on the ground that the decree-holder had to sue for these mesne profits as they did not form a part of his decree. Against

this decision this first appeal has been admitted.

It is clear from S. 36 of the Civil P. C. that orders can be executed in the same way as decrees. Further under S. 145 of the Code, where any person has become liable as surety for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the order may be executed against him to the extent to which he has rendered himself personally liable, in the manner therein provided for the execution of decrees, and such persons shall, for the purposes of appeal, be deemed a party within the meaning of S. 47. These sections show that orders are capable of execution against persons and sureties affected by them. It is true that this is not a case of restitution coming under S. 144 of the Civil P. C., but in the exercise of their inherent powers Courts have often applied the principles of that section to cases which were not strictly within the terms of the section. Some of these cases are *Alagappa Chettiar* v. *Muthu-Kumara Chettiar* (1), *Jagan Nath* v. *Fateh Chand* (2) and *Rai Charan* v. *Debi Prasad* (3). It was held in the latter ruling that the executing Court has ample power to make an order to prevent what would be essentially a miscarriage of justice. This subject is also discussed at page 341 of Mulla's Civil P. C., 8th Edition, as follows:

It was said by Cairns, L. C., in *Rodger* v. *Comptior d' Escompte de Paris* one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court or of any intermediate Court of appeal, but the act of the Court as a wnole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

The order of this Court dated the 25th November 1920, clearly meant that the decree-holder would only he kept out of possession, to which he was immediately entitled, if the appellant and his surety agreed to give him mesne profits for the period after the date of the decree up to the date of the disposal of the appeal during which he was kept out of possession. It was certainly meant that these mesne profits would be determined by the executing Court and the amount as determined realised in the execution proceedings, and that no further proceedings by way of a separate suit would be necessary. I therefore accept this appeal, and setting aside the order of the executing Court, remand the proceedings to it to decide what sum is due to the decree-holder for mesne profits from the date of the decree of the trial Court to the date of the disposal of the appeal by this Court and to realise that sum in the execution proceedings. The appellant is entitled to his costs in this Court.

J.V. *Appeal accepted.*

(1) [1917] 41 Mad. 316=42 I. C. 836=(1917) M. W. N. 669.
(2) [1917] 61 P. R. 1917=41 I. C. 910=98 P. W. R. 1917.
(3) A. I. R. 1922 Cal. 28.

A. I. R. 1927 Lahore 347

DALIP SINGH, J.

Karam Chand—Defendant—Petitioner.

v.

Mt. Jasodhan—Plaintiff—Respondent.

Civil Revision Petition No. 729 of 1926, decided on 2nd February 1927, from the order of the Addl. Dist. J., Lahore, D/- 24th July 1926.

(a) *Civil P. C., 2nd Sch., Para.* 14—*Award without Court's intervention cannot be remitted.*

Where the award is without the intervention of the Court, the Court has no power to remit the award to the umpire: *A. I. R.* 1925 *Lah.* 86, *Foll.* [P. 348, C. 1]

(b) *Civil P. C., 2nd Sch., Para.* 15—*Decision by umpire without notice to parties is legal misconduct.*

It is a legal misconduct on the part of the umpire to decide a case without giving notice to the parties or hearing their comments on the evidence: *A. I. R.* 1924 *Sind* 27 and 5 *S. L. R.* 89, *Foll.* [P. 348, C. 2]

J. G. Sethi—for Petitioner.

M. L. Puri—for Respondent.

Judgment.—In this case there was a dispute between the parties as the amount or number of ornaments in the possession of the petitioner which he had agreed to return to the respondent who was his wife. The parties agreed to refer the dispute to arbitration. Two arbitrators were appointed and it was agreed that if the arbitrators differed they were to appoint an umpire and the decision of the majority was to prevail. The two arbitrators disagreed, one holding that the value of the ornaments was Rs. 400, the other holding that the value

was Rs. 800 plus Rs. 40 on account of arrears of maintenance. An umpire was thus appointed and he, without calling upon the parties or giving any notice to them, proceeded to give his decision in which he agreed with the second arbitrator's decision. Thereafter the respondent wished to make the award a rule of Court. Various objections were taken by the petitioner.

The trial Court held that the arbitrators had exceeded their powers in dealing with the question of arrears of maintenance which had not been referred to them. Following *Dhanpat Rai* v. *Kahn Devi* (1) it held that the award could not be filed. It also held on the authority of *James Finlay & Co.* v. *Asudamal Harbhagwandas* (2) that the umpire had been guilty of legal misconduct because he held no enquiry and decided the matter on the notes of the arbitrators without giving notice to the parties to appear before him and to state their case and adduce evidence. It also held that the award of the second arbitrator with which the umpire had agreed was illegal because the award itself stated that the arbitrator had based his award on private enquiries. It also held that the document was not properly stamped. As a result it dismissed the application to file the award.

On appeal the learned District Judge, held that the umpire had been guilty of legal misconduct and that the objection taken fell under para. 14 (c) of the Second Schedule of the Civil P. C., but the Court ought to have remitted the award to the umpire. As regards the arrears of maintenance it held that that amount was separable and following the Privy Council ruling *Amia Begam* v. *Badrud-Din Husain* (3) it held that this was not a bar to filing the award.

In revision counsel for the petitioner has argued that as the award was without the intervention of the Court the Court has no power to remit the award to the umpire. He cited *A. I. R.* 1925 *Lahore* page 86, a Single Bench ruling of this Court which, however, was upheld in Letters Patent Appeal. The decision of the Letters Patent Bench is not reported but I appeared in the case myself and I remember the arguments addressed to the Court. Two points arose in that case for decision (1). Whether the Court could correct an error of an arbitrator appointed without the intervention of Court (2). Whethar it could remit an award to the arbitrator on the ground of illegality apparent on the fact of it or on the ground of a decision in excess of the powers of the arbitrator. The appeal was dismissed by the Letters Patent Bench as stated above.

Counsel for petitioner next contended that it was legal misconduct on the part of the umpire to decide the case without giving notice to the parties or hearing their comments on the evidence produced, *James Finlay & Co.* v. *Asudamal Harbhagwandas* (2) and *A. I. R.* 1924 *Sind* page 27. These cases referred to an English case reported as *In re Broak* (4). Counsel for respondent has not shown me any ruling to the contrary.

Following these rulings and the ruling of our own Court reported in *A. I. R.* 1925 *Lahore* page 86, which is binding on me I hold that the Court had no power to remit the award to the umpire and as the umpire was guilty of legal misconduct the award could not be filed in Court, I therefore, accept the revision set aside the decree of the learned Additional District Judge and restore the decree of the first Court refusing to file the award. In the circumstances, however, I leave the parties to bear their own costs throughout. I note that the counsel for the petitioner agreed to return the ornaments which he admitted were in his client's possession, to the respondent.

D.D. *Revision accepted.*

(1) [1914] 30 P. R. 1914=31 P. L. R. 1914=23 I. C. 422=11 P. W. R. 1914.
(2) [1911] 5 S. L. R. 89=12 I. C. 637.
(3) [1914] 36 All. 336=23 I. C. 625=17 O. C. 120 (P. C.).
(4) [1864] 33 L. J. C. P. 246 =10 Jur. (N. S.) 704=16 C. B. (N. S.) 403=143 E. R. 1184 =10 L. T. 378.

A. I. R. 1927 Lahore 348

SHADI LAL, C. J., AND JAI LAL, J.

Mazulla Khan and *another*—Plaintiffs—Appellants.

v.

Ghazi Khan and *others*—Defendants—Respondents.

Second Appeal No. 774 of 1922, Decided on 28th April 1927, from the decree of the Dist. J., Mianwali, D/- 13th January 1923.

Punjab Limitation (Custom) Act, Ss. 6 and 5 —S. 6 does not repeal the applicability of Ss. 4 to 25 of Limitation Act (1908) *to suits governed by S. 6—Limitation Act, Ss. 4 to 25.*

The words "notwithstanding anything herein contained" do not repeal S. 5 in so far as the applicability of the provisions of Ss. 4 to 25 to suits governed by S. 6 is concerned. They are intended to govern the period of limitation prescribed by the Act, and the object of section was to prescribe a maximum period of one year after the commencement of the Act for a suit for which the period of limitation had commenced to run before the enforcement of the Act. [P 349, C 2; P 350, C 1]

Ram Chand Manchanda—for Appellants.

Niaz Mohammad—for Respondents.

Judgment.—The facts relevant to the question of law involved in this appeal may be shortly stated: One Ghazi Khan a Pathan of the village Yaru Khel in the Mianwali District, sold, by an instrument registered on the 1st of November, 1904 a plot of ancestral land to Khan Beg and Ahmad Khan for a sum of Rs. 1,000. On the 19th of April 1922, the vendor's sons Mazullah Khan and Yakub Khan brought the present action for the usual declaration that the alienation should not affect their rights of succession after the death of their father. The learned District Judge, concurring with the trial Judge has dismissed the suit on the ground that it was barred by limitation.

The plaintiffs alleged in their plaint that they were born in 1902, and 1903 respectively, and if this allegation is found to be correct, both of them were minors at the time when the cause of action accrued to them to impeach the sale. The action was brought by them within three years immediately after attaining majority, and there can be no doubt that if Ss. 6 and 8 of the Indian Limitation Act (9 of 1908) apply the suit would be within time.

It is common ground that the Statute, which was in force at the time of the sale, was the Punjab Limitation Ancestral Land Alienation Act (1 of 1900) and that it provided a period of twelve years for a suit of this character. It is clear that the period prescribed by that Statute was subject to the general provisions contained in Ss. 4 to 25 (inclusive) of the Indian Limitation Act of 1908; and as both the plaintiffs were minors on the date, from which the period of limitation was to be reckoned, they could invoke Ss. 6 and 8 of the Indian Limitation Act, and institute their suit within three years of the date of the cessation of the disability.

If the matter rested here, there would be no difficulty in holding that the law of limitation did not operate as a bar to the claim; but in 1920 another Statute, the Punjab Limitation (Custom) Act, came into force, and this Statute repealed the Punjab Limitation Act of 1900 and prescribed a shorter period of limitation for suits relating to alienations of ancestral immovable property and to appointments of heirs made by persons governed by custom in the Punjab. Now, the 5th section of the Act of 1920 provides that subject to the provisions contained in Ss. 4 to 25 (inclusive) of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the first schedule of the said Act, every suit, of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence.

The learned counsel for the respondents admits that by virtue of this section, the period of limitation enacted by the Statute is subject to the general rules embodied in Ss. 4 to 25 of the Indian Limitation Act, but he contends that the concession allowed by the section has been taken away by S. 6 which applies to suits brought after the date of enforcement of the Act to impeach transactions effected before that date. S. 6, which has been involved by the defendants is in the following terms:

> Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900 may be instituted within the period of one year next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, whichever period expires first.

It is argued that the words "notwithstanding anything herein contained" practically repeal Ss. 5 in so far as the applicability of the provisions of Ss. 4 to 25 to suits governed by S. 6 is concerned. In other words, the general principles embodied in Ss. 4 to 25 of the Indian Limitation Act, while applying to suits

in which the cause of action arises after the date of the enactment of the Statute, do not govern any suit based upon a cause of action which had accrued before that date. This argument, if accepted, would bar the suit of a minor even if it is brought during the period of his minority. Now it is a cardinal doctrine of the constsuction of statutes that an interpretation, which would reduce the statute to an absurdity, should always be avoided. The words quoted above were, in our opinion intended to govern the period of limitation prescribed by the Act, and the object of section was to prescribe a maximum period of one year after the commencement of the Act for a suit for which the period of limitation had commenced to run before the enforcement of the Act. It is to be observed that the view taken by us coincides with that adopted by a D. B. in *Muhammad Ghaus* v. *Muhammad Ali* (1).

Upon the assumption that the plaintiffs were born on the dates mentioned in their plaint, we are of opinion that the action brought by them was within limitation. We accordingly accept the appeal and, setting aside the decree of the Court below, remit the case to the Court of first instance for decision in accordance with law. The Court fees on the memorandum of appeal to this Court as well as on that to the Court of the District Judge shall be refunded, and other costs shall abide the event.

G.B. *Appeal allowed.*

(1) A. I. R. 1926 Lah. 183.

A. I. R. 1927 Lahore 350

BROADWAY AND ZAFAR ALI, JJ.

Miran Bakhsh and *another*—Plaintiffs —Appellants.

v.

Allah Bakhsh and *others*— Defendants —Respondents.

First Appeal No. 1387 of 1922, Decided on 26th October 1926, from the decree of the Sr. Sub-J., Gurdaspur, D/- 11th May 1922.

Civil P. C., S. 92—Suit for declaration of property to be wakf—Sanction is not necessary.

Where all that the plaintiff prays for in his suit is a declaration that the property be declared to be a wakf, no sanction under S. 92 is necessary: 2 *L. L. J.* 457, *Foll.*

[P. 350, C. 2; P. 351, C. 1]

Mehr Chand and *Kidar Nath*—for Appellants.

Devi Dyal and *N. C. Mehra*—for Respondents.

Broadway, J.—This appeal has arisen out of a suit brought by Miran Bakhsh and Phallu Shah who claim to be the disciples of one Sultan Shah. They sued for a declaration to the effect that the defendants who are Allah Bakhsh and others, the sons and grandson of Sultan Shah, have no proprietary rights in the land in suit which is land attached to the shrine known as khankah Gudar Shah of which Sultan Shah, deceased, was the gaddinashin. They averred that the defendants claimed to have inherited this property from Sultan Shah as their own, whereas it really was property attached to the khankah, and they sought for a declaration that the said property was wakf and that the defendants were not entitled to divert the produce of the suit land for purposes incompatible with the trust. The defendants denied the wakf character of the property and pleaded, inter alia, that the suit was bad: (*a*) for want of sanction under S. 92 of the Civil P. C.; and (*b*) that it was barred by time. The trial Court settled two preliminary issues:

(1) Can the suit proceed without the Collector's sanction under S. 92, Civil P. C.?

(2) Is the plaintiff's suit within limitation?

These preliminary issues were decided against the plaintiffs and their suit is dismissed. Hence this appeal.

It has been urged before us that the decision of the Court below on these two issues is wrong and that S. 92, Civil P. C., did not apply to the suit.

The trial Court has held that sub-Cl. (*c*) of S. 92, Civil P. C., applied. Before us it has been urged by Mr. Devi Dayal for the respondents that sub-Cl. (*g*) was also applicable. With regard to sub-Cl. (*g*) I have no hesitation in holding that it has no bearing on the question before us. The plaint does not ask for the settling of any scheme whatever so far as the property in suit is concerned. Sub-clause (*c*) contemplates a suit for the obtaining of a decree vesting any property in a trustee. In the present suit all that the plaintiffs seek is a declara-

tion to the effect that the property should be declared to be wakf. The plaintiffs do not seek to interfere with the possession of this property or its management. As was held in *Nihal Shah* v. *Malan* (1) all that the plaintiffs asked for was that the wakf character of the property should be retained and they asked for a declaration to that effect. In these circumstances I do not think that the suit as laid falls within the ambit of S. 92, Civil P. C., and I hold, therefore, that no sanction was required.

[The rest of the judgment is not necessary for this report.]

Zafar Ali, J.—I agree.

G.B. *Case remanded.*

(1) [1920] 2 L. L. J. 457.

A. I. R. 1927 Lahore 351

ZAFAR ALI, J.

Prabhu Mal—Plaintiff—Appellant.

v.

Banwari Lal—Defendant — Respondent.

Second Appeal No. 2675 of 1926, Decided on 3rd March 1927, from the decree of the Sr. Sub-J., Rohtak, D/- 6th October 1926.

(a) *Transfer of Property Act, S. 8—Rights and privileges concomitant to property sold go with it, specially where there is no provision to the contrary.*

When a house or any other immovable property is sold, all rights and privileges concomitant to it and previously enjoyed by the vendor go with it, specially where there is no provision to the contrary in the deed of sale and it is of no use to the seller to reserve them.

[P. 351, C. 2; P. 352, C. 1]

(b) *Easement—Open space in which houses of parties open is presumed to be meant for use of adjoining occupants.*

An open space in which the houses of the parties open, it may generally be presumed is meant for the use of the owners and occupants of all the houses abutting on it. [P. 352, C. 1]

Shamair Chand—for Appellant.

Nawal Kishore—for Respondent.

Zafar Ali, J.—The houses of the parties are situated in a blind alley, which, though of ordinary narrow width at both ends, expands into a large open space or sehn in front of their houses. In this sehn the defendant originally had a small kitchen just outside and adjoining a portion of the front wall of his house. Recently he enlarged this kitchen and the plaintiff sued for demolition of this extension stating that it interfered with the rights of the owners of the surrounding houses to use the entire sehn for certain purposes. The defendant pleaded that the plaintiff had no right or interest in the sehn though the owners of the other surrounding houses had, and that the area over which the building was erected had already been in his exclusive possession. The trial Court overruled these pleas and ordered demolition of so much of the building as constituted an extension.

On appeal the learned Senior Sub-Judge dismissed the plaintiff's suit for the following reasons: (1) That the plaintiff acquired his house by purchase at an auction sale and the sale certificate was silent as to transfer of any rights to him in the sehn. Consequently his claim that he had a right to the use of the sehn jointly with the owners of other surrounding houses was untenable; (2) that the encroachment did not interfere in any way with his right of way through the alley.

The senior Sub-Judge has not given a clear finding as to whether the sehn or open space in question forms part of a blind lane (kucha sarbasta) or a public thoroughfare open at both ends. In the defendant's own title-deeds the alley is described as "kucha sarbasta" and it appears that it was neither party's case that it was a public thoroughfare and it was therefore of no consequence even if it was described as a shar-i-am (public thoroughfare) in an application of the plaintiff to the Municipal Committee. It was admitted that all the houses surrounding the open space originally belonged to one man and that they were sold one by one. Further, the defendant admitted, as already stated, that with the exception of the plaintiff, all other owners of the surrounding houses were entitled to use the sehn. Thus it becomes clear that the sehn was for the use of the owners or occupants of the surrounding houses. This being so, it was of no consequeuce if the right to use it was not specifically given to the plaintiff in the sale certificate. When a house or any other immovable property is sold, all rights and privileges concomitant to it and previously enjoyed by the vendor go with it, specially where there is no provision to the contrary in

the deed of sale and it is of no use to the seller to reserve them. An open space situated like the one now in question, it may generally be presumed, is meant for the use of the owners and occupants of all the houses abutting on it and as the defendant on whom the onus lay produced no evidence to the contrary, this general presumption stands unrebutted : see on this point. *Manji* v. *Ghulam Muhammad* (1), *Manji* v. *Ghulam Muhammad* (2), *Attar Singh* v. *Kirpa Singh* (3) and *Secretary of State* v. *Bhatt Laxmishanker Govindram* (4).

I, therefore, accept this second appeal, and, reversing the judgment and decree of the lower appellate Court, restore that of the trial Court. Defendant will pay plaintiff's costs in this Court as well as in the lower appellate Court.

R.D. *Appeal accepted.*

(1) [1920] 1 Lah. 249=57 I. C. 207.
(2) A. I. R. 1921 Lah. 157=2 Lah. 73.
(3) A. I. R. 1923 Lah. 175.
(4) A. I. R. 1925 Bom. 27.

A. I. R. 1927 Lahore 352

ADDISON, J.

Sube Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Revision No. 1156 of 1926, Decided on 26th January 1927, from the order of the Dist. J., Ambala, D/- 28th September 1926.

Criminal P. C., S. 476—Sanction is improper where a prosecution must fail.

Where a prosecution is bound to end in a failure, a Court should not give its sanction to it under S. 476. [P 353 C 1]

Barkat Ali—for Appellant.

Judgment.—Sube Khan sued Fattan on a mortgage-deed for Rs. 2,000 dated the 6th June 1910. The suit was instituted on the 18th April 1923, and was for Rs. 2,000 principal, together with Rs. 500 interest. The defendant Fattan produced a receipt Ex. D-1, bearing date the 22nd October 1920, to the effect that the plaintiff acknowledged receipt from him of Rs. 1,000 for principal and Rs. 800 for interest. The plaintiff pleaded that this was a forged receipt, but that he did receive Rs. 740 on that day and that he had given a receipt for that amount. He further suggested that the receipt, Ex. D-1 produced by the defendant, had been forged from the receipt he actually gave. Later the plaintiff was able to produce what he alleged to be the original receipt, namely, Ex. P-2, and he explained that he had been able to buy it from a forger of Shahabad, who had traced Ex. D-1 from the proper receipt, Ex. P-2.

The trial Judge held that Ex. P-2 was the original receipt and that Ex. D-1 was a palpable forgery. He, therefore, decreed the suit, for Rs. 2,500. On appeal the learned District Judge held that Ex. P-2 was the forged document and that Ex. D-1 was the original document. He, therefore, accepted the appeal to the extent of reducing the principal amount to Rs. 1,000 instead of Rs. 2,000 and he also decreed interest on the sum of Rs. 1,000. At the same time he sanctioned the prosecution of the plaintiff Sube Khan, under S. 471 of the Indian Penal Code on the ground that he had fraudulently used as genuine a document Ex. P-2, knowing or having reason to believe it to be a forged document. Against this order Sube Khan has appealed.

At the suggestion of the defendant Fattan, all the papers were sent to Mr. Stott the Government Examiner of Questioned Documents. Mr. Stott's opinion is on the record and it is to effect that Ex. D-1 produced by Fattan, is a traced forgery, from the original receipt, Ex. P-2. He is also positive that all the signatures on Ex. D-1 are traced forgeries, while the signatures on Ex. P-2 are, in his opinion, good signatures. When the defendant saw the report he did not call the expert as his witness and the plaintiff does not seem to have considered it necessary to do so either. In fact the plaintiff's suit was decreed in toto by the trial Court.

Exhibit D 1, which the expert stated to be a forgery, is attested by two witnesses, Abdul Majid Khan and Karim Bakhsh. Ex. P-2, which the expert considers to be a good document, is signed by the same two persons and one Abdul Rahim as witnesses. Abdul Majid has deposed in Court that he signed Ex. P-2 and not Ex. D-1. Karim Bakhsh is dead but his brother Chand Khan has deposed that the signature of his brother on Ex. P-2 is genuine while the other is not. This leaves Abdul Rahim, whose signature

is on the document Ex. P-2 but not on Ex. D-1. He stated in Court that the signature on Ex. P-2 is not his. The expert's opinion, however, is that it is a genuine signature.

If this criminal case is allowed to go on against the appellant, it is obvious that the expert's opinion will be in his favour and so will all the witnesses be in his favour except, possibly, Abdul Rahim. It is obvious, therefore, that the prosecution is bound to end in failure. When this is the case, there is a consistent series of rulings that the prosecution should not be sanctioned. I, therefore, accept the appeal and set aside the order of the District Judge dated the 28th September 1926, ordering a complaint to be instituted against the appellant, Sube Khan, under S. 471, Indian Penal Code. If a complaint has been instituted proceedings upon it must end at once, and the appellant discharged from any bail-bond he may have put in.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 353

SHADI LAL, C. J.

Emperor—Petitioner.

v.

Kesho Ram and *another*—Accused—Respondents.

Criminal Revision Petition No. 898 of 1926, Decided on 14th January 1927, from the order of 1st Cl. Mag. Lahore, D/- 5th March 1926.

(a) *Criminal P. C., S. 562—High Court will not interfere with order of release unless on strong grounds—S. 439.*

Where the trying Magistrate, before releasing an accused under S. 562 on probation of good conduct, considered all relevant circumstances and the Public Prosecutor also said that an order under S. 562 would meet the ends of justice

Held: that the terms of S. 562 (1) are wide and the Court of revision will refuse to set aside an order passed under that section by a Magistrate in the exercise of his discretionary jurisdiction, unless a strong case for interference is made out : 11 *Cr. L. J.* 389 ; *A.I.R.* 1925 *Oudh* 673, *Rel. on.* [P. 353, C. 2, P. 354, C. 1]

Sundar Das—for Petitioner.

Tek Chand for *Govt. Advocate*—for Respondents.

Judgment.—The trial Magistrate has convicted both the accused under S. 161 read with S. 116 of the Indian Penal Code ; but, instead of sentencing them to any punishment he has directed, under S. 562 of the Criminal P. C., their release on probation of good conduct. The learned counsel for the Crown asks this Court to interfere in revision with the order of the Magistrate and to pass a sentence of imprisonment upon each of the convicts. Now, in order to give the Magistrate jurisdiction to release an offender under this section, it is necessary that two conditions must be fulfilled : (1) the accused must be a first offender ; (2) the offence must be one of those specified in the section. It is conceded that both these requirements of the law have been satisfied ; and the only question is whether the Magistrate was, in the circumstances of the case, justified in exercising the discretion vested in him by law.

Now, on perusing the judgment of the Magistrate I find that he has taken, to use his own phraseology "everything into consideration." and that he has also paid due regard to the statement made by Mr. Byrne, Special Public Prosecutor, that he does not "ask for a sentence of imprisonment," but "that an order under S. 562, Criminal P. C, would meet the ends of justice." The question for determination is whether in these circumstances I should exercise my extraordinary jurisdiction as a Court of revision and interfere with the discretion exercised by the Magistrate. In this connexion my attention has been invited by the learned advocate for the respondents to a judgment of Mr. Justice Johnstone in *Abdul* v. *Emperor* (1) in which the learned Judge declined to interfere in revision with an order under S. 562 of the Criminal P. C. although the order had been passed in a case to which the section was wholly in applicable. Reliance is also placed on the judgment in *Emperor* v. *Pratab Narain* (2) where it was pointed out that the terms of S. 562, sub-S. (1) are wide, and the Court of Revision refused to set aside an order passed under that section by a Magistrate in the exercise of his discretionary jurisdiction.

In the case before me the Magistrate has, as pointed out above, taken into

(1) [1910] 19 P. W. R. 1910 Cr.=6 I. C. 639=11 Cr. L. J. 389.
(2) A. I. R. 1925 Oudh 673.

consideration the relevant circumstances and it is significant that even the Public Prosecutor asked him not to pass a sentence of imprisonment, but to make an order of release under S. 562 of the Criminal P. C. Upon these facts I am not prepared to hold that a strong case, such as would justify interference by a Court of revision with the discretion of the trial Court, has been made out. Accordingly I dismiss the application.

J.V. *Application dismissed.*

A. I. R. 1927 Lahore 354

JAI LAL, J.

Sita Ram and *another*—Applicants—Appellants.

v.

Hukam Chand and *others*—Creditors—Respondents.

Misc. First Appeal No. 1670 of 1926, Decided on 21st March 1927, from the order of the Dist. J., Jhelum, D/- 26th March 1926.

Provincial Insolvency Act, S. 10—Debtor applying for insolvency filing list of assets—Burden is on creditors to prove that he is able to satisfy his debts.

Where the debtor has filed a list of his assets, he cannot be required to prove that he has no other property except the one mentioned in such list. It is for the creditors to prove affirmatively that he has property sufficient to satisfy his debts. [P. 354, C. 2]

Ghulam Rasul—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.—Sitaram and Damodar Mall, two brothers presented an application of insolvency alleging that their debts amounted to Rs. 6,939, and their assets to Rs. 700 odd. The application was opposed by some of the creditors but was supported by others. The learned District Judge has rejected the application holding that the applicants were able to pay their debts.

On appeal it is contended by Mr. Ghulam Rasul, advocate for the petitioners, that the learned District Judge has wrongly appreciated the evidence and has not followed the proper procedure in deciding the case. S. 24 (2) of the Provincial Insolvency Act requires that the debtor, if present, should be examined by the Court, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing and the creditors shall have the right to question the debtor thereon. Though at the end of the case the debtor was put in the witness box he was not examined in detail as to his property and as regards other allegations made by the creditors. Two issues were framed:

1. Whether the debts of the petitioners amounted to Rs. 500? and
2. Whether they were unable to pay them?

The testimony of one creditor alone, A. W. No. 1 showed that the liability of the applicants to the witness is Rs. 1,900 in respect of which he holds decrees against them. There are other debts admittedly owing by the applicants. I hold, therefore, that the first issue had been proved by the applicants.

As regards the second issue the applicants having filed a list of their assets I am unable to see how they could be required to prove that they had no other property except the one mentioned in such list. It was for the creditors to prove affirmatively that they had property sufficient to satisfy their debts. In my opinion, this has not been established. Vague statements have been made by some of the witnesses who say that the applicants were able to pay four, five or six thousand rupees. With regard to their property some say that it is worth Rs. 2,000; others say that it is worth Rs. 4,000 or Rs. 5,000. It is impossible to hold on such evidence that the petitioners have sufficient property to pay Rs. 6,900 odd.

The learned counsel for the respondents contended before me that the petitioners had not disclosed the whole of the property which belongs to them and that they are joint with their brothers whose shares in the joint property should have been mentioned in the Schedule; he further contended that the debt mentioned in the Schedule of liabilities are fictitious. These are all matters which may have to be gone into in the insolvency proceedings. I express no opinion thereon and leave them to be decided by the learned District Judge.

In my opinion the petitioners have proved a prima facie case entitling them to be adjudicated insolvents. I accept this appeal and adjudicate Sita Ram and Damodar Mallas insolvents, and direct the learned District Judge to proceed with the insolvency proceedings in accordance with law. The parties will bear their own costs in this Court.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 355 (1)

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Malla—Defendant—Appellant.

v.

Muhammad Sharif and *others*—Plaintiffs—Respondents.

First Appeal No. 990 of 1922, Decided on 20th November 1926, from the decree of the Sr. Sub-J., Shahpur, D/- 20th January 1922.

Minor—Contract by guardian for purchase of immovable property—Minor cannot claim specific performance after majority.

It is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property. The minor is, consequently, not bound by the contract, and there being no mutuality he cannot, after attaining majority, obtain specific performance of the contract : 39 *Cal.* 232 (*P. C.*), *Foll.* [P 355 C 2]

Tek Chand and *Oertel*—for Appellant.

Judgment.—The facts relevant to the question of law involved in this appeal may be shortly stated. The defendant Malla had received from Government a grant of two squares of land on horse breeding conditions ; and in July 1920, he entered into negotiations with one Karam Dad for the sale of the land. No sale could, however, be effected without the permission of the Colonization Officer. Accordingly both Malla and Karam Dad made a joint application on 8th July 1920, to the Colonization Officer, which recited an agreement made by Malla to sell the land to Muhammad Sharif, the minor son of Karam Dad for Rs. 22,000 and requested that sanction be accorded to the agreement. In September the Colonization Officer sanctioned the contract for the sale of the land in favour of Muhammad Sharif.

It appears that the vendor did not fulfil his part of the contract, with the result that a suit for the specific performance thereof was brought by both Karam Dad and Muhammad Sharif. The trial Court had decreed specific performance, apparently in favour of Muhammad Sharif, who was the only person who was allowed by the Colonization Officer to purchase the property.

Against this decree the defendant Malla has preferred the present appeal. The respondent Muhammad Sharif, who has since attained majority, has not appeared to defend the appeal, although notice of the appeal has been served upon him. It appears that Karam Dad died during the pendency of the appeal and that an application to implead his legal representatives made after the expiry of the prescribed period of limitation. It is, however, unnecessary to consider the question whether the abatement of the appeal in so far as Karam Dad's heirs are concerned should be set aside, because as pointed out above, the decree has been granted in favour of Mahammad Sharif, and Karam Dad should, therefore, be treated as a pro forma respondent.

On the merits, the sole question is whether a contract entered into by the guardian of an infant for the purchase of an immovable property can be specifically enforced at the option of the latter. There was considerable divergence of judicial opinion on this point in India, but the matter has now been set at rest by the judgment of their Lordships of the Privy Council, *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1), which enunciates the principle that it is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property. The minor, is consequently, not bound by the contract, and there being no mutuality, he cannot, after attaining the age of majority, obtain specific performance of the contract. Whatever our own opinion may be on the subject, we are bound by the rule laid down by the Privy Council, and following that decision we must hold that the infant in the present case was not entitled to obtain a decree for the specific performance of the contract,

We accordingly allow the appeal and dismiss the suit with costs throughout.

G.B. *Appeal allowed.*

(1) [1912] 39 Cal. 232=13 I. C. 331=39 I. A. 1 (P. C.).

A. I. R. 1927 Lahore 355 (2)

CAMPBELL, J.

Karam Ali and *others*—Accused—Petitioners.

v.

Crown—Opposite Party.

Criminal Revision Petition No. 1581 of 1926, Decided on 15th February 1927, from the order of the S. J., Jhelum, D/- 20th May 1926.

Penal Code, S. 97—A's cattle suspected to be stolen and found with B—A driving away his as well as B's cattle—B's right of private defence arises.

Where A finds his stolen animals in B's possession and to recover them drives his as well as B's cattle along with his, B's right of private defence of property arises. [P 356, C 2]

Mukand Lal Puri—for Petitioner.

Des Raj Sawhney—for the Crown.

Campbell, J.—On the finding of the learned Sessions Judge in this case he should have acquitted the petitioners as having acted in the exercise of the right of private defence of property. The finding is as follows :

I am definite in my holding that a party consisting of Salabat, Mutalli, P. Ws. 4 and 7, and others who went in advance of the police came across the stolen animals that were grazing in a large herd under the charge of Karam Ali, Gaman and Shahu appellants and Jalla deceased, that armed with their brief authority they did not wait for the arrival of the police and tried to drive away the whole herd. The appellants instead of waiting for the arrival of the police took the law into their own hands and attacked Salabat, Mutalli and their companions and a fight ensued, in which owing to weakness of number they were routed.

The stolen animals referred to were two buffaloes which were said to have been stolen in June 1925. The present occurrence took place on the 3rd August 1925 and the prosecution case was that a party consisting of police officers and others went to the petitioners' village in order to recover the animals which were said to be there. The learned Sessions Judge has found that the policemen remained behind and that the other members of the rescuing party went ahead to locate the stolen buffaloes. The learned Sessions Judge does not hold that the petitioners' party knew anything about the police being associated with the complainant party or being anywhere in the vicinity and thus the point of saying that the appellants should have waited for the arrival of the police is not apparent.

It has been suggested by the learned Public Prosecutor that when after a thief has effected his retreat with stolen property the property is subsequently found in his possession the owner's right of private defence would revive for the purpose of its recovery. This proposition was mentioned with disapproval in *Mt. Ghulam Jannant* v. *Crown* (1), but in any case it would have no relevancy here for the finding of the learned Sessions Judge is not that the complainant party tried to cut out the two stolen animals from the herd and take them away, but that they tried to drive away the whole herd consisting mainly of animals which the petitioners had a perfect right to protect. It could scarcely be said that the petitioners used more force than was necessary to protect their animals in view of the result of the fight.

I accept the petition set aside the conviction and sentence and acquit the petitioners.

D.D. *Petition accepted.*

(1) A. I. R. 1926 Lah. 271=7 Lah. 70

A. I. R. 1927 Lahore 356

JAI LAL, J.

Saidu—Defendant—Appellant.

v.

Mehr Dad and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2434 of 1926, Decided on 21st March 1927, from the decree of the Addl. Dist. J., Gujranwala, D/- 6th August 1926.

Evidence—Admission by co-defendant of plaintiff's title—No evidence by plaintiff—Admission is not sufficient proof of plaintiff's title.

A sued B and C for possession of land on the ground that the land was sold to him by B, but C was resisting possession. B admitted sale of land to A in his written statement and C denied A's title and joined issue on the point. No evidence was led by A to prove the sale.

Held : that B's admission was not sufficient proof of the sale and A must fail. [P 357, C 1]

Kishen Dayal—for Appellant.

G. S. Salariya—for Respondents.

Judgment.—Mehr Dad and others instituted a suit for possession of land claiming that the same had been sold to them by Daulat and Bhag. Both these men with one Saidu were impleaded as defendants and it was alleged that Saidu resisted the plaintiffs in their attempt to obtain possession of the lands sold to them. Daulat did not appear and consequently the proceedings were ex parte against him throughout. Bhag appeared and admitted in his written statement that he had sold the land to the plaintiffs. He absented himself thereafter and proceedings were ex parte against him

also thereafter. Saidu denied the title of the plaintiff to the land and put them to the proof of the same. An issue was consequently framed which was as follows :

Are the plaintiffs owners of the land in suit and have they or their predecessors-in-interest been in possession of the land within 12 years ?

No evidence whatsoever was produced by the plaintiffs to prove the sale of the land in suit in their favour by Daulat and Bhag. The trial Court dismissed the suit, but the District Judge has decreed it holding that the admission of one of the vendors was sufficient proof of the sale in favour of the plaintiffs and that Saidu was not competent to question the sale. In my opinion the mere admission by Daulat in his written statement was not sufficient proof of the sale especially when Saidu denied it and put the plaintiffs to its proof and an issue was thereupon framed by the trial Court. I hold, therefore, that the plaintiffs have failed to prove any title in their favour and that the finding of the learned District Judge is not based on any legal evidence.

In view of the above finding it is not necessary for me to consider the other points involved in this appeal. I accept the appeal and set aside the judgment of the District Judge and restore the decree of the trial Court, but under the peculiar circumstances of the case leave the parties to bear their own costs throughout.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 357

HARRISON, J.

Rashid Muhammad Khan and *another* —Petitioners.

v.

Crown—Complainant—Opposite Party.

Criminal Revision No. 1633 of 1926, Decided on 28th January 1927, against the order of the Addl. Dist. Mag. Hoshiarpur, D/- 31st August 1926.

Criminal P. C., S. 250—Appeal or revision against compensation order—Notice to ex-accused is not necessary.

Where compensation is awarded to the accused under S. 250 and the complainant appeals or files a revision against that order, the Crown is the real respondent and notice to ex-accused is not necessary. [P 357, C 2]

Abdul Aziz—for Petitioners.

Sh. Abdul Aziz—for the Crown.

Harrison, J.—This revision has been admitted on the strength of *Ram Chand* v. *Jesa Ram* (*A. I. R.* 1924 *Lah.* 675) the facts being that the trial Court, as second class Magistrate, acquitted two accused persons and awarded Rs. 25 compensation to each of them under S. 250. From this order an appeal was presented to the Additional District Magistrate and the parties to the appeal were shown as complainant appellant versus the Crown as No. 1 and the accused persons as Nos. 2 and 3. The appeal was heard without serving notice either upon the Crown or upon the accuesd persons and was accepted. On revision it is urged that according to the view taken in the ruling quoted, which is based on two rulings of the Madras High Court it is so desirable as to be practically obligatory to serve the accused persons. On the other hand counsel for the respondent has drawn my attention to *In the matter of the application of Mr. A. Grant* (1), which clearly was not brought to the notice of the learned Judge who decided the case *Ram chand* v. *Jesa Ram* (*A. I. R.* 1924 *Lah.* 675.) The same view as in that Division Bench ruling was taken in *Guruswami Naiken* v. *Tirumurthi Chetti* (2), also a Division Bench ruling of the Madras High Court. Counsel for the petitioners has attempted to draw a distinction between an appeal and a revision and has pointed out, as noted above, that the ex-accused were impleaded. I do not think that any such distinction really exists. Both appeal and revision are strictly speaking between the persons aggrieved and the Crown, and quite apart from the question of whether an ex-accused should or should not be given an opportunity of appearing, the respondent is the Crown both in revision and in appeal. Under the circumstances I have thought it best to give counsel an opportunity in this Court to support the original order from the judgment of the trial Court. It is contended that the case is false and was brought to harass the accused. As to the falsity of the

(1) [1888] 14 P. R. 1888.
(2) [1914] 1 L. W. 908=25 I. C. 818=27 M. L. J. 629.

case the finding is, in my opinion not quite satisfactory. This being so I think the order regarding compensation should have been cancelled on the merits and I dismiss the petition.

J.V. *Petition dismissed.*

A. I. R. 1927 Lahore 358

JAI LAL, J.

Municipal Committee, Lahore—Defendant—Appellant.

v.

Mt. Allah Rakhi and *another*—Plaintiffs—Respondents.

Second Appeal No. 509 of 1926, Decided on 8th December 1926, from the decree of the Dist. J., Lahore, D/- 30th October 1925.

(a) Evidence Act, S. 101 — Notice issued by Municipality asking plaintiffs to leave certain area alleging that they were public prostitutes—Suit by plaintiffs to prevent operation of notice—Plaintiffs must prove that they are not public prostitutes.

Suit by alleged public prostitutes for grant of a perpetual injunction against the Municipal Committee to the effect that the Committee be restrained from taking any action against the plaintiffs under the notice under S. 152 of the Municipal Act on the ground that they were not public prostitutes, the burden is on plaintiffs to show that they were not public prostitutes: *A.I.R.* 1926 *Lah.* 461, *Foll.* [P 358 C 2; P 359 C 2]

(b) Punjab Municipal Act, S. 152—Notice issued to plaintiffs to leave certain area, they being public prostitutes—Suit to restrain Municipality from enforcing the notice lies in civil Court—Civil P. C., S. 9.

The Civil Courts have jurisdiction to decide in a suit by alleged public prostitutes against Municipal Committee for their having issued notice under S. 152 of the Municipal Act, the question whether or not the plaintiffs were public prostitutes and, on a finding of this issue in their favour, to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality: *A. I. R.* 1926 *Lah.* 461, *Rel. on*; *A. I. R.* 1924 *Cal.* 334, *Dist.* [P. 359, C. 2]

There is no express provision of the law which bars the jurisdiction of the civil Courts in such a case and it is for the Municipality to show that such jurisdiction is barred by implication. [P. 360, C. 1]

It is only when the Municipal Committee acts bona fide, reasonably and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the civil Courts; and that if its requisitions go beyond the powers conferred upon it then the civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised, but they are competent to restrain such bodies if they act ultra vires, and as the act of the Municipal Committee issued a notice under S. 152 of the Municipal Act against persons who are proved not to be public prostitutes, the Committee acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was ultra vires, and hence civil Courts would interfere. [P. 361, C. 2]

Hari Chand—for Appellant.

C. H. Oertel—for Respondents.

Judgment. — The Municipal Committee, Lahore, purporting to act under the provision of S. 152 of the Punjab Municipal Act, which authorises a Committee to prohibit the residence of a public prostitute in a specified area, served a notice on the respondents, Mt. Allah Rakhi and Mt. Khurshaid prohibiting their residence as public prostitutes in a specified area within the Municipality of Lahore. In the notice the respondents were described as public prostitutes, and on non-compliance with it they were prosecuted and convicted Their defence that they were not public prostitutes was not accepted by the Magistrate.

A suit was consequently instituted by the alleged public prostitutes for grant of a perpetual injunction against the Municipal Committee to the effect that the Committee be restrained from taking any action against the plaintiffs under the notice aforesaid on the ground that they were not public prostitutes. On behalf of the Municipal Committee several pleas were taken including a denial that the plaintiffs were not public prostitutes and an assertion that the civil Courts had no jurisdiction to interfere with the exercise of the Municipal Committee's powers under S. 152 of the Municipal Act. The learned Subordinate Judge who heard the case placed the burden of proving that they were not public prostitutes on the plaintiffs and came to the conclusion that it had been discharged. On the question of jurisdiction also he held against the Municipal Committee and consequently decreed the suit.

On the appeal by the Municipal Committee the District Judge of Lahore concurred with the views of the trial Court and maintained the decree with a slight modification as to the terms of the injunction granted by the Subordinate

Judge. The learned Judge, however, was of opinion that the burden of proving that the plaintiffs were public prostitutes lay on the Municipal Committee and that the same had not been discharged. On the other point involved he came to rather contradictory findings, as in one place he held that

> after careful consideration I have come to the conclusion that the Municipal Committee has acted within its powers reasonably and without oppression.

Still after finding that the plaintiffs were not public prostitutes he decided the appeal against the Municipal Committee on the ground that he was entitled to interfere with its action if he was

> satisfied that the Committee was acting oppressively to any individual such as the one of the alleged public prostitutes.

The Municipal Committee has presented a second appeal to this Court and the judgment of the District Judge is attacked on two grounds:

(a) That the burden of proving that they were not public prostitutes lay on the plaintiffs; and

(b) that the civil Courts had no jurisdiction to entertain the suit.

Cross-objections were also filed on behalf of the respondents that the appeal by the Municipal Committee to the District Judge was barred by time. The learned Judge has discussed this matter in his judgment and has found that the appeal would be within limitation if three days are allowed to the Committee as the time requisite for obtaining copies of the judgment and the decree of the trial Court. Owing to the date of the preparation of the copy of the judgment as entered thereon being blurred he came to the conclusion by a reference to the endorsement on the copy of the decree sheet that both the copies were ready on the 8th January and therefore that the appellant was entitled to an allowance of three days. As this finding was attacked in the cross-objections I inspected the original registers kept by the Copying Department of the trial Court and found that the copies were as a matter of fact prepared even later than the 9th. There is consequently no force in the cross-objections which are dismissed.

Now as regards the first ground of the appeal by the Municipal Committee: I held in *Mt. Moti Jan* v. *Municipal Committee of Delhi* (1), that the initial burden in such cases lies on the plaintiffs and I am still of the same opinion. One of the tests in the matter of burden of proof is who would fail if no evidence is given by either side; and applying this test it is obvious that if no evidence is given on either side the plaintiff's suit would have to be dismissed. In my opinion it is the duty of the plaintiffs who attack the finding of a public body and seek relief from the civil Courts to estabish the ground on which the relief is claimed. I hold that the burden of proof lay on the plaintiffs. The learned counsel for the appellant expressly stated before me that he merely wanted a decision on the question of burden of proof and that he did not desire a remand to the District Judge for a fresh finding if I held that it lay on the plaintiffs, therefore I refrain from remanding the case and proceed to discuss the second ground of appeal on the assumption that the plaintiffs are not public prostitutes,

I am of opinion that the civil Courts had jurisdiction to decide the question whether or not the plaintiffs were public prostitutes and on a finding of this issue in their favour to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality. In the case already referred to by me I arrived at the same conclusion and nothing that has now been urged before me has induced me to change that view. Counsel for the appellant relied upon *Tarabai, in re* (2), *Kerr* v. *Preston Corporation* (3), *Corporation of Calcutta* v. *Bijoy Kumar* (4).

The first of these cases related to a prayer for an order under S. 45 of the Specific Relief Act, under circumstances similar to those of the present case. Now S. 45 expressly provides that no relief under it is to be granted unless, inter alia the applicant has no other specific and adequate legal remedy and therefore the learned Judge who decided that case held that as it was open to the applicant to raise the question of her status as a public prostitute in her defence before the Magistrate on her prosecution for

(1) A. I. R. 1926 Lah. 461.
(2) [1905] 7 Bom. L. R. 161.
(3) [1877] 6 Ch. D. 463=25 W. R. 264=46 L. J. Ch. 409.
(4) A. I. R. 1924 Cal. 334=50 Cal. 813.

disobedience of the order of the Municipal Corporation, no relief under S. 45, of the Specific Relief Act could be granted to her. It is thus to be observed that the reported case was under a special provision of the law which precluded the Court from granting the relief prayed for under specified circumstances and has therefore no bearing on facts of the case before me which has been instituted under the provisions of S. 9 of the Civil P. C. That section provides that

> the Court shall have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Admittedly there is no express provision of the law which bars the jurisdiction of the Civil Courts in the present case and it is for the appellant to show that such jurisdiction is barred by implication.

In *Kerr* v. *Preston Corporation* (3) the plaintiff had built on his own area some bay-windows which projected on a street. This was done afternotice to the Municipal body but without its sanction. A notice to demolish the building having been issued by the local body the plaintiff instituted a suit praying for an injunction to restrain the former from enforcing the notice on the grounds inter alia that he built on his own land and that the defendant had by not replying to this notice acquiesced in the building of the windows. It was held that under the circumstances the Civil Courts had no jurisdiction to entertain the suit because the Municipal body in issuing the notice did not act beyond the powers conferred on it by the statute. That case, was, therefore, decided on its peculiar facts and though the judgment contains certain remarks which might be held to support the contention of the appellant still it has no application to the present case, as here it is contended that the Municipal Committee was not legally empowered by law to issue the notice to the plaintiffs, in other words, that the plaintiffs were not amenable to the law which has been applied to them and therefore that the requisition of the Committee was ultra vires.

In *Corporation of Calcutta* v. *Bijoy Kumar* (4), it was held that though the extreme position cannot be maintained that there is absolutly no jurisdiction in a Court of equity to restrain proceedings before a Magistrate the Court will not interfere unless in very special circumstances, by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a Magistrate, and that :

> it is not the practice to interfere with corporate bodies unless they are manifestly abusing their powers.

In that case the Municipal Corporation of Calcutta called upon the owners of some basti land occupied by tenants to carry out certain improvements in the basti and on their failure to comply with the requisition prosecuted them and had them convicted several times under the Calcutta Municipal Act. A suit by the owners for a decree to restrain the Corporation from taking any action or proceedings for non-compliance with the requisition was finally dismissed by the High Court as, in the opinion of the learned Judges, the alleged ground for non-compliance, that the tenants prevented them from carrying out the improvements, was not a sufficient ground for the exercise of the discretionary powers of the Court to interfere with the actions of the corporate bodies. After reviewing the previous authorities both English [including *Kerr* v. *Preston Corporation* (3)] and Indian, the learned Judges remarked as follows :

> There has been much discussion at the Bar as to whether a Court of equity has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments. An authority for an affirmative answer has been traced to the decision of Lord Hardwick in *Mayor of York* v. *Pilkington* (5) though a contrary view had been indicated by Holt C. J., in *Holderstaffe* v. *Saunders* (6); see also the decision of Lord Hardwick in *Montague* v. *Dudman* (7). But the tendency of modern decisions is that even if the Court has such jurisdiction, it will not interfere as a general rule: *Saull* v. *Browne* (8), *Kerr* v. *Corpn. of Preston* (3) *Hedley* v. *Bates* (9), *Stannard* v. *Vestry of Saint Giles* (10), *in re Briton Medical Association* (11); *Grand Junction Water-works Co.* v. *Hampton Urban Council* (12) *Devonport Corporation* v.

(5) [1742] 2 Atk. 302.
(6) [1694] 6 Mod. 15.
(7) [1751] 2 V. S. 396.
(8) [1874] 10 Ch. 64=31 L. T. 493=44 L. J. Ch. 1=23 W. R. 50=13 Cox. C. C. 30.
(9) [1880] 13 Ch. D. 498=42 L. T. 41= 49 L. J. Ch. 170=28 W. R. 365.
(10) [1882] 20 Ch. D. 190=46 L. T. 243=51 L. J. Ch. 629=30 W. R. 693.
(11) [1882] 32 Ch. D. 503=34 W. R. 390=55 L. J. Ch. 416=54 L. T. 152.
(12) [1898] 2 Ch. 331=78 L. T. 673=67 L. J. Ch. 603=46 W. R. 644=14 T. L. R. 467= 62 J. P. 566.

Tozer (13); *Merrick* v. *Liverpool Corporation* (14). The principle deducible from these decisions is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right, where the Legislature has pointed out a mode of procedure before a Magistrate; see also *Emperor of Austria* v. *Day* (15). A similar view has been adopted in the Courts of the United States as relief has been frequently denied on the ground that the proceedings for enforcement were of a criminal or quasi-criminal nature and that equity declines to interfere with the administration of the criminal laws. It has been maintained however, that a Court of equity may in a proper case, interfere by injunction to restrain an act or proceedings, criminal or quasi-criminal in form, which tends to the impairment of property rights and proceedings for enforcement of Municipal ordinances, such as the one before us, have been treated as quasi-criminal (Pomeroy on Equity Jurisprudence, S. 1777). We need not pursue this point further, but it should not be overlooked that the judicial decisions on the subject in other jurisdictions were largely rendered necessary by the system of classification of Courts prevalent there. Apart from this, we have the well settled rule that it is not the practice of the Court to interfere with corporate bodies unless they are manifestly abusing their powers.

This case, in my opinion, instead of being an authority in favour of the appellants rather goes against them and is distinguishable by the fact that there was no question as to the power of the corporation to require the plaintiffs to carry out the improvements, the main ground of the suit being that the plaintiffs had a good excuse for not complying with the requisition.

It was held in *Chunder Roy* v. *Chairman of Serampore* (16) that Municipal as well as other public Boards are within the restraining jurisdiction of the civil Courts which are competent to enquire into and control the action of the public bodies where they have acted in excess or contradiction of the powers conferred upon them.

In *Chairman, Giridhi Municipality* v. *Suresh Chandra* (17), it was held that it is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Act that the civil Court has no authority to interfere. It would appear that it is only when the Municipal Committee acts bona fide, reasonably, and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the civil Courts; and that if its requisitions go beyond the powers conferred upon it then the civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised but they are competent to restrain such bodies if they act ultra vires.

In the case before me it has been found both by the Subordinate Judge and the District Judge that the plaintiffs are not public prostitutes. and this finding must be held to be conclusive for the purposes of this appeal in view of the express request made before me by the counsel for the appellant that the case be not remanded for a fresh finding owing to the wrong allocation of the burden of proof by the District Judge. That being so they were not amenable to the law which has been applied to them by the Municipal Committee of Lahore and therefore, in issuing a notice under S. 152 of the Municipal Act to them the Committee has acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was ultra vires. The Civil Courts were therefore competent to grant a relief to the plaintiffs by way of injunction. No cause has been shown, in fact no attempt was made to show one, why if the civil Courts had jurisdiction, an injunction should not be granted in this case.

I, therefore, dismiss this appeal with costs.

This judgment will also dispose of Civil Appeals Nos. 510, 511, 512 of 1926 in which the same legal points are involved and though the facts are slightly different, the decision on the legal points concludes them, Those appeals are also dismissed with costs.

D.D. *Appeal dismissed.*

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(13) [1902] 2 Ch. 182=86 L. T. 612=71 L. J. Ch. 754.
(14) [1910] 2 Ch. 449=103 L. T. 399=79 L. J. Ch. 751=8 L. G. R. 966=74 J. P. 445.
(15) [1861] 3 De. G. F. and J. 217, 253=130 R. R. 101, 121.
(16) 19 W. R. 309.
(17) [1908] 35 Cal. 859=7 C. L. J. 631=12 C. W. N. 709.

A. I. R. 1927 Lahore 362

FFORDE AND TEK CHAND, JJ.

Guran Ditta and *others*—Defendants—Appellants.

v.

Pokhar Ram and *another*—Plaintiffs—Respondents.

First Appeal No. 3003 of 1922, Decided on 24th March 1927, from the decree of the Sr. Sub-J., Montgomery, D/- 23rd August 1922.

(a) *Civil P. C., Sch. 2, paras.* 16 (2) *and* 15 (c)—*Decree passed in accordance with invalid award—No appeal lies—Remedy lies under para.* 15 (c).

No appeal lies from a decree passed in accordance with any invalid award under para 16 (2), Sch. 2. The remedy lies by taking proceedings to have the invalid award set aside by the Court which made the reference under para. 15 (c): *A. I. R.* 1923 *All.* 502 and 99 *P. R.* 1915, *Rel. on.* [P 363, C 2]

(b) *Civil P. C., Sch.* 2 *para.* 1—*Signature of pleader authorised to refer suit to arbitration is sufficient authority for reference.*

Absence of a party's signature on the application for reference will not invalidate the award where the pleader, who was conducting the case on his behalf and who had been specially authorised in the vakalatnama, to refer the suit to arbitration, had actually affixed his signature to the application and the party had appeared before the arbitrator during the proceedings. Specially, it does not lie in the mouth of the opposite party to pick holes in the award on this score. [P 364, C 2]

(c) *Civil P. C., Sch.* 2, *para.* 16—*Parties added in suit at the time of considering objection to award and joining in the objections—They are bound by the decision of the Court and no appeal lies at their instance.*

Where at a time when the objections to the award are under consideration, certain persons apply to be made parties to the suit and file detailed objections against the award in the same manner as if they had been parties to the suit and to the arbitration proceedings at an earlier stage of the litigation, they must be deemed to have submitted themselves to the arbitration proceedings and placed themselves in the same position in which they would have been had they been parties to the suit from its commencement. They cannot subsequently be permitted to turn round and repudiate their previous conduct and urge that they are not bound by the result of the decision of the Court on the objections raised by them, and no appeal lies against the decree at their instance. [P 364, C 1]

(d) *Civil P. C., Sch* 2. *Para.* 1—*Refernce by father of joint Hindu family is binding on sons unless fraud is proved.*

A reference to arbitration made by the manager of a joint Hindu family consisting of himself and his sons is binding upon the sons unless the latter can show that the father's act was tainted with fraud or collusion or was otherwise done in bad faith: 16 *All.* 231 and *A. I. R.* 1921 *Lah* 34, *Rel. on.* [P 364, C 2]

Shuja-ud-Din and *Anant Ram Khosla*—for Appellants.

Ram Chand Manchanda and *Jagan Nath Malhotra*—for Respondents.

Tek Chand, J.—On the 16th of November 1917 one Hoshnak Rai, purporting to be the agent of one Ladha Ram, executed a sale deed in respect of the property in suit in favour of Khushal Mal, Mahtab Mal, and Maghar Mal. It appears that Ladha Ram died shortly afterwards without delivering possession of the land to the vendees. On the 1st of December 1920 the vendees instituted the suit out of which this appeal has arisen, against Guran Ditta and Pokhar Das (sons of Ladha Ram) and Hoshnak Rai for possession of the land sold. The principal defence put forward by Defendants 1 and 2 was that Hoshnak Rai had not been properly authorised by Ladha Ram to effect the sale, which was not binding upon Ladha Ram, or, after his death, on his sons.

A number of issues was framed and both parties were given opportunity to produce evidence in support of their respective contentions. After this had been done and when the case was ripe for arguments, an application was filed on the 20th of February 1922, signed by Mahtab Mal and Pokhar Das brother of Khushal Mal (who had died in the meantime), plaintiffs, and Guran Ditta and Pokhar Das defendants praying that the whole dispute be referred to the sole arbitration of one Lala Anup Chand, pleader. Naghar Mal plaintiff was absent and did not sign this application but it was stated by Pokhar Das, plaintiff that he was responsible for him. The application was also signed by Lala Radha Kishen, pleader, who represented all the plaintiffs (including Maghar Mal, and by Pandit Daulat Ram, pleader, for the contesting defendants. This application was granted by the Court and an order was passed referring the dispute to the arbitration of Lala Anup Chand. It appears that all the parties appeared before the arbitrator and led a certain amount of evidence before him. On the 23rd March 1922 the arbitrator gave an award holding that the sale in question was effected by Hoshnak Rai, as the duly authorised agent of Ladha Ram and was binding on the Defendants 1 and 2

and that the plaintiffs were entitled to a decree for possession against them.

On the 1st of April 1922 Defendants, 1 and 2 filed lengthy objections against this award, most of which attacked it on its merits. It was also urged that the appointment of the arbitrator was bad inasmuch as Maghar Mal plaintiff had not signed the application for reference to arbitration and also that the arbitrator was a member of the brotherhood of Hoshnak Rai and was also his relation and that he had given his award as a result of partiality. The defendants called no evidence to support these objections, but the Court of its own accord, ordered that the arbitrator should be summoned for examintion in Court. After several adjournments the arbitrator appeared on the 26th of June 1922 but the defendants expressed no desire to examine him. On the other hand, on that date an application was filed by the sons of Defendants 1 and 2, who are Appellants 3 to 7 before us, that as the property in suit was joint Hindu family property and Ladha Ram was not the sole owner of it, therefore, the applicants being interested in it, ought to be impleaded as parties to the proceedings before the Court. This application was granted by the Court the same day and these newly impleaded defendants filed a lengthy Jawab Dawa on the 19th of July 1922. The arbitrator was summoned and he again appeared in Court on the 9th of August 1922, but on this occasion also the defendants took no steps to examine him with regard to their objections as to partiality or the alleged irregularities in the conduct of proceedings before him, nor did they make any attempt to substantiate their allegations either by going themselves into the witness box or by any other means. On the other hand, on this date, their sons who had, as stated already, been impleaded as Defendants 3 to 7, filed objections against the award alleging that the award was "ineffectual and unacceptable against them" and imputing misconduct and partiality to the arbitrator. They, however, took no steps to substantiate these objections, and the Court, on the 23rd August 1922, passed a decree in accordance with the award against all the defendants except Hoshnak Rai whom the arbitrator had exonerated and against whom the case had in the meantime been withdrawn by the plaintiffs.

Against this decree of the learned Subordinate Judge, which was passed in accordance with the award, a first appeal has been preferred by Defendants 1 to 7 to this Court. The first question to be decided is whether an appeal is competent at all in view of the express provisions of Schedule 2, paragraph 16, of the Code of Civil Procedure, Clause (2) of which lays down that

> no appeal shall lie from a decree passed n accordance with the award except in so far as the decree is in excess of or not in accordance with the award.

It is contended by Dr. Shuja-ud-Din that Defendants 1 and 2 who were admittedly parties to the reference have got a right to prefer this appeal because the award in this case was void ab initio inasmuch as the application for reference had not been signed by one of the plaintiffs Maghar Mal. In the first place, even if the application was defective on the ground that Maghar Mal plaintiff had not signed it, and it is to be supposed that the award was for that reason invalid, it is quite clear that the remedy of Defendants 1 and 2 was by taking proceedings to have the award set aside by the Court which had made the reference, under paragraph 15 of the Second Schedule, in which S. 521 of the former Code has been re-enacted with the addition in Cl. (c) of the words "being otherwise invalid". In view of this amendment the ruling under the old Code which laid down that an appeal lay against a decree passed in accordance with an invalid award must be considered to have become obsolete. This is a proposition which is too well established to require an elaborate discussion. Reference, may, however, be made to *Hari Shankar* v. *Ram Piari* (1), *Mt. Gulab Khatun* v. *Chaudhuri* (2) and *Nida Murthi* v. *Ganapathilingam* (3) which cover the point fully. It must, thereforo, be held that no appeal was competent on behalf of Defendants Nos. 1 and 2.

I am also of opinion that on the merits this objection is devoid of all force. No doubt Maghar Mal was not present when the reference to arbitration was made,

(1) A. I. R. 1923 All. 502=45 All. 441.
(2) [1915] 99 P. R. 1915=32 I. C. 250=207 P. W. R. 1915.
(3) [1914] M. W. N. 865=25 I. C. 583.

nor did he actually sign the application for reference, but the pleader, who was conducting the case on his behalf and who had been specially authorised in the vakalatnama to refer the suit to arbitration, had actually affixed his signature to the application and it appears from the award that all the plaintiffs had appeared before the arbitrator during the proceedings. It must, therefore, be held that Maghar Mal was a party to the reference, or in any case, had submitted to the jurisdiction of the arbitrator. Moreover, it is significant that it is not Maghar Mal or any of the other plaintiffs who is impeaching the award on this ground. The objection comes from the opposite party and in my opinion it does not lie in their mouths to pick holes in the award on this score. I would, therefore, hold that no appeal lies on behalf of Defendants Nos. 1 and 2.

Dr. Shuja-ud-din however, argued that the case of the other Defendants Nos. 3 to 7 stands on a different footing inasmuch as they were not originally parties to the suit and were not on the record either at the time when the reference was made, or when the award was filed in Court. He, therefore, urges that the decree of the lower Court, which was passed against all the defendants including these persons, must be held to be "not in accordance with or in excess of the award" and for this reason an appeal is competent on their behalf. It must however be borne in mind that these defendants themselves applied to be made parties to the proceedings in Court at a time when the objections to the award were under consideration, and having succeeded in having their application granted, they filed detailed objections against the award in the same manner as if they had been parties to the suit and to the arbitration proceedings at an earlier stage of the litigation. In my opinion, by making this application and filing these objections and by the whole course of their conduct they must be deemed to have submitted themselves to the arbitration proceedings and placed themselves in the same position in which they would have been, had they been parties, to the suit from its commencement. They cannot now be permitted to turn round and repudiate their previous conduct and urge that they are not bound by the result of the decision of the Court on the objections raised by them. I would, therefore, hold that no appeal lies on behalf of these defendants also.

I may further mention that there is no substance in the merits of their appeal inasmuch as they base their claim on their being members of a joint Hindu family with their respective fathers Defendants Nos. 1 and 2 and as such they are bound by the acts of the latter. Strictly speaking it was not necessary to implead them as defendants at all, as they were effectively represented by their fathers, and would have been bound by the result of the litigation: see *Sheo Shankar* v. *Jaddo Kunwar* (4) Moreover, it is quite clear that a reference to arbitration made by the manager of a joint Hindu family consisting of himself and his sons is binding upon the sons unless the latter can show that the father's act was tainted with fraud or collusion as otherwise done in bad faith. In this connexion reference may be made to *Jagannath* v. *Mannu Lal* (5) and *Dwarka Das* v. *Kishen Kishore* (6). No such allegation of fraud or bad faith is made here.

It remains now to examine ground 5 of the memorandum of appeal in which it was urged that Maghar Mal, one of the plaintiffs, had died while the proceedings were still pending in the Court below, i. e. in the interval after the filing of the award and before the passing of the decree and that the decree passed in his favour is a nullity. This matter does not seem to have been brought to the notice of the trial Court before the passing of the decree and though this appeal was preferred on the 22nd of November 1922 no affidavit has up to this day been filed whether Maghar Mal deceased left any heirs or legal representatives. As the sale was a joint one in favour of the various vendees we think that his death under such circumstances does not affect the decree of the lower Court in any way.

For the foregoing reasons the appeal fails and I would dismiss it with costs.

Fforde, J.—I agree.

G.B. *Appeal dismissed.*

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(4) [1914] 36 All. 383=24 I. C. 504=41 I. A. 216 (P. C.).
(5) [1894] 16 All. 231=(1894) A. W. N. 60.
(6) A. I. R. 1921 Lah. 34=2 Lah. 114.

A. I. R. 1927 Lahore 365

JAI LAL, J.

Muhammad Sharif and *another*—Defendants—Appellants.

v.

Din Muhammad—Plaintiff—Respondent.

Misc. First Appeal No. 1770 of 1926, Decided on 22nd February 1927, from the order of the Addl. Dist. J., Lahore, D/- 16th March 1926.

(a) *Civil P. C., O. 41, R. 19—Appeal by several persons—Appellants are entitled to notice individually.*

Where the memo. of appeal filed by several persons purports to be signed by all of them they are entitled to have notice of the hearing of the appeal individually. [P. 365, C. 2]

(b) *Civil P. C., O. 41, R. 19—Absence of knowledge of the date of hearing is sufficient cause.*

Absence of knowledge of the date fixed for the hearing ot the appeal is a sufficient cause for failure to appear when the appeal is called on for hearing within R. 19. [P. 365, C. 2]

Mohsin Shah—for Appellants.

Asghar Beg and *Tirath Ram*—for Respondent.

Judgment.—Three defendants, Muhammad Husain, Muhammad Sharif and Muhammad Amin who are brothers filed an appeal in the Court of the District Judge of Lahore, against the decree of the Sub-Judge, Lahore. The memo of appeal purports to be signed by all three appellants. The appeal was fixed for hearing on the 11th January 1926 for which date summonses were sent to the respondent and a notice to the appellants. It appears, however, that the notice was served on Muhammad Hussain appellant but not on Muhammad Sharif and Muhammad Amin. Muhammad Hussain, however, when accepting service of the notice undertook to inform Muhammad Sharif. On the 11th January the date of the hearing of the appeal, none of the appellants appeared. The appeal, therefore, was dismissed in default.

An application to set aside the dismissal for default made by Muhammad Sharif and Muhammad Amin has been dismissed by the learned Additional District Judge on the ground that service of the notice on Muhammad Hussain was sufficient notice of the date fixed for the hearing of the appeal to the other appellants also. The learned Judge was of opinion that the appeal was filed by Muhammad Hussain on behalf of the others. I have examined the memo of appeal and find that this view of the learned Judge is erroneous. The appeal was by the three brothers and the memo purports to be signed by all of them. They were, therefore, entitled to have notice of the hearing of the appeal individually. It appears to me that the learned Additional Judge was misled by the fact that process-fee for summoning the respondent was filed by Muhammad Hussain alone. This, however, does not make him the agent of the other appellants for the purpose of accepting notice of the hearing of appeal. The learned counsel for the respondent contends that there is no provision in the Civil P. C. requiring that notice of the hearing of appeal should be given to the appellant. The present case, however, falls under O. 41, R. 19 of the Civil P. C. which provides that where an appeal is dismissed under O. 41, R. 17 in the absence of the appellant, the latter may apply for the re-admission of the appeal and where it is prayed that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. In my opinion the appellants in this case have proved that they had no knowledge of the date fixed for the hearing of the appeal and that, in my opinion was a sufficient cause for their failure to appear when the appeal was called on for hearing.

It may be mentioned that the application for setting aside the dismissal in default was by Muhammad Sharif and Muhammad Amin alone; Muhammad Hussain was no party to that application and the present appeal also is by Muhammad Sharif and Muhammad Amin.

I accept the appeal, set aside the order of the learned District Judge and direct him to re-admit the appeal so far as the appellants before me are concerned. The effect of the dismissal of the appeal so far as Muhammad Hussain is concerned will be decided by the learned District Judge. Under the peculiar circumstances of this case I make no order as to costs.

R.D. *Appeal accepted.*

* A I. R. 1927 Lahore 366

ADDISON, J.

Imam Din—Appellant.

v.

Khamandi and *others*—Respondents.

Second Appeal No. 2658 of 1925, Decided on 1st February 1927, from the decree of the Dist. J., Hoshiapur, D-/ 13th June 1925.

(a) Custom (Punjab)—Mahomedan Gujars of Kangra—Daughter can contest alienation by her mother.

Among Muhammadan Gujars of Kangra tahsil daughters have a right under custom to contest alienations by their widowed mothers, and the fact that the mother succeeded collaterally, does not make any difference. [P 365 C 2 ; P 367 C 1]

** (b) Custom (Punjab)—Alienation by widow holding limited estate—Next heir whether male or female can contest.*

Where it is a question of alienation by a widow holding a life estate, it is wholly immaterial whether the next heir is a male collateral or a female, the right to challenge arising out of the succession and not being derived from any common ancestor or any principle of agnatic succession. (*Case law discussed.*) [P 369 C 1]

Mehr Chand Mahajan—for Appellant.

Jagan Nath Aggarwal and *Fakir Chand*—for Respondents.

Judgment.—For the proper understanding of this appeal the following pedigree table is necessary.

Nathu

Chhanga=Mt. Gohri widow	Budhu	Baju
Mt. Gaddo daughter (plaintiff)	Mt. Koklu (daughter)	
	Mt. Kando	Mt. Nabian (Plaintiff)
		Daughters.

The question is one of custom amongst Muhammadan Gujars of the Kangra District. Chhanga died before 1890 and was succeeded by his widow Mt. Gohri. Budhu died in 1904 and was succeeded by his brother Baju and by Mt. Gohri, widow of Chhanga. Baju died in 1910 and was succeeded by his widow Mt. Pardhani. The last named died in 1911 and her estate went to Mt. Gohri. In this way Mt. Gohri, the widow of Chhanga, became the life owner of all the land held by the three brothers. They had all daughters who did not succeed upon the deaths of their respective fathers as widows were in existence.

On the 16th November 1922 Mt. Gohri gifted the whole land, which came to her from the three brothers, namely, 93 kanals 9 marlas to one Imam Din, her own distant relative. She alleged that she was the absolute owner and that he had been serving her and thus she had the right to gift the land to him, there being no reversioners. The prsent suit was instituted by Mt. Gohri's daughter Mt. Gaddo, and by Mt. Nabian, a daughter of Baju, for a declaration that the gift in suit should not affect their rights of inheritance after the death of Mt. Gohri. Mt. Kando, another daughter of Baju, and Mt. Koklu, daughter of Budhu, have not sued. The donee pleaded that the plaintiffs had no right to challenge the gift either under custom or Muhammadan Law as the daughters were not heirs and that, if custom was the rule, the plaintiffs should prove that they as heirs had the right to contest the gift under custom.

The trial Judge held that the gift in favour of a stranger was invalid, that it had not been proved that the donee had served the donor and that custom was against gifts in favour of strangers by a widow, that the widow was not a full owner, and that she held usual limited estate under Customary Law, but he dismissed the suit on the ground that the plaintiffs had no locus standi to sue. Against this decision the plaintiffs appealed to the District Judge. The donee's counsel there admitted the correctness of all the findings by the trial Judge against him and the only question before the District Judge was whether the plaintiffs had a locus standi to sue. He held that the daughter of Mt. Gohri in any case was an heir and as such had the right to contest the gift by her mother, who only held the usual life estate. He, therefore, decreed the suit, but granted a certificate under S. 41 of the Punjab Courts Act, as to whether among Muhammadan Gujars of Kangra tahsil daughters had a right

under custom to contest alienations by their widowed mothers. On this certificate this second appeal bas heen admitted.

Under the general law of the province daughters succeed even to the ancestral landed property of their father in the absence of near male collaterals. This is the rule given in para. 23 of Rattigan's Customary Law, and the answer to Question 49 of the Customary Law of the Kangra District is also to the effect that after sons and widows daughters are entitled even when married to succeed when, as in the present case, there is no collateral of the deceased up to seven generations. Further, it is commonly the case under custom that widows succeed collaterally, see Remark 2 of para. 11 of Rattigan's Digest. Several instances of collateral succession of widows in the Kangra District are given at pages 108 and 109 of the Customary Law of that district. Further, the answer to Question 45 of the Customary Law of the Kangra District shows that widows succeed to the usual limited interest in the estate only. Under custom, therefore, the daughter in the present case is certainly an heir and the fact that the mother succeeded collaterally does not show that daughters are not heirs. It is also clear that Mt. Gohri had only a limited life interest in the estate.

The only question remaining is whether the daughter of Mt. Gohri can contest the gift by her mother. Some attempt was made to argue on the authority of a dictum in *Allah Ditta* v. *Gauhra* (1) that a widow's estate is only limited for the benefit of reversioners and, where there are none, she is to all intents and purposes an absolute owner. This dictum, however, was not followed in *Kundan* v. *Secy. of State* (2), and it is obvious that it was stated in too wide terms.

There is no evidence as to the custom either way and this was to be expected, seeing that instances like the present must be very few in number. It was argued, however, that the right to inherit does not necessarily give the right to contest an alienation, such right of contest being usually vested in the agnatic body. It was further argued that the power to contest under custom must be proved in each case and that as there was no evidence, the appeal should be accepted and the plaintiffs' suit dismissed.

The authorities relied upon on behalf of the appellants were the following:

In *Nur-ul-Nissa* v. *Gauhar-ul-Nissa* (3), it was held that the plaintiffs, who were nieces of the last male owner, had no locus standi to sue for a declaration that a gift by the last male owner's childless daughter should not affect their reversionary rights. It was further said that there being no presumption in favour of control by a female over such an owner it was not open to the plaintiff to contest the alienation unless they were in a position to establish a custom ad hoc. This view seems to have been approved in *Ali Muhammad* v. *Siraj-ud-Din* (4). In *Mt. Partapi* v. *Hazara Singh* (5), it was held that among Jat Sikhs of the Jullundur district the onus of proving that a daughter had the right to contest an alienation by her mother of land, whereof the last male holder was her father, lay on the daughter and that on the record she failed to discharge it. A similar view was taken in *Dalipa* v. *Suraj Kaur* (6) where it was said that the rights and privileges of a female heir have to be decided on the evidence of each particular case and that plaintiff, a married daughter, who had succeeded to her father's estate, had failed to prove that by custom among Dhillon Jats of the Ambala district she had a right to contest alienations effected by her mother or stepmother. *Mt. Ram Devi* v. *Hazara Singh* (7) was decided by a Full Bench which held that it was not the function of a Judge to enunciate general principles of law and custom irrespective of the facts of a case and that cases under customary law should be decided according to the facts established by the evidence produced in those cases and that the opinions of Judges in other cases, however valuable by way of illustration, cannot safely be applied to parties in a different case. After the Full Bench

(1) [1914] 3 P. R. 1914=23 I. C. 127=129 P. L. R. 1914.
(2) A. I. R. 1926 Lah. 673=7 Lah. 543.
(3) [1906] 61 P. R. 1906
(4) [1912] 13 P. R. 1912=162 P. L. R. 1911=10 I. C. 236=199 P. W. R. 1911.
(5) [1916] 33 P. R. 1916=31 I. C. 794.
(6) [1916] 48 P. R. 1916=34 I. C. 581=142 P. W. R. 1916.
(7) [1916] 17 P. W. R. 1916.

gave that decision the Division Bench, to whom the appeal went back, held that the power to control an alienation by a female, whether a widow or not, was usually vested in the agnates which the daughters were not, and that the burden of proving the power to contest an alienation by the widow lay on the daughter. These exhaust the authorities in favour of the appellants.

On the other hand, there are numerous rulings of this Court which have taken the opposite view. It was held in *Chiragh Bibi* v. *Hassan* (8) that among Ghelna Arains of the Lahore district a daughter (assuming her to be the heir of her father) was by custom entitled to contest an alienation made by her step-mother. This means that the daughter, if she is heir, is entitled by custom generally to contest an alienation by her mother, the daughter succeeding as full owner, while her mother, as widow, has only a limited life interest in the estate. It was held in *Lahori* v. *Radho* (9) that a widow, who was entitled to succeed collaterally, was as such competent to contest the validity of an alienation made by the widow of a collateral of her husband whom she was entitled to succeed. There are thus two other cases of the year 1906 at variance with *Nur-ul-Nissa* v. *Gauhar-ul-Nissa* (3).

Another authority which has often been discussed and followed is *Maqsud-ul-Nissa* v. *Kaniz Zohra* (10) where it was held that a female with a right to succeed to an estate held by another female is competent to control the acts of the latter, provided she establishes that she is entitled to succeed and that the alienor is holding only a limited estate resembling that of a widow; but she can in no case challenge an alienation by a male proprietor or by a female holding as full owner. In the case before me the alienor held only the limited estate of a widow and the daughter has established that she is in fact entitled to succeed on her death. Again it was held in *Diyal Kaur* v. *Mehtab Kaur* (11) that, where the owner for the time being has only a limited interest in the estate, a prospective heir entitled to succeed to an absolute estate can restrict the enjoyment of the limited interest within proper limits. This was a case similar to the present. In *Dalipa* v. *Dallu* (12) it was held that amongst Rajputs of tahsil Nurpur of Kangra district a widow, who holds a life interest under custom, has the same restrictions on her power of alienation as a widow who holds a similar estate under Hindu Law and that the next heir has a right to protect his inheritance by challenging any unauthorised alienation. The authority followed in this case was *Maqsud-ul-Nissa* v. *Kaniz Zohra* (10). It was held in *Mt. Nasib-un-Nisa* v. *Mt. Ahmadi-un-Nisa* (13) which was a case amongst Sayyids of Kharkhauda in the Rohtak district, that as a daughter who succeeds by the right of representation had in every way the rights of a male, she had the right to contest alienations made by a widow. In this case again *Maqsud-ul-Nisa* v. *Kaniz Zohra* (10) was approved genrally (see pages 392 and 393 of the report). In *Nawaz Khan* v. *Mt. Zohra Jan*, *A. I. R.* 1924 *Lahore* 187, the proposition is laid down in the broadest terms to the effect that, when a female is entitled to succeed on the death of the alienor and when the alienor holds only a limited estate, such female is competent to control the alienations of the alienor. That was a case amongst Khattar Muhammadans of the Attock district. In *Mt. Surjo* v. *Mt. Dalelo*, *A. I. R.* 1925 *Lahore* 573, a case of Brahmans of tahsil Dohra Gopipur, in the Kangra district, it was held that where under customary law a widow is entitled on the death of another widow to succeed to the estate held by the latter as a life tenure, the former can restrain an alienation by the latter.

The extent to which the right to contest an alienation by a female with a limited estate is now recognized is shown by the fact that in *Ahmad* v. *Mt. Bano* (14) it was admitted that, if the sisters of the last male owner were heirs, they could contest an alienation made by the widow of the last male owner. In *Gobinda* v. *Nandu* (15) a case between Hindu Ghirths of the Kangra district, the same view was taken as regards the rights of one female to challenge an

(8) [1906] 19 P. R. 1906=70 P. L. R. 1906.
(9) [1906] 72 P. R. 1906=108 P. L. R. 1907.
(10) [1908] 135 P. R. 1908.
(11) A. I. R. 1921 Lah. 168.
(12) A. I. R. 1921 Lah. 176.
(13) 2 Lah. 383=A. I. R. 1921 Lah. 85.
(14) A. I. R. 1922 Lah. 114=3 Lah. 40.
(15) A. I. R. 1922 Lah. 217=5 Lah. 450.

alienation by another with a limited estate.

Lastly, it will be sufficient to refer to *Mt. Aisha* v. *Mt. Hussan Bano* (Civil Appeal No. 475 of 1919). This was a case of Mussalmans of the Jullundur district and it was held that, where it is a question of alienation by a widow holding a life estate it was wholly immaterial whether the next heir be a male collateral or a female, the right to challenge arising out of the succession and not being derived from any common ancestor or any principle of agnatic succession.

The above discussion will show that apart from the authorities of the year 1916 and one authority of the year 1906, all the others are against the contention of the appellant and in favour of the view that a female heir is entitled to contest the alienation of another female with a limited estate. That being the case, I dismiss the appeal with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 369

FFORDE AND ADDISON, JJ.

Fazal Khan—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 705 of 1926, Decided on 4th November 1926, from the order of the S. J., Attock, at Campbellpur, D/- 28th April 1926.

Criminal P. C., S. 439—Acquittal means complete acquittal—Trial under S. 302, Penal Code—Conviction under S. 304 does not amount to acquittal under S. 302.

To alter the conviction from one under S. 304 to one under S. 302 and to pass an appropriate sentence under the latter section does not amount to altering an acquittal into conviction. Where a person has first been tried under S. 302, and convicted under S. 304, this does not mean, for purposes of S. 439, that he has been acquitted under the former section. [P 369, C 2; P 370, C 1]

Acquittal means a complete acquittal and discharge of all the allegations and facts charged, and not an acquittal on one charge and a conviction on another: 12 *P. R.* 1904 *Cr.*; 37 *Mad.* 119 and *Queen* v. *Bayard*, (1892) 2 *Q. B.* 187, *Foll.*; *A. I. R.* 1922 *All.* 487, *not Foll.* [P 370, C 1]

Fforde, J.—The appellant was tried under S. 302 of the Indian Penal Code of having murdered a young girl called Mt. Sakina Jan by stabbing her a number of times with a spear. The learned Sessions Judge somehow came to the conclusion that the offence was not murder, and he convicted the appellant under the first part of S. 304 of the Indian Penal Code and sentenced him to rigorous imprisonment for ten years. He appealed through jail, and the matter came before Broadway, J., who directed that notice should issue to the appellant calling on him to show cause: (1) why the conviction should not be altered to one under S. 302 of the Indian Penal Code and a sentence of death passed, and (2) why the sentence under S. 304 of the Indian Penal Code should not be enhanced.

Mr. Balkishen Mehra appears on behalf of the respondent in the revision matter. The case is a perfectly clear one. The convict admitted that he stabbed Mt. Sakina Jan three times with a spear. The medical evidence shows that there were in fact five incised wounds, one of them. 1½ × 1, penetrating the chest cavity, and another penetrating the abdominal cavity. From the latter wound the large intestine was protruding. The covering of the heart was cut opposite the chest wound, and the pulmonary artery on the right side was also cut. It is quite clear from these injuries, and from the convict's own admission that he either intended to kill the girl or that he intended to inflict such injuries as he knew were likely to cause death.

Upon the evidence which was before the trial Court he should, in my opinion, have been convicted of an offence under S. 302 of the Indian Penal Code. The case was clearly one of murder and nothing else, and by no possible construction of the Penal Code could it be held to fall within the provisions of S. 304. Mr. Balkishen Mehra who has been assigned for the defence on the hearing of the revision application (the Crown not being represented) has, relying upon *Emperor* v. *Sheo Darshan Singh* (1) argued that the conviction cannot be altered to one under S. 302, as this would have the effect of converting a finding of acquittal under that section to one of conviction. In my opinion, to alter the conviction from one under S. 304, to one under S. 302 and to pass an appropriate sentence under

(1) A. I. R. 1922 All. 487=44 All. 332.

the latter section, does not amount to altering an acquittal into a conviction. Where a person has first been tried under S. 302, and convicted under S. 304, this does not mean, for the purposes of S. 439 of the Code of Criminal Procedure, that he has been acquitted under the former section. This Court in *Bhola* v. *Emperor* (2) has held that acquittal means a complete acquittal and discharge of all the allegations and facts charged, and not an acquittal on one charge and a conviction on another. If further authority is required for this proposition it is to be found in *Crown* v. *Bali Reddi* (3). It has also been decided in *Queen* v. *Bayard* (4), that the words acquitted upon an indictment " means acquitted of all the misdemeanours charged in the indictment." I am unable to accept the contrary view taken by the learned Judges of the Allahabad High Court in *Emperor* v. *Sheo Darshan Singh* (1).

I would accordingly alter the conviction to one under S. 302, Indian Penal Code, but as the Crown has not appeared to prosecute this revision, and as the respondent is a youth of only 18 years of age, I do not think it is necessary to impose the death penalty. I would accordingly impose the lesser punishment of transportation for life.

Addison, J.—I concur.

D.D. *Conviction altered.*

(2) [1904] 12 P.R. 1904 Cr.=110 P. L. R. 1904.
(3) [1904] 37 Mad. 119 = 22 I. C. 756 = 15 Cr. L. J. 180.
(4) [1892] 2 Q. B. 181=17 Cox. C.C. 572 = 67 L. T. 313=56 J. P. 650=40 W. R. 525.

A. I. R. 1927 Lahore 370

JAI LAL, J.

Tufail—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1222 of 1926, Decided on 10th February 1927, from an order of the 1st Cl. Mag., Jullundur, D/- 8th November 1926.

Penal Code, S. 366—Seduction resulting in abduction need not be proved to be separate from that resulting in illicit intercourse.

In order to have conviction under S. 366 it is not necessary to establish by independent evidence that the girl was seduced to illicit intercourse and that such seduction was separate from and independent of the original seduction which resulted in her abduction. The proximity of both the events is an important factor and so long as the Court is satisfied that the effect of inducement which was the cause of abduction continued till the time of the illicit intercourse, it is legally open to it to hold that the girl was seduced to illicit sexual intercourse. [P 371 C 2]

L. Saunders—for Appellant.

Muhammad Husain for *Govt. Advocate*—for the Crown.

Judgment.—Tufail, Abdul Ghafoor, Mt. Biran and Imam Din have been convicted under S. 366 of the Indian Penal Code and have been sentenced to seven years' rigorous imprisonment each. They have all appealed to this Court and I have heard Mr. Saunders on behalf of Tufail and Mr. M. M. Tufail on behalf of Abdul Ghafoor. The other two having appealed through Jail were not represented before me.

The case for the prosecution is that Mt. Zainab alias Rajji, wife of Mali aged between 14 and 15 years was residing in Jullundur City with her husband. Mt. Biran who is alleged to be a woman of doubtful character began to visit her occasionally and in such visits to prejudice her against Mali and to introduce the name of Tufail as a handsome young man in comparatively affluent circumstances. On these occasions Mt. Biran actually suggested to Mt. Zainab that she should leave her husband and go and live with Tufail.

On the 28th June 1926, when Mt. Zainab was on a visit to her parents in another part of Jullundur City and her husband and her father were absent from the house, Mt. Biran and Imam Din came and asked Mt. Zainab to accompany them and to meet Tufail who was waiting outside the house with Rs. 500 to be given to her. Mt. Zainab accompanied them and met Tufail and Abdul Ghafoor outside the house. The four culprits then took the girl to the house of Mt. Biran and Imam Din in a garden nearby, shut her in a room and kept her there till the next day. During the night she was visited by Tufail who had sexual intercourse with her. She was finally taken to Ludhiana by Tufail and Abdul Ghafoor and was recovered from the house of Ali Bakhsh, Constable, where she had been taken by Abdul Ghafoor who also was present in the house at

the time of her recovery. It may be mentioned that before the girl was taken to Ludhiana she was kept in the house of Abdul Ghafoor's maternal grandmother where Abdul Ghafoor had intercourse with her. Mali on discovering the disappearance of his wife made a search for her and was informed by several persons that they had been going to the house of Mt. Biran accompanied by the four convicts. He made a search for her but without success, and filed a complaint which was dismissed. Afterwards he was informed by some of the witnesses for the prosecution that they had seen the girl being taken to Ludhiana. Thereupon he reported the matter at the Thana and the police succeeded in tracing the girl to the house of Ali Bakhsh, Constable.

The above facts are established by the evidence of Kidar Nath and Rahmat Ali who saw the girl being taken to the house of Mt. Biran, Kesar Das and Rahman who saw Abdul Ghafoor and Tufail taking her to Ludhiana, Ali Bakhsh who proves that she was brought to his house by Abdul Ghafoor on the pretext that she was his relation and had been brought to Ludhiana for medical treatment, Muhammad Yusaf who proves that Abdul Ghafoor brought Mt. Zainab to his mother-in-law's house and Ali Gauhar and Abdul Hamid who prove that Tufail brought Mt. Zainab to the house of Ali Gauhar before she was taken by Abdul Ghafoor to the house of Ali Bakhsh. The above story is further proved by the testimony of Mt. Zainab herself who has given a straightforward account of the treatment that she received at the hands of the accused. I have, therefore, no hesitation in agreeing with the Magistrate that the story told by Mt. Zainab in the witness-box is a true one and has been corroborated by other evidence on the record. I also agree with him that it has been established by the statement of Pira her father and Dr. Ganga Bishan, Assistant Surgeon, that Mt. Zainab is between 14 and 15 years of age.

The accused denied their guilt. Tufail stated that he had nothing to do with the disappearance of Mt. Zainab, Abdul Ghafoor admits that he took her to the house of Ali Bakhsh but says that Tufail had brought the woman to his house and left her there. This he has not been able to establish. The evidence as to alibi produced on behalf of Tufail is worthless and has been rightly rejected by the Magistrate. Counsel for the appellants contended that no offence under S. 366 had been established because it had not been shown that after her first abduction or kidnapping the girl was seduced to sexual intercourse. The argument of the learned counsel was that in order to bring the conduct of the accused under S. 366, Indian Penal Code, there should be a second act of seduction of the girl to illicit intercourse after she had been abducted or kidnapped. In support of this contention reliance was placed on certain remarks in Gour's Penal Law of India. The actual judgment on which those remarks are based was not cited before me but I observe that according to the learned author opinion on this question is divided. In my opinion the appellants have been rightly convicted under S. 366 and under the circumstances of this case it was not necessary to establish by independent evidence that the girl was seduced to illicit intercourse and that such seduction was separate from and independent of the original seduction which resulted in her abduction. The proximity of both the events is an important factor, in this case and so long as I am satisfied that the effect of inducement which was the cause of abduction continued till the time of the illicit intercourse it is legally open to me to hold that the girl was seduced to illicit sexual intercourse. I hold, therefore, that the guilt of the appellants under S. 366, Indian Penal Code, has been established and having regard to all the circumstances of this case the sentence of seven years' rigorous imprisonment was fully deserved by the appellants.

I dismiss the appeal.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 371

JAI LAL, J.

Hari Singh and *others*—Defendants and Appellants.

v.

Sahib Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1062 of 1926, Decided on 8th February 1927.

(a) *Stamp Act, S.* 36.

The objection that a document is inadmissible in evidence for want of sufficient stamp, cannot be taken on appeal for the first time. [P 372 C 1]

(b) *Custom (Punjab)—Alienation—Antecedent debt—Alienee satisfying as to the nature of debt and then discharging—Question of enquiry does not arise.*

Where the alienee satisfies himself as to the existence of an antecedent debt due to the vendor and then actually discharges that debt, no question of enquiry as to the nature of the debt arises unless it is proved that it was tainted with immorality or that there were suspicious circumstances which should have put the alience to enquiry. [P 372 C 1]

D. C. Ralli—for Appellants.

C. L. Mathur—for Respondents.

Judgment.—In pursuance of my order of remand dated the 8th of October 1926, the District Judge has submitted a finding that Rs. 850 was paid by the appellant to Basant Singh in discharge of a debt due to him from the alienor. This finding is based on evidence on the record and cannot be attacked before me and the appeal, therefore, is concluded by it. Counsel for the respondents has raised objections to the report of the District Judge. The first objection is that the document in favour of Basant Singh was inadmissible in evidence for want of sufficient stamp. This objection cannot be taken on appeal considering that the document has already been admitted in evidence by the trial Court. The second objection is that the appellant has not shown that he made an enquiry as to the nature of the debt, that is to say, whether there was any necessity for the alienor to borrow the money from Basant Singh. In this connexion it may be noted that there is absolutely no evidence on behalf of the respondent who did not think it necessary to go into the witness-box himself. The alienee having satisfied himself as to the existence of the antecedent debt due to Basant Singh and having actually discharged that debt no question of enquiry as to the nature of the debt arises unless the plaintiffs prove that it was tainted with immorality or that there were suspicious circumstances which should have put the alienee to enquiry. In my opinion there is no force in the objections by the respondents.

I accept this appeal, set aside the decree of the learned District Judge and grant the plaintiffs a decree to the effect that the alienation in dispute shall not affect their reversionary rights in the property in suit except to the extent of Rs. 650. Under the circumstances of the case I leave the parties to bear their own costs throughout.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 372

CAMPBELL, J.

Amar Singh—Plaintiff—Petitioner.

v.

Buta Shah—Defendant—Respondent.

Civil Revision Petition No. 50 of 1927, Decided on 21st March 1927, from the order of the 4th Cl. Sub-J., Daska, D/- 7th April 1926.

Civil P. C., S. 151 — *Ex-parte decree passed but defendant found not served—Decree cannot be cancelled under S.* 151—*Defendant must apply for its setting aside — Civil P. C., O.* 9, *R.* 13.

An ex-parte decree was passed against the defendant but it was subsequently found that summons was not served on him and the Court cancelled the decree under S. 151,

Held: that S. 151 cannot be used for such a purpose. The remedy was for the defendant to apply to set aside the decree when he would become aware of the decree. [P 372 C 2, P 373 C 1]

Arjan Dass—for Petitioner.

Dhanpat Rai—for Respondent.

Judgment.—An ex-parte decree was passed in favour of Amar Singh against Buta Shah on the 3rd November, 1925. On the 7th of April 1926, the Court Ahlmad reported that while arranging the papers on the record he had found that a summons issued to another person Buta Singh a party to another proceeding and reported to have been served had been placed on the record, whereas the summons issued to Buta Shah had never been returned back to the Court after issue. On receiving this report the learned Subordinate Judge recorded an order that under the circumstances the ex-parte decree should be cancelled under S. 151 of the Code and that fresh summons be issued to the defendant. This order was passed in the presence of the plaintiff.

Section 151, however, cannot be used for this purpose. The Code provides a means by which the judgment-debtor could have moved the Court, when he became aware of the decree, to set aside the decree ex-parte and this can now be

done by the judgment-debtor if he wishes to have the decree set aside, since he is represented before me and now has knowledge of decree.

I accept the revision and set aside the order of the Court. The parties to bear their own costs.

G.B. *Revision accepted.*

A. I. R. 1927 Lahore 373

HARRISON AND DALIP SINGH, JJ.

Muni Lal and *others*—Defendants—Appellants.

v.

Kishore Chand Kanshi Ram—Plaintiffs—Respondents.

First Appeal No. 1660 of 1922, Decided on 11th March 1927, from the decree of the Sr. Sub-J., Amritsar, D/- 16th March 1922.

(a) Hindu Law—Alienation by manager—Recital as to necessity is not itself evidence of necessity so as to bind minor members.

The mere recital in the deed as to necessity is no evidence of such necessity so as to bind minor members, where it is not shown that any enquiry was made at all, nor is it shown that proof of that enquiry was not forthcoming owing to lapse of time : 36 *All.* 187 (*P. C.*), *Foll.*; 44 *Cal.* 186 (*P. C.*), *Dist.* [P 374, C 1, 2]

(b) General Clauses Act, S. 3 (25)—Building is immovable property.

Building is immovable property. [P 375, C 1]

(c) General Clauses Act, S. 3 (25)—Mortgage with possession—Mortgagee rights are immovable property.

A mortgage with possession is an interest in land because the mortgagee has a right to possession and enjoy the benefits arising out of the land until he is redeemed. In such a case, the mortgagee rights therein are immovable property. [P 375, C 1, 2]

Jagan Nath and *Hukam Chand Mehra*—for Appellants.

Badri Das and *Nawal Kishore*—for Respondents.

Dalip Singh, J.—Plaintiffs in this case sued on the basis of the mortgage deed dated the 2nd May 1906 for sale of the property specified in the mortgage deed. The total sum alleged to be due was Rs. 96,441-9-0. It was also prayed that a decree be passed against the persons and property of Defendants 1 to 4 as principal mortgagors and against Defendants 5 to 6 as sureties. The mortgage deed was executed by Defendants 1 to 3 who are all brothers, on behalf of themselves and as guardians for Defendant 4, another brother, who was at the time a minor. Defendants Nos. 1 and 4 appeared and pleaded as did also Defendants 5 and 6 ; Defendants Nos. 2 and 3 did not appear. The trial Court granted the plaintiffs a decree for Rs. 83,898-8-0 with full costs and interest on Rs. 30,000, at Re. 0-14-0 per cent per mensem from the 23rd of April 1918 until realization against Defendants 1 to 4 realizable in the first instance from the mortgaged immovable property specified in the plaint by attachment and sale thereof and failing that from the other immovable property of Defendants 1 to 3, and also from the immovable property of sureties, Defendant 5 to 6, if it is discovered that the mortgaged property was already encumbered and if the prior encumbrance causes loss to the plaintiffs. The defendants have appealed.

It is conceded before us by counsel on both sides that the decree is bad in form in that it does not comply with the requirements of O. 34, R. 4 of the Civil P. C. It has also been conceded before us by counsel for the respondents that the decree against the persons and the other property is barred unless certain letters printed in the supplementary paper book are considered to extend limitation on account of acknowledgment. The first letter is not proved at all and even the second letter is not proved. In any event the letters are dated after the expiry of limitation and, therefore, cannot extend time. The point has not been seriously pressed by counsel for the respondents. Counsel for the appellants contends first that the share of Muni Lal minor in the joint property has not been proved to be liable under the mortgage. His contention is that it is proved that at the time of the mortgage the joint Hindu family consisting of Kotu Mal, father of Defendants 1 to 4 and Defendants 1 to 4 had been disrupted. The evidence on the point is certainly all one way. Bhana Mal who was plaintiffs' witness admits that Kotu Mal separated his sons previous to the execution of the mortgage deed. Narain Das and Lok Nath, defendants' witnesses, also deposed to the same effect. Counsel for the respondents contends that Bhana Mal had been won over by the defendants and that the onus was on the defen-

dants to prove separation and that the oral evidence was insufficient to discharge the onus. He also relied on the mortgage deed which contained the following paragraph printed at page 7 of the paper book :

> The whole of the said property situate in both the districts is free from every kind of alienation and our shops known as (Kotu Mal Gurditta Mal) and (Ram Lal Radha Kishan) as a joint Hindu family, have to pay debt to certain persons.

The paragraph is not a correct translation of the original mortgage deed and should really read :

> The whole of the said property ....Ram Lal Radha Kishan have to pay debt to certain persons on account of the joint Hindu family.

In reply counsel for the appellants urges that Bhana Mal was not treated as a hostile witness in the Court below and his statement was not intended to be hostile to the plaintiff as is shown by the fact that in the trial Court it was contended and seemingly upheld that until actual partition of the joint property by metes and bounds the Hindu joint family could not be disrupted.

Counsel for the appellants further contends that in any event there is no proof that the debt was incurred for a joint family necessity or for purposes of a family business. He urges that a mere recital in a deed cannot bind Muni Lal, who was a minor at the time, and, therefore, cannot be considered a party to the deed. He cited *Brij Lal* v. *Indra Kumar* (1), for this purpose. In reply counsel for the respondents has relied on *Banga Chandra* v. *Jagat Kishore* (2) also a Privy Council ruling, and on certain other rulings in support of the proposition that the recital coupled with the circumstances of the case may be considered as proof of the representation made which if bona fide believed by the mortgagees after due enquiry would validate the transaction and bind all the members of the joint Hindu family. In our opinion it is clear that the necessity for the transaction has not been proved and that the mere recital in the deed is no evidence of such necessity. *Banga Chandra* v. *Jagat Kishore* (1) does not apply to the facts of this particular case. It is not shown that any enquiry was made at all, nor is it shown that proof of that enquiry was not now forthcoming owing to the lapse of time. Therefore, the proposition relied on by the learned counsel for the respondents has not been established.

Counsel for the respondents next also contended that as all the adult members of the joint Hindu family had joined in the transaction there was a presumption in favour of necessity. There would be force in this contention if it were proved beyond reasonable doubt that the firms for whose debts the present debt was incurred were really run on behalf of all and for the benefit of the minor. There is absolutely nothing to show this and we are, therefore, of opinion that necessity for the transaction in the circumstances of this case has not been made out and that, therefore, the share of Muni Lal is not liable for the mortgage debt.

The next point argued by the learned counsel for the appellants is that three properties specified in the plaint are not immovable properties and are, therefore, subject to a different law of limitation, namely, to six years and not to twelve years and the suit in respect of them is barred by time. These are the properties specified as 1 and 3 at page 1 and in para. 5 of the plaint at page 3. They consist of (1) an Ice Factory built of pacca masonry along with machinery etc., and the accessories of every kind bearing No. 2163 situate on a site which admittedly does not belong to the mortgagors, (2) mortgagee rights in an area of 52 kanals and 2 marlas owned by Maya Shah and Sant Singh in mortgage with mortgagors with possession, and (3) 130 kanals and 9 marlas situated in Amritsar in mortgage with possession with other co-sharers and the mortgagors and owned by Jhandu and Kalu, the mortgagors having 2/8ths share in the same.

As regards the Ice Factory it is sufficient to state that there is no evidence on the record whatsoever to show that the machinery bearing No. 2163 was immovable property in the sense of being attached to the earth or permanently fastened to anything attached to the earth. In the absence of such proof we think the plaintiffs must fail because it lay on them to show that their suit was within time. It is un-

(1) [1914] 36 All. 187=23 I. C. 715=16 Bom. L. R. 352 (P. C.).
(2) [1917] 44 Cal. 186=33 I. C. 420=43 I. A. 249 (P. C.).

necessary, therefore, to discuss the various rulings which were cited by counsel on either side as to whether machinery is or is not a fixture in any particular case. Equally it is clear that in the absence of anything to the contrary the superstructure described as built of pacca masonry must be taken to be immovable property. Counsel for the appellants contends that the superstructure should be looked upon as accessory to the machinery. Where in India the machinery is accessory to the building or the building is accessory to the machinery does not really matter because the question is not "which must be taken into consideration as passing title on a transfer of the property" but the question is whether for purposes of limitation the building is to be considered immovable property or not. On the definition given in the General Clauses Act it seems to us quite clear that the building must be regarded as immovable property and the plaintiff's suit is within time qua this portion of the property.

The next point raised by counsel for the appellants is that the mortgagee rights are moveable property and therefore, the suit of the plaintiff is barred by time. He has cited the following rulings: *Tarvadi* v. *Bai Kashi* (3). *Chullile Peetikayil* v. *Othenan* (4), *Bantu* v. *Ganda Singh* (5), *Suressur Misser* v. *Mohesh Rani* (6). In all these cases the point that was decided was that the mortgage consisted both of a debt as well as other rights and the mortgage debt, if any existed, could be attached for the purposes of the Civil Procedure Code as moveable property, and that if so attached on sale the security passed with the debt. It is unnecessary to decide whether these rulings are correct or otherwise because the point does not arise in the case. The question here again is whether mortgagee rights in mortgages with possession are moveable property or immovable property. Now it is clear from the definition in the Transfer of Property Act as well as on general principles that a mortgage is an interest in land, and at any rate it is perfectly clear that a mortgage with possession is an interest in land because the mortgagee has a right to possession and enjoy the benefits arising out of the land until he is redeemed. There may be cases in which the mortgage being usufructuary and a term being fixed for redemption there is no debt due at all until the expiry of the term. In such a case it cannot be held that the mortgagee has anything other than an interest in land. In the particular case before us one of the mortgage deeds has been printed. It shows that the mortgage was with possession, the interest and the produce of the land were to counter-balance each other and the term of the mortgage was fixed at eight years. This mortgage was executed on the 29th November 1902. On the date when the mortgage in suit was executed, namely, in May 1906 no debt was due. It is, therefore, quite clear that qua this mortgage the mortgagee rights were immovable property. No copy of the mortgage deed in the other cases was put on the record, but it is stated in the mortgage in suit that this mortgage was also with possession and it would follow, therefore, that though there might have been a debt under this mortgage it was also a right in land. We therefore, hold that the mortgagee rights in this case are immovable property and the suit of the plaintiffs is in time.

The next point urged by counsel for the appellants was that the term as to compound interest was penal. He conceded that compound interest in itself was not necessarily a penal term, but he contended from the evidence of Bhana Mal that the rate both of interest and compound interest had been enhanced after six months and that, therefore, this clause was a penal clause. We are unable to accept this which rests on the solitary statement of Bhana Mal which seems to have been a slip on his part and which was not pleaded by Defendant No. 1 and which seems to be opposed to the implications of the mortgage deed. There was no reason to suppose from that deed that there was any enhancement of terms and we, therefore, consider that the argument of the learned counsel fails.

It was next contended that the suit was bad or premature as against the sureties because either the plaint showed no cause of action against them or their liability being a personal liability must

(3) [1902] 26 Bom. 305=4 Bom. L. R. 18.
(4) [1915] 27 M. L. J. 239=26 I. C. 503.
(5) [1908] 18 P. R. 1909=1 I. C. 450=22 P. W. R. 1909.
(6) [1915] 20 C. W. N. 142=31 I. C. 933.

be held to be barred by time. Now the mortgage deed makes the sureties liable only if the mortgaged property is found to have been previously alienated and in consequence the mortgagees suffered a loss. In the plaint it was pleaded that the sureties were liable for the mortgage debt. Counsel for the respondents concedes that this is incorrect. He has urged however, that no harm is done by embodying the terms of the mortgage deed in the decree. But decrees and judgments should not deal with hypothetical cases and there is nothing to show us that the liability of the sureties has arisen or will ever arise. We, therefore, consider that the suit against the sureties must be dismissed.

The next point is the question of future interest. We see no reason why future interest should not be given to the plaintiffs, but we are not inclined to allow more than a rate of 6 per cent.

Counsel for the respondents has urged that there is a personal covenant in the mortgage whereby Defendants 1 to 3 make themselves liable if the mortgagees suffer any loss on account of the minority of Muni Lal. He contends that under O. 34, R. 6, he can now make an application against these three mortgagors because their liability would only arise when loss occurs to the mortgagees by the exclusion of Muni Lal's share and that the limitation would be governed by Article 83. This may or may not be so, but this personal covenant was not pleaded in the plaint and we see no reason to decide it now. When an application, if any, is made under O. 34, R. 6, it will be for the Court to consider it.

The result is that we accept the appeal and give the plaintiffs a decree against Defendants 1 to 3 for Rs. 88,898-8-0 and interest on Rs. 30,000, at Rs. 0-14-0, per cent per mensem from the 23rd of April 1918 up to the due date for redemption which we fix at two months. A decree will be drawn up in accordance with this decision in compliance with the terms of O. 34, R. 4. After due date future interest will be allowed at the rate of 6 per cent per annum. The suit against Muni Lal and against the sureties is hereby dismissed.

The costs of the sureties and of Muni Lal must be paid by the plaintiffs respondents throughout and plaintiffs-respondents are entitled to their costs against Defendants 1, 2 and 3 throughout.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 376

JAI LAL, J.

Pesu Mal-Harbhagwan Das—Defendant—Petitioner.

v.

Bishen Das-Mewa Ram—Plaintiff—Respondent.

Civil Revision No. 800 of 1926, Decided on 28th March 1927, from the order of the Dist. J., Lyallpur, D/- 8th July 1926.

(a) *Civil P. C., O. 5, R. 10, Proviso—Defendant served by registered post but not appearing—Court cannot proceed ex-parte.*

Where defendant has been served by registered post but he does not appear, the Court is not entitled to proceed ex-parte against him but is bound to send summons in the ordinary manner. [P. 377, C. 1]

(b) *Civil P. C., O. 5, R. 20—Copy of plaint not affixed—Service is bad.*

Where the summons was affixed to defendant's door, but it was not accompanied by a copy of the plaint, the affixation of such summons is not a sufficient compliance with the law. [P. 377, C. 1]

(c) *Civil P. C., O. 19, R. 1—Affidavit not bearing seal is not bad*

The fact that an affidavit, which is signed by the Magistrate before whom it was sworn, does not bear the seal of his Court, is not a sufficient ground for rejecting the affidavit. [P. 377, C. 2]

Mukand Lal Puri—for Petitioner.

Jai Lal, J.—A civil suit instituted against the petitioner was decreed ex-parte. His application to set aside the ex-parte decree was dismissed and his appeal to the District Judge rejected. The learned District Judge has held that the service of the summons on the defendant had been duly effected and also that the latter had not proved that he obtained knowledge of the ex-parte decree against him within the period of limitation for an application to set aside the ex-parte decree. With both these conclusions I am unable to agree. It appears that no substituted service was ordered by the trial Court under O. 5, R. 20, but in the first instance summonses were sent to the defendant by registered post and also in the ordinary manner for service through the Presidency Small Cause Court at Madras. Those sent through post were received

by the defendant but, it appears, they were not accompanied by a copy of the plaint as is required by O. 5, R. 2. The defendant handed over the summons to their solicitors who wrote to the Court concerned asking for a copy of the plaint and for an adjournment of the case to enable their client to defend the suit. This request does not appear to have been complied with.

Now, as I have already stated the summonses not being accompanied by a copy of the plaint could not be held to have been duly served. Moreover a rule has been added to O. 5, R. 10, by this Court which is to the following effect:

> Provided that in any case if the plaintiff so wishes the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule and provided always that should the defendant not appear in answer to the summons so issued the Court shall have service effected in accordance with the provisions of this order.

It is quite clear that, even if the defendant had received a copy of the plaint with the summons by registered post and had not appeared in Court thereafter, the Court was not entitled to proceed ex parte against him but was bound to send summons in the ordinary manner. I hold, therefore, that the alleged service through registered post did not entitle the Court to proceed ex-parte against the defendant.

Now, with regard to the service of summons through the Presidency Small Cause Court at Madras it is clear that no service was effected personally on the petitioner. On the other hand in his absence from Madras the summonses were affixed to his door. But these summonses also were not accompanied by a copy of the plaint and an endorsement was added thereto that a copy of the plaint may be obtained by application personally to the Presidency Small Cause Court, Madras. There is no material on the record from which it is possible to ascertain under what circumstances the summonses were affixed, to the door of the defendant respondent. The copy which should have been returned by the Madras Court to the trial Court, is not on the record. Moreover, the summonses affixed on the door of the defendant's house not accompanied by a copy of the plaint and the affixation of such summonses is not a sufficient compliance with the law. The service of summons in this manner is not, therefore, a proper service.

With regard to the question of limitation there is an affidavit on the record filed on behalf of the defendant that it was on the 8th June that he learnt of the ex-parte decree against him. This affidavit has not been relied upon by the District Judge on the ground that, though it is signed by the Honorary Presidency Magistrate before whom it was sworn, it does not bear the seal of his Court. That in my opinion was not a sufficient ground for rejecting the affidavit. It was not through any fault of the petitioner that the seal of the Court was not affixed to the affidavit. I hold, therefore, that the summonses were not duly served on the defendant in this case and that his application to set aside the ex-parte decree was within time.

I accept this petition, set aside the ex-parte decree passed against the petitioner and direct the trial Court to hear the case on the merits and proceed with it in accordance with law. There will be no order of costs of these proceedings.

D.D. *Petition accepted.*

A. I. R. 1927 Lahore 377

DALIP SINGH, J.

Molar—Plaintiff—Appellant.

v.

Ram Parshad and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2130 of 1926, Decided on 1st February 1927, from the decree of the Sr. Sub-J., Rohtak, D/- 9th August 1926.

Evidence Act, S. 17—Admission must be proved by producing statement made—Evidence Act, S. 65.

> Where a previous admission of a party is sought to be used against him, the statement containing the admission must be put in. Court's order referring to the admission is not sufficient proof. [P. 378, C. 1]

Shamair Chand—for Appellant.

Brij Lal—for Respondents.

Dalip Singh, J.—The plaintiffs sued for demolition of a house or part thereof on the allegation that it was a fresh construction which had obstructed the passage of carts on shamilat deh. The trial Court held that the plaintiffs' oral

evidence proved their case and decreed the suit. On appeal the learned Sub-Judge relied on an order of the Sub-Divisional Officer in which one of the plaintiffs Sudhan was alleged to have admitted that the present defendants were not guilty of any encroachments. He, therefore, accepted the appeal and dismissed the plaintiffs' suit with costs throughout as barred by time. In second appeal counsel for the appellants urges that no copy of the statement was put on the record in the trial Court nor was any reference made to the statement in the grounds of appeal, nor was the admission, if any, put to Sudhan for his explanation nor could his statement bind Molar, the other plaintiff. I do not think there is any question of the statement binding Molar the other plaintiff. It is a question of the weight to be attached to the present evidence having regard to the previous admission, if any, of one of the plaintiffs.

Counsel relies on *Sawan Singh* v. *Emperor* (1), as authority for the proposition that the admission should have been put to Sudhan. Counsel for the respondents does not contest that the statement of Sudhan was not proved. He states, however that by mistake of counsel evidently only the order of the Sub-Divisional Officer embodying the statement was put in. In these circumstances I must accept the appeal and remand the case to the Senior Sub-Judge for decision. He will also decide, if necessary, whether the copy of Sudhan's statement should be allowed to be put in now. The costs will abide the event.

G.B. *Appeal accepted.*
Case remanded.

(1) A. I. R. 1925 Lah. 499.

A. I. R. 1927 Lahore 378

ADDISON, J.

Nawab—Defendant—Appellant.

v.

Muhammad Ali and *others*—Plaintiffs—Respondents.

Second Appeal No. 271 of 1927, Decided on 2nd May 1927, from the decree of the Addl. Dist. J., Amritsar, D/- 4th November 1926.

(a) Family arrangement—Three brothers accepting land from Government relinquishing original land in favour of fourth—Fourth also getting land from Government later on—He cannot be made to restore shares of his brothers.

In 1915, Government offered certain squares of land in the Canal Colonies on the condition that these co-sharers who took the squares relinquished their rights to the land in their original villages in favour of those who remained behind. Three brothers out of four agreed to take a square and relinquished their original land in favour of the fourth. After some time when other canal land became available, the fourth brother also got a square. Thereupon, one of the three brothers instituted a suit against him for the return of his original share,

Held: that the suit could not succeed as there was no condition that if the fourth brother did ever succeed in getting a square he would restore the original share of his brothers in their native village. [P 378 C 1]

(b) Custom (Punjab)—Guardian can deal with minor's property for his benefit.

Under Customary Law the mother or brother has the power to bind a minor if she or he deals with his property for the benefit of the minor. [P 378 C 1]

A. R. Kapur—for Appellant.
M. Khurshid Zaman—for Respondents.

Judgment.—Lal, Jalal, Nawab and Muhammad Ali were four brothers of Punjgarain in the Amritsar District. In 1915, Government offered certain squares of land in the Canal Colonies on the condition that those co-sharers who took the squares relinquished their rights to the land in their original villages in favour of those who remained behind. This was in order to prevent overcrowding and to increase the size of the holdings in the over populated villages. Lal and Jalal for themselves and on behalf of Muhammad Ali, who was a minor, agreed to take a square of 300 Kanals of land and to give up their rights in the joint Khata, the share of each in it being just over 19 kanals. Nawab agreed to remain at home and to have no share in the granted square, though he was to get the 19 kanalas of each of his brothers in the original village. The mutation was sanctioned on the 1st of February 1915 all the brothers except the minor agreeing to it before the Revenue Officer. Accordingly a square was granted to the three brothers other than Nawab. This means that each of them got 100 kanals of good canal irrigated land.

This state of affairs continued for a long time. Very much later when other

canal land became available Nawab also got a square. Thereupon Jalal instituted a suit against him for the return of his original share of 19 kanals or so in the original village, while Muhammad Ali, minor, instituted a similar suit. Both suits were dismissed by the Trial Court, but on appeal they were decreed by the Additional District Judge on the ground that it was only equitable to restore the land, seeing that Nawab had succeeded in getting a square for himself. Against these decisions these two second appeals have been admitted.

Lal is the only brother who has not tried to get back his land in the original village. It appears to me that Jalal at least has no case. He gave up his 19 kanals for valuable consideration. He was a major at the time. He profited greatly by the transaction and it might well have been the case that Nawab would never have got a square. There was no condition that if he did ever succeed in getting a square he would restore the original shares of his brothors in their native village, and no attempt has been made to prove such a condition. I accordingly accept the appeal in his case and dismiss his suit with costs throughout.

As regards the minor Muhammad Ali, I also am of opinion that his suit should be dismissed. If he had been a minor governed by Muhammadan Law, it is true that his brother or brothers as de facto guardian or guardians could not have dealt with his property. But the parties are governed by agricultural custom and do not follow Muhammadan Law. Under Customary Law the mother or brother has the power to bind a minor if she or he deals with his property for the benefit of the minor. In the present case it is clear that the minor obtained great benefit from the transaction in question and this was admitted by the learned Counsel who appeared on his behalf and who stated that it would not be to the advantage of the minor to be restore any portion of the third share in the square which was granted in 1915. In these circumstances I accept the appeal in his case also and dismiss the suit with costs throughout to be borne by his next friend.

D.D. *Appeals accepted.*

A. I. R. 1927 Lahore 379

HARRISON, J.

Inayat Ullah—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1442 of 1925, Decided on 16th February 1927, from an order of the Addl. Dist. Mag., Shahpur, D/- 26th July 1926.

Criminal P. C., Ss. 195 and 476—Failure to record order for sanction is an irregularity curable by Criminal P. C., S. 537.

Where there is no separate order as contemplated by S. 476 for sanction to prosecute, but the order is embodied in the complaint, it is a trifling irregularity which may be overlooked under S. 537. [P. 380, C. 1]

Muhammad Alam—for Petitioner.
Abdul Rashid—for the Crown.

Judgment.—Lieutenant Malik Muhammad Sher Khan, Honorary Magistrate, presented a complaint under S. 195, Code of Criminal Procedure, on the 17th March, 1926, with respect to an offence alleged to have been committed by Sheikh Inayat Ullah, late Sub-Inspector of Police. This complaint was not only a complaint but also embodied a finding under S. 476. From this an appeal was presented to the Additional District Magistrate and that appeal was dismissed.

On revision before me it is urged that an application for the admission of copies of certain documents the existence of which was discovered after the dismissal of the appeal would have been presented had it been possible to obtain such copies. These documents are said to be entries in certain Police diaries. The main point, however, which has been pressed very forcibly is that the Magistrate first refused to take action and then at a later stage presented this complaint and this is said to be shown by an undated order written at the conclusion of the written arguments, some twenty pages in length, put in by counsel for the Sub-Inspector. This so-called order first quotes a Rangoon ruling and as pointed out by Mr. Abdul Rashid for the Crown, is merely

a note of even further verbal arguments which, supported by this ruling were addressed by counsel to the Magistrate.

The second point on which stress is laid is that there is no separate order as contemplated by S. 476, but that the order is embodied in the complaint. This is, I think, a trifling irregularity which may well be overlooked under S. 537, and it is certainly not even alleged that the accused has been prejudiced in any way thereby. I do not wish to express any opinion regarding the question of the copies more especially as I have not sufficient information on the facts and do not know whether the Police refused the copies asked for on the ground of privilege or not. If the documents are not privileged and copies can be obtained and benefit the accused in any way they will doubtless be relied upon in the later stages of the case. Another point made is the delay in passing the order and there certainly was delay and this was possibly due to the study of the lengthy written arguments. Here again I do not think the accused has been prejudiced. I see no sufficient reason for interference and dismiss the application for revision.

R.D. *Application dismissed.*

A. I. R. 1927 Lahore 380

JAI LAL, J.

Khazan Singh and *another*—Defendants—Petitioners.

v.

Secretary of State for India—Plaintiff—Respondent.

Civil Revision Petition No. 520 of 1926, Decided on 21st December 1926, for stay of execution proceedings.

(*a*) *Sikh Gurdwara Act* (1925), *Ss.* 7, 9 *and* 10—*Government can refuse to publish under S.* 7.

It is open to the Local Government to refuse to publish a notification under S. 7, sub-S. (3), if it is not satisfied as to the existence of the alleged Gurdwara, but if they once publish a notification under S. 7, they are bound to publish a notification under S. 9 if no petition under S. 8 has been presented, or to take action under the provisions of part III of the Act if such a petition had been presented. The same is the case with the powers of the Local Government to issue or not to issue a notification under S. 10. [P 381 C 1, 2]

(*b*) *Sikh Gurdwara Act, S.* 8—*Government can apply.*

It is open to the Secretary of State to present an application under S. 8. [P 381 C 1]

Gokal Chand Narang—for Petitioners.

C. H. Carden Noad—for Respondent.

Order.—A decree for possession of the land in dispute was granted by the Senior Subordinate Judge of Ambala in favour of the Secretary of State for India in Council against the defendants. The latter have lodged an appeal in this Court which has been admitted for hearing by a Division Bench. It appears that the decree-holder has applied for the execution of the decree. Two applications have been presented on behalf of the judgment-debtors; one is for the stay of execution under O. 41, R. 5, and the other is under the provisions of S. 31 (2) of the Sikh Gurdwaras Act, 1925, for the stay of the execution proceedings.

A previous application under O. 41, R. 5, was dismissed by this Court on the 23rd of April 1926 on the ground that no action had then been taken in execution and that no sort of grievance had been disclosed. In the present application under that rule it is alleged that the decree-holders have applied for execution of the decree and that the property in suit is the property of a Sikh Gurdwara and that therefore unless the execution is stayed the appellant will suffer substantial loss as it would become impossible to maintain the Gurdwara concerned which will pass into the hands of the decree-holder. This, it is alleged, would be nothing short of sacrilege.

The learned counsel for the petitioners did not address any arguments to me in support of this application. He, however, strenuously urged that the proceedings should be stayed under the Sikh Gurdwaras Act. The learned Government Advocate opposes this application and contends that before the provisions of the Sikh Gurdwaras Act could be applied it must be shown that there was a Gurdwara in existence. It is alleged that initially there was no Gurdwara and that the building which was claimed to be a Gurdwara was demolished in 1923. It is common ground that an application under S. 7 of the Sikh Gurdwaras Act was made by 50 or more Sikh worshippers of the alleged Gurdwara which was accompanied by a list of pro-

perty claimed for the Gurdwara and the other details required by the law and also that the local Government published the application along with the accompanying list by a notification on the 5th of July 1926. It is, however, alleged by the learned Government Advocate that the local Government has actually declined to issue a notification under S. 9 of the Act declaring the Gurdwara to be a Sikh Gurdwara on the ground that the Government is not satisfied as to the existence of the Gurdwara. An affidavit in support of the allegations made on behalf of the Secretary of State should have been filed before the hearing but I have permitted the Government Advocate to file one now.

Contention of the counsel of the Secretary of State is, and indeed it is conceded by the counsel for the petitioners, that an application and a notification under S. 7 of the Sikh Gurdwaras Act presuppose the existence of a Gurdwara. The learned counsels also are agreed that it is open to the Local Government to refuse to publish a notification under S. 7, sub-S. (3) if it is not satisfied as to the existence of the alleged Gurdwara. In the case before me however the Local Government did publish a notification under S. 7 and therefore the question arises what is the legal effect of the publication of such a notification.

Now S. 8 of the Sikh Gurdwaras Act provides that a counter-application may be made to the Local Government within the time prescribed therein to have it declared that the place asserted to be a Sikh Gurdwara is not such a Gurdwara. Then S. 9 provides that if no petition has been presented in accordance with the provisions of S. 8 the Local Government shall publish a notification declaring the Gurdwara to be a Sikh Gurdwara. It is contended by the learned Government Advocate that even if no petition had been presented under S. 8 it was open to the local Government suo motu to decline to publish a notification under S. 9. The counsel for the petitioners, on the other hand, contends that if no petition is made under S. 8, the Government has no option but to publish the notification under S. 9. In my opinion it was open to the Secretary of State to present an application under S. 8 and admittedly this has not been done, and therefore it is quite clear that whatever powers the Government had to refuse to publish a notification under S. 7, having once done so they were bound to publish a notification under S. 9 if no petition under S. 8 had been presented or to take action under the provisions of Part III of the Act if such a petition had been presented.

Section 10 of the Act further provides that any person claiming a right, title or interest in any property in the list published under S. 7 (3) of the Act may forward a petition to the local Government specifying the nature of the right, title or interest claimed by him and the ground of the claim and that in the absence of such a claim the local Government shall publish a notification specifying the rights, title or interests in the properties in respect of which no claim had been made and further that such a notification shall be conclusive proof of the fact that no such claim was made. Section 14 of the Act provides that the local Government shall forward to the Tribunal appointed under the Act all petitions received by it under the provisions inter alia of Ss. 8 and 10 and that the Tribunal shall dispose of such petitions by order in accordance with the provisions of the Act. My remarks relating to the powers of the local Government to issue or to refuse to issue a notification under S. 9 apply mutatis mutandis to its power to issue or not to issue a notification under S. 10.

Now S. 31 (2) of the same Act provides that no Ccurt shall continue any proceedings in so far as such proceedings involve any claim relating to a Gurdwara in regard to which a notification has been published under the provisions of sub-S. (3) of S. 7 which could have been made in a petition forwarded to the Local Government under the provisions of S. 10 or S. 11 and was not so made unless and until it has been decided under the provisions of S. 16 that such Gurdwara should not be declared to be a Sikh Gurdwara. This means that after the issue of a notification under S. 7 (3) all proceedings in the civil Courts of the nature mentioned in S. 31 (2) must be stayed unless the Tribunal appointed under the Act decides under S. 16 that the alleged Gurdwara is not a Sikh Gurdwara. I am bound by these mandatory provisions of the law which fully apply to the present

case. The learned Government Advocate then asked me to hold an enquiry as to the existence of the alleged Gurdwara with a view to decide whether the notification of the 5th July was invalid and ultra vires. Whatever other remedy the decree-holder may have to have the notification declared invalid or ultra vires I am unable to see that I can give such a finding in these proceedings. It may be mentioned that in the trial Court the existence of a Gurdwara does not appear to have been denied. I must therefore order that the execution proceedings relating to the decree in question be stayed under the provisions of S. 31 (2) of the Sikh Gurdwaras Act. No order as to costs.

J.V. *Execution stayed.*

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* A. I. R. 1927 Lahore 382

ZAFAR ALI AND JAI LAL, JJ.

Muhammad Ishaq and *others*—Plaintiffs—Appellants.

v.

Muhammad Hussain Khan and *others*—Defendants—Respondents.

First Appeal No. 1137 of 1922, Decided on 15th January 1927, from the decree of the Dist. J., Delhi, D/- 3rd February 1922.

* (a) *Civil P. C., S. 96 (3)—Suit under Civil P. C., S. 92—Plaintiff approving appointment of a person as Committee—No consent in other matter decided—Decree passed is not consent decree.*

Where in a suit under S. 92, Civil P. C., the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management,

Held: that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions. [P 382 C 2]

* (b) *Civil P. C., S. 92—Sanction granted to three persons—Two cannot prosecute suit or appeal.*

In a suit under S. 92 of the Civil P. C. all the persons authorised to institute the suit constitute one plaintiff and all must combine to to take any material step in the prosecution of the suit or appeal: *A. I. R.* 1925 *Sind* 1 and 29 *M. L. J.* 231, *Rel on.* [P 383 C 1]

(c) *Civil P. C., O. 3, R. 4—No proof that one appellant was authorised by others to sign on their behalf—Power must be signed by all.*

In the absence of proof that one of the appellants is duly authorised by the others to sign the power of attorney it must be signed by all the appellants personally. [P 383 C 2]

* (d) *Civil P. C., O. 41, R. 4—Suit under Civil P. C., S. 92—Sanction granted to three persons—Three are one plaintiff in eye of law.*

Where in a suit under Civil P. C., S. 92, sanction is granted to three persons to institute the suit, the three persons form one plaintiff in the eye of the law, and therefore an appeal filed by one or two only of them is incompetent. [P 383 C 2]

Sardha Ram and *Gobind Ram Khanna*—for Appellants.

Bishen Narain and *Hem Raj Mahajan*—for Respondents.

Jai Lal, J.—Three men, Haji Muhammad Ishaq, Muhammad Ibrahim and Muhammad Sadiq, after having obtained the consent in writing of the Collector of Delhi under S. 92 of the Civil P. C., instituted a suit in the Court of the District Judge of Delhi in respect of a mosque known as Masjid Khurd in Burjwali situate at Bara Hindu Rao in Delhi claiming reliefs such as are mentioned in S. 92. The suit was partially decreed by the District Judge. This is an appeal by the plaintiffs against the decree of the District Judge so far as he declined to grant certain reliefs to the plaintiffs.

A preliminary objection is taken on behalf of the respondents that no appeal lies as the decree was given with the consent of the plaintiffs. A reference to the judgment of the learned District Judge, however, shows that the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of management, and in the grounds of appeal to this Court objection is taken to the appointment of one Hamid Ullah as one of the managers. So far as the other matters decided by the District Judge are concerned there was no consent by either party to the conclusions of the learned Judge. We are, therefore, of opinion that there is no force in this objection except with regard to the grounds of appeal relating to the appointment of Hamid Ullah.

But another preliminary objection taken by the counsel for the respondents has force. It appears that out of the three plaintiffs only two have authorised this appeal. In the memorandum of appeal the names of all three are mentioned, but in the grounds of appeal only Haji Muhammad Ishaq is mentioned as the appellant and the power of attorney in favour of Mr. Sardha Ram who presented this appeal is signed only by

Muhammad Ishaq and Muhammad Ibrahim. Muhammad Sadiq has not authorised Mr. Sardha Ram in writing to present this appeal. We must, therefore, assume that the appeal is only by two out of three plaintiffs who were authorised by the Collector to institute the suit.

Mr. Sardha Ram, however, contends that an appeal could be filed by one or more of the plaintiffs on behalf of all. We are unable to concede to this contention. In a suit under S. 92 of the Civil P. C. all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit. This was the view taken in the case of *Bagavannarayana* v. *Perumallacharyulu* (1) in *Civil Appeals Nos.* 144 *to* 146 *of* 1912 decided by a Division Bench of the Madras High Court on the 23rd of March 1915 in which it has held that where more than two persons interested in a trust have obtained the necessary sanction under S. 92 of the Civil P. C., any two of them cannot sue without the others and that the language of S. 92 shows that the persons authorised to sue are all the persons to whom the consent has been given and not any two of them. It is true that this case relates to a suit and not to an appeal, but we consider that the same principle applies to both cases.

The same view was taken by the Judicial Commissioner of Sind in *Vishondas* v. *Damomal* (2). The facts of that case are identical with those of this as in that case also three persons having been authorised under S. 92 of the Civil P. C. instituted a suit which was dismissed. Two of the plaintiffs filed an appeal which was held to be incompetent. It was indicated in the judgment of the learned Judicial Commissioners that the proper procedure in such cases is to implead the plaintiff, who does not consent to an appeal, as a respondent, but with the permission of the Advocate-General authorising the remaining plaintiffs to present an appeal and to make the rest as respondents.

Counsel for the appellants then contended that some of a number of appellants could authorise him to file an appeal, but in the absence of proof that one of the appellants is duly authorised by the others to sign the power of attorney of the counsel on their behalf, such power of attorney must be signed by all the appellants personally. This is clear from O. 3, R. 4, Civil P. C., which provides that the appointment of a pleader shall be in writing and shall be signed by the person who appoints him or by his recognised agent or by some other person duly authorised by the power of attorney to act on his behalf.

Mr. Sardha Ram then relied upon O. 41. R. 4, which provides that where there are more plaintiffs than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs, any one of the plaintiffs may appeal from the whole decree. But as we have already indicated in the present case the three persons who filed the suit are in the eye of the law one plaintiff and not more than one plaintiff, and therefore O. 41, R. 4 does not apply to the fact of this case.

Mr. Sardha Ram then asked us to adjourn the hearing under O. 41, R. 20 and to direct that Muhammad Sadiq be made a respondent. We declined to accede to this prayer as in our opinion even if under the circumstances of this case we had the power to order that Muhammad Sadiq be made a respondent without the consent of the Collector we considered that the circumstances of the case did not justify such a course.

We dismiss this appeal with costs.

D.D. *Appeal dismissed.*

(1) [1915] 29 M. L. J. 231=31 I. C. 236.
(2) A. I. R. 1925 Sind 1.

✻ A. I. R. 1927 Lahore 383

DALIP SINGH, J.

Bala Parsad—Plaintiff—Appellants.

v.

Chandar and *others*—Defendants—Respondents.

Second Appeal No. 1807 of 1926, Decided on 24th January 1927, from the decree of the Dist.-J., Delhi, D/- 16th March 1926.

✻ *Easements Act, S.* 13—*Partition—No drain existing on either tenement—Level of dominant higher than that of servient—Right to easement arises as regards rain water but not as regards water for daily use.*

Where there is no drain either in the dominant tenement or in the servient tenement but the level of the dominant tenement is higher than

servient tenement so that the natural drainage would be from the dominant tenement to the servient tenement, a right of easement does arise, on partition between the .two tenements as regards the discharge of rain water but not of water for daily use the former being in the nature of an apparent and continuous easement and the latter not being continuous or apparent.

[P 385, C 1]

Jagan Nath Aggarwal—tor Appellant.

Kishan Dyal—for Respondents.

Judgment.—The plaintiffs claimed a right of easement to discharge the water of their house, i. e., both rain water and water for daily use (istimali and barsati) through the courtyard of defendants and door into the Municipal lands at C as shown in the plan Ex. P. 1. They alleged that defendants had stopped the passage of the water by building a wall and they prayed for an injunction preventing the defendants from interfering with their right to discharge water.

The facts are that houses of the plaintiffs and the defendants were originally joint. Subsequently Rupa got his share partitioned and sold it to Thakar Das. It is alleged by the plaintiffs that the water of the house used to flow through the courtyard of the defendants and the door on to the Municipal land. The plaintiffs got the dominant tenement by pre-emption. The defendants pleaded that Rupa himself had constructed the wall to seperate his own portion from the joint property and since then the water of his house passed into the Municipal lane by a new way marked Z in the plan Ex. P. 1. This defence has been rejected in both Courts.

The trial Court decreed the suit following *Buta Singh* v. *Lall* (1) holding that the water of the plaintiffs' house used to flow through the courtyard of the defendants in a natural stream one or two feet wide, and that the plaintiffs had a right of easement to discharge their water. He accordingly gave the plaintiffs a decree for a perpetual injunction directing the defendants to construct a drain one foot wide in the obstructing wall E D and onwards through their courtyard into the Municipal lane at point C in the plan Ex. P. 1, and restraining them from obstructing the flow of water in any way.

The defendants appealed and the learned District Judge held that there was nothing to show that Rupa possessed a right of easement prior to partition. He held that it was not improbable that following the natural drainage the water might have passed down through the common courtyard, but there was no evidence of any defined channel through the courtyard. He then held that according to Halsbury's Laws of England, Vol. XI, para. 610, page 313, there must be some ascertained channel for drainage before a right of easement in regard to drainage can be permitted. He also held that there was no question of easement of necessity under S. 13, because the plaintiff could arrange to pass his drainage water into the Municipal drain at the point Z. He held that the level of the floor of the plaintiffs' house might be lower than the Municipal drain, but that was not a reason for giving an injunction. He distinguished *Puta Singh* v. *Lall* (1), on the ground that no drainage in the ordinary sense of the term existed in the common courtyard prior to partition. He therefore dismissed the suit with costs throughout.

In second appeal it is urged that the reference to Halsbury's Laws has no application whatsoever and the counsel for the respondent has not contested this point. Counsel for the appellants relies on Peacock's Law of Easement at pages 22 and 23, on S. 13 (f) of the Easement Act, *Sultani* v. *Ramsaran Das* (2), *Munshi Misser* v. *Bhimrajman* (3) and *Khanchand* v. *Gul Rajmal* (4). He contends that the finding shows that previous to partition the water was allowed to pass through the common courtyard. On the authority of *Munshi Misser* v. *Bhim Rajman* (3) he contends that there is no necessity for a drain in the servient tenement. On the authority of *Sultani* v. *Ramsaran* (2) he contends that the right to discharge water is apparent and continuous. On the authority of S. 13 (f) of the Easements Act which stated the common law on the point he contends that an easement arose on partition. In reply counsel for the respondents contends that an easement under S. 13 (f) must be apparent and continuous. He contends that water for daily use is non-continuous and that neither rain water nor water for daily

(1) [1919] 101 P. R. 1919=53 I. C. 584.

(2) [1900] 49 P. R. 1900=173 P. L. R. 1900.

(3) [1913] 40 Cal. 458=17 C. L. J. 369=18 I. C. 824=17 C. W. N. 306 (F. B.).

(4) [1910] 4 S. L. R. 180=8 I. C. 939.

use can be apparent when there is no drain either in the dominant or in the servient tenement. In *Buta Singh* v. *Lal* (1) he contends that there was a drain. The judgment talks of 'drainage, but on referring to the record of the case it appears that there were actually two drains forming a drainage system in that particular case. In *Munshi Missir* v. *Bhimrajman* (3) there was a drain in a dominant tenement, though there was no drain in the servient tenement. In *Sultani* v. *Ramsaran Das* (2) it is not clear whether there was or was not drainage. The ruling merely speaks of a drainage. But the facts as far as I can gather from the judgment would tend to show that there was some sort of drain. He also referred to Gale on Easements, pages 113 and 114. He further contends that as there was no mention of any easement of drainage in the partition suit it must be considered that the decree finally decided the right of the parties, and he cites *Sibnath Saha* v. *Mohesh Chandra* (5). This last point can be disposed of at once. In *Sibnath Chandra* v. *Mohesh Chandra* (2) it seems that the right of way was actually contended in the partition suit and was only allowed to a limited extent. There is nothing on this record to show that there was any question as to the right of drainage in the partition suit and decided in that suit. The case is therefore distinguishable. The point then that arises for decision is that where there is no drain either in the dominant tenement or in the servient tenement but the level of the dominant tenement is higher than the servient tenement so that the natural drainage would be from the dominant tenement to the servient tenement, then in such a case if there is a partition of the dominant from the servient tenement, does a right of easement arise, and to what extent.

Now it seems to me that the question of the easement qua water for daily use and rain water stands on a different footing.

It may be contended that the easement to discharge rain water is both apparent and continuous, because by looking at the level of the two properties it ought to be possible to see that the water from one will naturally flow into the other. It is also clear that the right to discharge rain water is a continuous one, and therefore the easement would be both apparent and continuous qua rain water. It must also be borne in mind that it is found that there was a hole at the point X at the other end of the courtyard and that therefore there was some trace of an easement to drain in the servient tenement. That being so, I hold that qua the right to discharge rain water there was an apparent and continuous easement and on partition this easement arose and continued.

I am, however, doubtful as to the right to discharge water for daily use. I find it difficult to see how such an easement can be either continuous or apparent without any drain in the dominant tenement to indicate it. Counsel for the respondents relies on *Sultani* v. *Ramsaran Das* (2) where the right to water from certain bath-rooms was held to be apparent and continuous. He contends that the argument of the learned District Judge that this would mean all sorts of sewage and filthy water is not correct, but the plaintiff would only have the right to discharge water and not sewage. As stated above the facts of *Sultani* v. *Ramsaran Das* (2) are not very clear and I am of opinion that the right to discharge water of daily use is not made out.

I, therefore, accept the appeal only to this extent that I grant the plaintiffs a decree for an injunction restraining the defendants from preventing the rain water of the plaintiffs' property passing into the courtyard of the defendants and discharging itself at point X in the plan Ex. P. 1, into the Municipal drain at C. I do not accept the appeal as regards the right of water of daily use. As the parties have partially succeeded in this Court, I direct that the parties should bear their own costs throughout.

D.D. *Appeal partly accepted.*

(5) [1921] 59 I. C. 89.

A. I. R. 1927 Lahore 385

ZAFAR ALI, J.

Ghulam Muhammad and *another*—Judgment-debtors—Appellants.

v.

Sohna Mal and *another*—Respondents.

Miscellaneous Second Appeal No. 1943 of 1926, Decided on 24th February 1927, from the order of the Addl. Dist. J., Gujranwala, D/- 29th April 1926.

(a) *Hindu Law—Partnership—Brokers constituting partnership—Younger brother is as much entitled to manage business as elder brother.*

If two partners of a firm are brothers, they are enqully entitled to participate in the management of the business of that firm, and it is in the fitness of things that either of them may at all opportune times attend to the business and do all that is needful. Even according to Hindu Law a younger brother is as much entitled to take part in the management of the business as his elder brother. [P. 386, C. 2, P. 387, C 1]

(b) *Contract Act, S. 251—Each partner is unlimited agent of every other in every matter irrespective of private arrangements between partners—Rule applies to joint Hindu family firms also.*

As between the partners and the outside world, whatever may be their private arrangements between themselves each partner is the unlimited agent of every other in every matter which is partnership business or which he represents as partnership business and not being in its nature beyond the scope of the partnership. This rule applies equally to joint Hindu family firms and ordinary partnership concerns : 34 *P. R.* 1906; 31 *M. L. J.* 93 ; 60 *P. L. R.* 1915, *Dist.* [P 387, C. 1]

(c) *Civil P. C., O.* 21, *R.* 2 (1)—*Joint family firm of brothers—Younger brother can give valid discharge on receipt of payment.*

In a Hindu joint family firm, a younger brother can give a valid discharge of a decretal debt on receipt of payment, decree being in favour of the firm : *A. I. R.* 1925 *Mad.* 230, *Dist.* [P. 387, C 2]

M. L. Puri—for Appellants.

G. C. Narang—for Respondents.

Judgment.—In this second appeal against on order in an execution case the questions of law that arise are :

(1) Whether of the two Hindu brothers constituting a firm the younger can give a valid discharge on receiving payment of a decretal debt, the decree being in favour of the firm ?

(2) Whether the principle enunciated in S. 251 of the Contract Act 9 of 1872 was not applicable because it was not a contract but a decree that was sought to be enforced.

(3) Whether this payment though admitted before the executing Court by the younger brother cannot be of any avail to the judgment-debtors because the provisions of O. 21, R. 2 of the Code of Civil Procedure had not been complied with.

(4) Whether the decree could not be said to have been satisfied even to the extent of the share of the younger brother.

(5) Whether the transfer of the decree by the elder brother representing that the decree was in his favour (though it was in favour of the firm) was a valid transfer of the decree.

The two brothers were Sohna Mal and Kartar Singh, and after the names of both the firm was styled Sonha Mal-Kartar Singh.

The suit was instituted by the elder brother Sohna Mal but in the name of the firm and a decree for Rs. 780 and costs was passed in favour of the firm on the 14th March 1925. On the 5th April 1925, Kartar Singh received Rs. 800 from the judgment-debtors in full satisfaction of the decree and gave a receipt therefor. The firm was dissolved on the 21st April 1925 and on the 20th June 1925, Sohna Mal transferred this decree in lieu of Rs. 600 to one Khan Chand representing it to be a decree in his favour exclusively. In the deed of transfer that was executed, it was stated that Sohna Mal would be responsible if any previous payment in respect of the decree would be proved. As there is nothing to indicate that the judgment-debtors were not men of substance, it was evidently not without a cogent reason that Sohna Mal instead of executing the decree himself transferred it for about three-fourths of the decretal amount. That reason presumably was that he knew that his brother had already received the decretal debt.

When the assignee of the decree applied for execution the judgment-debtors pleaded that it had already been satisfied. Kartar Singh appeared in Court and deposed that he did receive payment and give the receipt for Rs. 800 which was produced by the judgment-debtors. The executing Court found that the decree had been satisfied, but on appeal the learned District Judge came to the contrary conclusion. He proceeded on two wrong assumptions, viz., (1) that partition between the brothers took place on the 21st April 1921, while as a matter of fact the date of partition was 21st of April 1925, and (2) that the brothers were two joint decree-holders though the decree was in favour of the firm and not in favour of the two brothers ; and that made all the difference.

Now it is obvious that if the two partners of a firm are brothers they are equally entitled to participate in the management of the business of that firm and it is in the fitness of things that either of them may at all opportune

times attend to the business and, do all that is needful. Even according to Hindu Law, Kartar Singh was as much entitled to take part in the management of the business as his elder brother and it cannot be said that Sohna Mal possessed any special powers of management which Kartar Singh did not. In this connexion see *Ganpat* v. *Annaji* (1). Either of them was competent to represent the firm and the outside world could deal with one in the same way as with the other. It may be that a Hindu father as manager may be competent to exclude a son from participating in the management of the family business or may place certain restrictions on his powers, but it is nowhere laid down that the elder brother as manager could treat the younger in the same way as the father could. Moreover, it appears that the business of the brothers was not their old family business as they conducted it in their own joint names. If it had been the old family business, the father's name would have been associated with the name of one of them. The position of these two brothers, therefore, as members of a trading firm was not different or distinguishable from that of the partners of a firm created by contract. It follows, therefore, that as in the case of an ordinary firm each brother was an agent of the other.

But the general rule is that :

each partner is an agent only in and for the business of the firm and, therefore, his acts beyond the business will not bind the firm. *Bank of Australasia* v. *Breillat* (2) :

Lord Justice James said :

As between the partners and the outside world, whatever may be their private arrangements between themselves each partner is the unlimited agent of every other in every matter which is partnership business or which he represents as partnership business and not being in its nature beyond the scope of the partnership: *Baird's* case (3).

This rule is embodied in S. 251 of the Indian Contract Act which applies equally to joint Hindu family firms and ordinary partnership concerns. In *Bichha Lal* v. *Jai Pershad* (4) a balance of account or acknowledgment of debt was signed by a Hindu son whose father was the manager. It was held that

whether or not such member was the manager of the business, he was a partner therein, and his act being one usually done in carrying on the business of the partnership, and having been done while the partnership, subsisted, bound the other members of the family to the same extent as if he were their agent duly appointed for that purpose : Contract Act, 1872, S. 251.

Now, in the present case the firm had to realise the decretal debt and it was the business of the firm and of nobody else to realise it. It is obvious that one of the two brothers must have received payment of the money tendered by the judgment-debtors, and in doing so no liability was incurred, that is to say, the firm was not placed under any obligation. The debt was realised on behalf of the firm and if the brothers had not fallen out subsequently, Sohna Mal could not have taken any objection to this act of Kartar Singh. I, therefore, answer the first two questions in the affirmative. *Dhanraj* v. *Ujain Singh* (5) cited by the respondent's counsel was a case of joint decree-holders and is, therefore, distinguishable. So was *Mahomed Silar Sahib & Co.* v. *Nabi Khan Sahib* (6). In *Ram Singh* v. *Nanak Chand* (7) the finding was that the judgment-debtor's conduct had been throughout dishonest and fraudulent. There was no plea of fraud in the present case.

As regards the third question it is clear that the provisions of O. 21, R. 2(1) were fully complied with. Kartar Singh, who had received payment of the money on behalf of the firm, appeared in the executing Court and certified that he had done so. The executing Court having recorded the payment and recognised it the decree stood satisfied. *Pitchakkuttiya Pillai* v. *Doraswami Moopanar* (8), cited by the respondent's counsel was also a case of joint decree-holders in which it was held that payment should either be certified or recorded and that payment to one of several joint decree-holders will not be even a partial satisfaction of the decree unless the payee was an agent of the others for receiving the whole amount on their behalf or unless the distinct share of each of the joint decree-holders was ascertained and known. But in the

(1) [1899] 23 Bom. 144.
(2) [1847] 6 Moo. P. C. 152=12 Jur. 189.
(3) [1870] 5 Ch. 725=18 W. R. 1094=23 L. T. 424.
(4) [1899] 45 P. R. 1899.
(5) [1906] 34 P. R. 1906=52 P. W. R. 1906=93 P. L. R. 1906.
(6) [1916] 3 L. W. 579=31 M. L. J. 93=35 I. C. 157=(1916) 1 M. W. N. 471.
(7) [1915] 10 P. W. R. 1915=27 I. C. 603=60 P. L. R. 1915
(8) A. I. R. 1925 Mad. 230.

preent case Kartar Singh was an agent of his brother Sohna Mal.

In view of the above findings on the first three questions the remaining two lose all importance and need not be decided. The result is that I accept the appeal ; and reversing the order of the lower appellate Court restore that of the first Court. The respondents will pay appellants' costs throughout.

Appeal aecepted.

R.D.

A. I. R. 1927 Lahore 388 (1)

ADDISON, J.

Gulab Rai-Bhola Ram Guraya Ram—Plaintiffs—Petitioners.

v.

Farid—Defendant—Respondent.

Civil Revision Petition No. 663 of 1926, Decided on 1st February 1927, from an order of the 2nd Cl. Sub-J., Multan, D/- 17th June 1926.

Civil P. C., O. 17, R. 3—Court ordering one of plaintiffs to give evidence as witness—He failing—Court cannot dismiss the suit.

Under R. 3 of O. 17, a Court cannot order dismissal of a suit merely on the ground that one of the plaintiffs who has been ordered to give evidence as a witness on a particular day fails to appear on that day, but it is necessary for the Court to decide the suit on merits on the evidence as is before it [P 388 C 2]

Sain Das—for Petitioners.

Judgment.—The plaintiff firm sued one Farid for Rs. 100 alleged to be due on bahi account. The plaintiff firm led some evidence and on the 17th May 1926, the Court ordered that Gulab Rai, one of the plaintiffs, should come on the 17th June 1926, with the bahis of Tikan Mal's firm in order to give evidence. This Gulab Rai did not appear on the 17th June 1926, but Guraya Ram, a member of the firm, who had been conducting the suit throughout, was present. Because Gulab Rai did not appear in accordance with the Court's order the Court dismissed the suit under O. 17, R. 3, of the Civil P. C. Against this order this revision petition has been preferred.

It is obvious that O. 17, R. 3, of the Code of Civil Procedure, does not apply. Time was not granted to any party in this suit but the Court itself ordered Gulab Rai to be present with certain bahis in order to give evidence. If he did not appear the Court should have heard the other evidence in the case and then decided the suit on the merits. Even if O. 17, R. 3, had applied, it was still necessary for the Court to decide the suit on the merits upon such evidence as was before it. The order of the trial Court was totally illegal and I accept this revision and set aside its order dismissing the suit. I further direct it to be proceeded with the hearing of the suit, first giving the plaintiff an opportunity to produce the evidence he desires and thereafter hearing the evidence which the defendant wishes to lead. I make no order as to costs as the respondent has not appeared.

R.D. *Order set aside.*

A. I. R. 1927 Lahore 388 (2)

ADDISON, J.

Gurdas Mal—Appellant.

v.

Qadir Bakhsh and *others*—Respondents.

Second Appeal No. 1892 of 1926, Decided on 5th February 1927, from the decree of the Dist., J., Jhelum. D/- 22nd May 1926.

Punjab Pre-emption Act, S. 30—Oral sale and mutation in accordance with such sale—Time for pre-emption begins to run from the date of oral sale—Subsequent registered deed of sale does not give fresh start under Limitation Act, Art. 10.

Where an oral sale is completed and mutation is effected in pursuance of such sale, limitation for a suit for pre-emption begins to run from that date. The fact that subsequently a registered sale deed is executed does not give a fresh start for limitation under Art. 10 of the Limitation Act, time having once begun to run continues to run : 1900 P. L. R. 203 ; *A. I. R.* 1926 *Lah.* 220 and *A. I. R.* 1925 *Lah.* 348, *Rel. on.* [P 390 C 2, P 391 C 1]

Shamair Chand—for Appellant.

Nand Lal—for Respondents.

Addison, J.—One Maula Bakhsh first mortgaged 24 kanals 15 marlas of land with Lakhmi Das and, later, on the 5th September 1924 sold the equity of redemption of this land to Gurdas Mal for Rs. 7,000. Out of this amount Rs. 6,437 were left with the vendee to pay off the mortgage, Rs. 552 were paid before the Naib Tahsildar and Rs. 10-6-3

were taken in advance. What happened was as follows:

On the 5th September 1924 Maula Bakhsh presented an application to the Naib Tahsildar to the effect that he had sold the land in suit and that mutation should be effected at the spot in his absence. It was further said that Rs. 552 would be paid in presence of the officer to whom the petition was presented. This officer recorded his statement that very day and it was to the same effect as the petition. Accordingly the Revenue Officer in question sent the petition to the Patwari in order that mutation of the completed sale should be entered in the register of mutations. This was done by the Patwari on the 10th September 1924. On the 25th September, 1924 at the spot, the Naib Tahsildar sanctioned this mutation.

Gurdas Mal, the vendee, seems however, to have desired a sale-deed and accordingly on the 15th October 1924 Maula Bakhsh gave a regular sale-deed in favour of Gurdas Mal and it was registered the same day. The deed is an ordinary sale-deed in every respect except one, namely, it was stated in it that, although mutation had already been sanctioned in favour of the vendee, still a registered sale-deed was being executed in order to get over legal difficulties. It was admitted in the sale-deed that Rs. 552 had been paid before the Revenue Officer.

On the 2nd October 1925 one Abdulla instituted a suit for possession by pre-emption of the land in question on payment of the full amount while on the 14th October 1925 one Qadir Bakhsh instituted a similar suit. Each plaintiff was impleaded in the suit of the other. The vendee contested the suits on the ground that the plaintiffs had no right of pre-emption and that the suits were time barred.

The trial Court held that limitation commenced to run under S. 30 of the Punjab Pre-emption Act, on the 25th September 1924, that is, the date of mutation, and that time having once commenced to run it continued to run in spite of the subsequent registered sale-deed. It, therefore, held that the suit of Qadir Bakhsh, which was instituted on the 14th October 1925, was barred by time. It held however that Abdulla's suit was within limitation as it was presented on the 2nd October 1925 when the Courts opened after the vacation. It held that Abdulla was a collateral of Maula Bakhsh in the fourth degree and Abdulla's suit was decreed upon payment of Rs. 562-6-3 before a certain date to the vendee.

Against these decisions Qadir Bakhsh, the unsuccessful pre-emptor, instituted two appeals in the Court of the District Judge. The District Judge held that there was an oral sale, followed by a mutation, which in its turn was followed by a registered sale-deed. He thought, however, that the ruling *Mustadi* v. *Dhani Ram* (1) did not apply and that as there was a registered sale-deed limitation commenced to run under Art. 10 of the Limitation Act from the date that deed was registered. He further held that Qadir Bakhsh was the grandson of the vendor's deceased brother while Abdulla had not established any relationship. He accordingly accepted the two appeals and granted Qadir Bakhsh a decree for possession by pre-emption of the land in suit on payment of Rs. 592-6-3 by a fixed time. Against these two appellate decisions the vendee Gurdas Mal has preferred these two second appeals.

There is a clear finding of the District Judge that there was an oral sale on the 5th September which was followed by a mutation of the 25th September while he has also held that the oral sale, which had been followed by the mutation was again followed by a registered sale-deed. It is an established principle of law that when once time commences to run it continues to do so. There is no doubt that if there has been no subsequent registered sale-deed time would have commenced to run under S. 30 of the Pre-emption Act from the 25th September 1924, that is, the date of the mutation. Can it be said that this being the case, the fact that a subsequent registered sale-deed was entered into gave a fresh start to limitation under Art. 10 of the Limitation Act? There is no doubt that the lower appellate Court's finding that there was an oral completed sale is correct and the subsequent sale-deed seems to have been by way of precaution only. A sale in the Punjab may be either oral or by a registered deed. If the sale had been completed orally, can

(1) [1900] 203 P. L. R. 1900.

it be said that the registered deed subsequently entered into, is of any effect? A sale as defined in S. 54 of the Transfer of Property Act is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If however, the sale has already been completed orally there is nothing left to transfer by a subsequent registered sale-deed. A vendor, having once completed a sale orally, cannot obviously re-sell the same property to a stranger and it seems to me that it makes no difference that the subsequent sale by means of the registered deed was to the same person to whom the land had already been sold out and out orally. If a vendor gave three different sale-deeds on the first day of three consecutive months to the same person surely it must be held that only the first deed was a sale-deed and transferred the property. Suppose that the property sold has been a house and it was burnt down after the 5th September when the oral sale was completed, and before a deed was entered into on the 15th October, surely the vendee would have been liable for the loss. Further under S. 34 of the Land Revenue Act a mutation can only be sanctioned after the right has been acquired. A contract for sale (see S. 54 of the Transfer of Property Act) does not itself create any interest in any property and does not amount to the acquisition of a right in property. It could not, therefore, have been a contract for sale which was entered into on the 5th September 1924. In fact it has been held by the learned District Judge himself that it was an oral sale.

In view of these circumstances it must be held that time commenced to run under S. 30 of the Punjab Pre-emption Act from the date of mutation of the completed sale and having once commenced to run could not be interrupted by any subsequent act.

Much stress was laid by respondents counsel on the opening words of S. 30 of the Punjab Pre emption Act which run as follows :

> In any case not provided for by Art. 10 of the Second Schedule of the Indian Limitation Act, 1908.

but this argument is clearly met by the consideration that when time commenced to run the case was not provided for by Art. 10 but by S. 30 of the Punjab Pre-emption Act.

There is a ruling of this Court, *Mutsadi* v. *Dhani Ram* (1), which lays down the same principles as have been stated above though all the facts in it were not the same. There too it was pleaded that the transfer took place under an oral sale since which the vendee had held the proprietary possession. The following year there was an unregistered sale-deed, which was inadmissible in evidence, but two years again after that there was a registerad deed and it was on it that the plaintiffs relied in their plaint to pre-empt the sale. It was held that the sale operated from the date of the actual transfer and not from the date of the registered sale-deed, and that the right of pre-emption accrued as soon as the sale was completed whether a deed was executed or not. Finally it was said that the plaintiffs' suit for pre-emption, impeaching the sale, which was by registered deed, alleged their cause of action to have arisen on the date of its registration, but it was open for the defendants to show that there was a prior sale and that the deed was simply executed in order to secure better evidence of the transaction. There is thus no distinction in principle between that case and the present.

Two other rulings may be referred to, both of this Court. The first is *Ram Dutt* v. *Rup Chand* (2). In it the terms of a mortgage were settled between the parties and an entry was made in the mutation register at their instance and thereafter a receipt for the mortgage money was written which also embodied the conditions of the mortgage ; it was held that the mortgage was completed before the receipt was written and the mere fact that the receipt contained an unnecessary recital of the terms of the mortgage did not convert it into a mortgage deed and it was not compulsorily registrable. The same view was taken in *Ranpat Singh* v. *Mangat* (3).

On the analogy of these rulings it follows that once the oral sale was completed it did not affect the question that a subsequent registered sale-deed was entered into. Time thus commenced to run under S. 30 of the Punjab Pre-emption Act from the date of the muta-

(2) A. I. R. 1925 Lah. 348.
(3) A. I. R. 1926 Lah. 220.

tion, that is, the 25th September 1924 and the suit of Qudir Bakhsh was barred by time. I, therefore, accept the appeals and dismiss the suit of Qadir Bakhsh. The order of the District Judge, dismissing the suit of Abdulla, who has not appealed, will stand. Gurdas Mal will get his costs from Qadir Bakhsh in the original suit brought by Qadir Bakhsh in the main appeal from that suit in the Court of the District Judge and in one appeal here. In the case of the other suit, brought by Abdulla, and in the appeals therefrom parties will bear their own costs throughout.

G.B. *Appeal allowed.*

A. I. R. 1927 Lahore 391 (1)

DALIP SINGH, J.

Shiv Nath Rai—Plaintiff—Appellant.

v.

Shmar Singh—Defendant — Respondent.

Second Appeal No. 448 of 1926, Decided on 12th March 1927, from the decree of the Dist. J., Gujranwala, D/- 31st October 1925.

Punjab Alienation of Land Act, S. 2 (3)—Land —House in abadi is not.

A house in the abadi is not "land" within the definition of land as given in S. 2 (3).

[P. 391, C. 1]

Mehr Chand—for Appellant.

Judgment.—See my judgment in Civil Appeal No. 482 of 1926. In this connected appeal which is by the plaintiff, the sole point for decision is whether a mortgage by way of conditional sale of a house situate in the abadi of the village is void qua the condition of conditional sale by virtue of S. 9 or S. 10 of the Alienation of Land Act.

A house in the abadi is not "land" within the definition of land as given in that Act in S. 2 (3). The learned District Judge did not decide the question as to whether the foreclosure proceedings in this case were regular or not. I, therefore, accept the appeal and remand the case under O. 41, R. 23, to the learned District Judge for decision on the point whether the foreclosure proceedings were regular and, therefore, the property in the house passed to the plaintiff appellant Shiv Nath Rai. Stamp in appeal will be refunded to plaintiff-appellant.

G.B. *Appeal allowed.*

✻ A. I. R. 1927 Lahore 391 (2)

BROADWAY AND ZAFAR ALI, JJ.

Balkishan-Basheshar Nath — Defendants—Appellants.

v.

Fazal Ellahi—Plaintiff—Respondent.

First Appeal No. 2128 of 1922, Decided on 9th November 1926, from the decree of the Sr. Sub-J, Delhi, D/- 31st May 1922.

✻ *Contract—C.I.F. terms—Generally property in goods passes to the buyer as soon as they are shipped, but the question is one of intention—When seller takes the bill of lading to his order not as agent of buyer, property does not pass to the buyer—Contract Act, Ss. 87 and 91.*

Taken as a broad proposition in the case of C. I. F. contracts the property in the goods may be said to pass as soon as they are shipped, but the question is always one of intention, and if the seller retains the power of disposal or the 'jus disponendi' it cannot be said that he intended the property to pass. [P. 393, C. 1]

If the seller, when shipping the goods, takes the bill of lading to his own order and does not as agent or on behalf of the buyer, but on his own behalf, he thereby reserves to himself a power of disposing of the property and there is thus no final appropriation and the property does not, on shipment, pass to the buyer. [P. 393, C. 2]

If, in order to secure the contract price, the seller sends bill of leading with a bill of exchange attached, with directions that the bill of lading is not to be handed over to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance or payment of the bill of exchange or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the buyer. [P. 393, C. 2]

If the seller discounts a draft upon the buyer with a Bank and authorises the Bank to make over to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon the buyer's acceptance of the draft, the seller must be held to intend to transfer the property in the goods when the draft is accepted, but to retain the property in the goods till such acceptance. [P. 393, C. 2]

M.S. Bhagat and *Gobind Ram Khanna* —for Appellants.

Sardha Ram and *Bishan Nath*—for Respondent.

Broadway, J.—This appeal has arisen out of an action brought by S. M. Fazal Ellahi against the firm of Basheshar Nath-Balkishen Das for the recovery of a sum of Rs. 5,837-15-0.

The plaintiff's claim was based on two indents dated the 8th January 1920, and signed by the defendant firm for the supply of certain tweeds which the plaintiff was to procure from England.

These indents were drawn up in the form in use by the Delhi Piece-Goods Association, vide Exhibits P. 3, P. 4 and P. 5 (pp. 4—10 of the paper book).

The plaintiff alleged that the indents had been complied with and that the defendant firm had been duly supplied with the relative invoices and shipment samples or patterns; and further that drafts drawn by the shippers on the defendant firm had been accepted by the said firm, but not retired on due dates. It was further alleged that the contract goods had arrived and were lying with the National Bank of India, Limited, at Delhi, at the defendants' risk, the defendant firm having failed to take delivery of the same against payment.

The plaintiff claimed a lien on these goods as an unpaid seller and prayed for a decree for the amount stated above as the price of the said goods.

The defendant firm admitted the execution of the two indents, but pleaded that they were mere offers which had to be accepted before the contracts were complete, and that no valid acceptance had been made. It was further pleaded that the invoices and shipment patterns had been returned to the plaintiff, and that the drafts drawn by the shippers had been accepted under a misapprehension. It was also urged that the plaintiff was not entitled to sue for the price of the goods either in law or under the terms of the indents, and that the plaintiff, not having retired the drafts as "drawee in case of need" could not transfer the property in the goods which were also not in accordance with the contract.

Finally, it was urged that the plaintiff had no locus standi to sue, as he was only an agent. The trial Court settled the following issues:

(1) Were the two suit contracts bindingly entered into between the parties?
(2) Have plaintiffs no locus standi to bring this action?
(3) Were the drafts accepted inadvertently? If so how does it affect the claim?
(4) Were plaintiffs ready and willing to perform their part of the suit contracts and did defendants break them? If so, how and when?
(5) Had the property in goods passed to the defendants?
(6) If so, does not the suit lie for price of goods under law or indent terms?
(7) Are defendants estopped from raising any or all the pleas incorporated in the above issues on account of their conduct, if any, and in view of the terms of the suit contracts?
(8) At what rate of exchange the amount due to the plaintiffs should be calculated?
(9) To what amount in all for price of goods, interest and other charges, if any, are plaintiffs entitled?

And finding the defendant firm was liable, granted the plaintiff a decree for a sum of Rs. 4,892 with proportionate costs and a lien on the suit goods till repayment of the amount decreed with future interest at Rs. 8 per cent per annum till realization on that amount.

Against this decree the defendant firm have preferred this appeal.

Only two points have been argued at the Bar. First, it has been contended that the offers made in the indents never having been accepted no completed contract had been entered into between the parties; and secondly, it was urged that there had been no such 'appropriation' of the goods as could have or had transferred the property in them to the defendant firm, and that the suit to recover the price was, therefore, incompetent.

The first question need not detain us long. It has been proved beyond doubt that the goods were shipped in accordance with the said indents, and that, in due course, the relative invoices and shipment patterns were made over to the defendant firm by the plaintiff. The defendant firm also accepted the drafts when forwarded to them by the National Bank of India, Limited, and in these circumstances I have no hesitation in agreeing with the trial Court's finding that the contracts were completed ones.

In order to decide the second question it is necessary to go into certain details. The goods ordered by the defendant firm are what are known as "stock goods." On receipt of the two indents the plaintiff placed the orders with the firm of Messrs. G. Atherton and Company of Liverpool. Atherton and Company in due course shipped the goods, the bills of lading being made out in their own name, and sent them with the necessary drafts to the National Bank of India, Limited, at Delhi who as their agents were to deliver the shipping documents to the defendant firm against payment. The bills of lading were endorsed in blank.

The contracts were c. i. f. contracts and it was urged by Mr. Sardha Ram for the plaintiff-respondent that in such con-

tracts the property in the goods passed to the buyer as soon as the goods were shipped and that therefore the finding of the trial Court that the property in the suit goods had passed to the defendant firm was correct.

Taken as a broad proposition I have no doubt that in the case of c. i. f. contracts the property in the goods may be said to pass as soon as they are shipped, but the question is always one of intention, and if the seller retains the power of disposal or the jus disponendi it cannot be said that he intended the property to pass.

If the seller takes a bill of lading making the goods deliverable to himself or to his agent at the port of discharge, thus retaining the power of disposal of the goods, the property and risk will remain with him. But if he endorses and sends the bill of lading to the buyer, the property and risk will thereupon pass to the buyer.

See *Delaurier* v. *Wyllie* (1) and *M'Dowal* v. *Snowball* (2) cited in Aitkin's Sale of Goods, page 161.

On the other hand if the seller takes a bill of lading making the goods deliverable to the buyer, the property and risk ordinarily passes to the buyer on shipment of the goods.

After an examination of Benjamin on Sale, 6th Edition, page 420 et seq and the following authorities referred to by counsel, viz., *Marji Jetx* v. *Honnavar Puthu Hari Pai* (3), *Karachi Steam Roller Flour Mills* v. *Indo-Continental Agency* (4), *Rustamji* v. *Haji Hussein Lari* (5), *Nazarali Samsuddin* v. *Malwa and Co.* (6), *Ford Autombiles, Ltd.* v. *Delhi Motor Engineering Co.* (7), *Raghunath Dxs-Ram Sarup* v. *Ghamandi Lal-Narain Das* (8), *Gulab Rai-Sagar Mal* v. *Nirbhe Ram-Nagar Mal* (9), *Findlay Muir & Co.* v. *Radhakissen Gopikissen* (10), *Lilladhar Jairam Narranji* v. *George Wreford* (11), and *Bank of Morvi, Ltd.* v. *Baerlein Bros.* (12), I consider that the following rules will be of assistance in the case :

(1) In the case of a contract for the sale of unascertained goods ordinarily, shipment on board a ship of or chartered for the buyer, is a sufficient appropriation to pass the property.

(2) If the seller when shipping the goods takes the bill of lading to his own order and does so not as agent or on behalf of the buyer, but on his own behalf, he thereby reserves to himself a power of disposing of the property and there is thus no final appropriation and the property does not, on shipment, pass to the buyer.

(3) If, in order to secure the contract price, the seller sends the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be handed over to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance or payment of the bill of exchange or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the buyer.

(4) If the seller discounts a draft upon the buyer with a Bank and authorizes the Bank to make over to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon the buyer's acceptance of the draft, the seller must be held to intend to transfer the property in the goods when the draft is accepted, but to retain the property in the goods till such acceptance.

Now in the present case the bills of lading were taken to the order of Atherton and Company, the sellers, and were sent, endorsed in blank, to the National Bank of India, Limited, at Delhi together with relative drafts attached. It is clear that the Bank was acting as the agents of the sellers and had been directed to deliver the bills of lading to the buyer against payment, and not merely on acceptance of the said drafts.

In these circumstances it seems to me that the sellers must be held to have intended to retain the property in the goods until the payment of the drafts and that therefore the property in the suit goods did not pass to the buyers on their acceptance of the said drafts.

In this view of the case it is clear that the suit for the price of the goods was incompetent and must fail.

The drafts have not been retired by the plaintiff and the goods have not yet been sold. No application for the amendment of the plaint was or has been asked for and therefore this appeal is accepted and the suit dismissed with costs throughout.

Zafar Ali, J.—I agree.

G.B. *Appeal accepted.*

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(1) 17 R. 173.
(2) 7 R. 35.
(3) [1915] 18 M.L.T. 457=31 I.C. 334.
(4) [1910] 10 S.L.R. 118=37 I.C. 7.
(5) [1920] 22 Bom. L.R. 1165=59 I.C. 15.
(6) [1919] 23 Bom. L.R. 1103.
(7) A.I.R. 1923 Bom. 125.
(8) A.I.R. 1925 Lah. 586.
(9) A.I.R. 1924 Lah. 239=4 Lah. 423.
(10) [1909] 36 Cal. 736=3 I.C. 185.
(11) [1892] 17 Bom. 62.
(12) A.I.R. 1924 Bom. 325=48 Bom. 374.

A. I. R. 1927 Lahore 394

ZAFAR ALI AND JAI LAL, JJ.

Kesar Singh and *others*—Plaintiffs—Petitioners.

v.

Shiromani Gurdwara Prabandhak Committee, Amritsar and *another*—Defendants—Respondents.

Civil Revision Petition No. 381 of 1926, Decided on 11th February 1927, from the order of the 1st Cl. Sub-J., Amritsar, D/- 19th January 1926.

(a) *Civil P. C., S.* 115—*Case decided—Order holding that suit is triable under Sikh Gurdwara Act* (8 *of* 1925) *is revisable.*

Order of Court holding that a suit is not triable by itself but by the tribunal under the Sikh Gurdwara Act (8 of 1925) goes to the root of the case and practically terminates the proceedings so far as that Court is concerned, and therefore the order is revisable. [P 394 C 2]

(b) *Sikh Gurdwara Act* (8 *of* 1925), *Ss.* 3 *and* 32—*Applicability.*

Section 32 of the Gurdwara Act does not come into operation unless the provisions of S. 3 of that Act have been complied with. [P 394 C 2]

(c) *Sikh Gurdwara Act* (8 *of* 1925), *S.* 37—*Whether alienation by limited owner in favour of Gurdwara is valid is to be decided by civil Courts.*

The question whether a person having a limited interest in the property is competent to alienate it by gift is obviously not one for the Tribunal to determine. That question must be enquired into and decided by the civil Courts whether the gift is to a Gurdwara or anybody else. [P 394 C 2]

Jagan Nath Bhandari — for Petitioners.

M. L. Puri—for Respondents.

Judgment.—The plaintiffs petitioners who claim to be the reversionary heirs of one Mihan Singh, Jat of the village Pindori Sidwan in the Amritsar District, sue for a declaration that the gift of his entire landed estate made by his widow Mt. Chandi to the langar (kitchen) of the Guru Ram Das, which is attched to or is an institution of the famous Sikh temple at Amritsar known as Darbar Sahib was invalid and inoperative as against them. The Shiromani Gurdwara Prabandhak Committee, Amritsar, through whom the gift was made, pleaded inter alia that the claim fell within the ambit of S. 32 of the Gurdwara Act which ousted the jurisdiction of the civil Court.

The trial Court accepted that plea and submitted the record of the case to the District Judge asking him to forward it to the Tribunal under the Gurdwaras Act.

The plaintiffs seek revision of this order on the following grounds:

(1) That the gift not having been directly made to a declared Sikh Gurdwara as such, the lower Court acted with material irregularity in refusing to exercise jurisdiction vested in it by law.

(2) That the Gurdwaras Act No. 8 of 1925 does not apply to this case; the lower Court had full jurisdiction to entertain and try the suit.

Counsel for the respondents takes a preliminary objection that no revision lies. He argues that the order in question is after all an interlocutory order because the Tribunal under the Act has to return the record with a copy of its decision and the suit is finally to be determined by the civil Court though in accordance with the decision of the Tribunal. This argument does not appear to us to be sound. If the points in issue were to be determined by the Tribunal the civil Court becomes functus officio for all purposes but one, viz., the carrying out of the order of the Tribunal which it may eventually pass. Thus the order of the civil Court holding that the Gurdwaras Act applies goes to the root of the case and practically terminates the proceedings so far as that Court is concerned. That being so this application for revision is, in our opinion, competent.

The next point is that S. 32 of the Gurdwaras Act does not come into operation unless the provisions of S. 3 of that Act have been complied with. The learned counsel for the respondents admits before us that no notification has yet been published under S. 3, Cl. 4 of that Act. Section 32 therefore is not applicable.

Thirdly the question whether a person having a limited interest in the property was competent to alienate it by gift is obviously not one for the Tribunal to determine. That question must be enquired into and decided by the civil Courts whether the gift is to a Gurdwara or anybody else.

We, therefore, accept this petition, set aside the order in question and direct that the case be proceeded with in accordance with law. The respondents will pay petitioners' costs in this Court.

D.D. *Petition accepted.*

* A. I. R. 1927 Lahore 395

SHADI LAL, C. J., AND
AGHA HAIDAR, J.

Barkha Nath—Defendant—Appellant.

v.

Shiv Ram and *another*—Plaintiffs—Respondents.

First Appeal No. 2615 of 1922, Decided on 17th November 1926, from the decree of the 1st Cl. Sub-J., Lahore, D/- 15th August 1922.

* *Registration Act, S. 77—Executant dying before registration — Return of document for want of executant's successor amounts to refusal.*

Returning of a document to its presentor, for want of representative or successor of the executant, who died before registration, amounts to refusal to register within the meaning of S. 77 : 9 *A. L. J.* 756 ; 34 *All.* 165 ; 40 *Mad.* 759 and 41 *P. R.* 1917, *Foll.*

In such cases Court should look to the substance and not to the form of the order.

[P 395 C 1,2, P 396 C 1]

Mehr Chand and *Lal Chand*—for Appellants.

Jai Gopal Sethi and *Faqir Singh*—for Respondents.

Judgment.—This is a defendant's appeal arising out a suit instituted by the plaintiff under the provisions of S. 77 of the Indian Registration Act. The plaintiff came into Court alleging that one Pir Prabhu Nath, the Mahant of a religious foundation, executed a sale deed in his favour on the 7th of August 1920 but afterwards refused to get it registered. The plaintiff applied to the Sub-Registrar under S. 36 of the Indian Registration Act on the 4th of September 1920. In the meantime Pir Prabhu Nath died somewhere between the 17th October 1920 and the 28th October 1920, after service of summons to appear before Sub-Registrar had been effected upon him. The matter came up before the Sub-Registrar on the 11th November 1920 who wrote out an order that, in view of the fact that the presentor of the document admitted that there was no representative or successor of Prabhu Nath, he the Sub-Registrar could not either register the document or refuse its registration and he accordingly ordered that the document may be returned to the presentor. Against this order the present plaintiff filed an appeal before the Registrar on the 23rd November 1920 who, after enquiring as to who was the successor of Prabhu Nath, on the 12th January 1921, refused to interfere with the Sub-Registrar's order on the ground that the question of Prabhu Nath's successor had not been settled.

The present suit was filed by the plaintiff under the provisions of S. 77 of the Indian Registration Act. The defendants pleaded that the present suit under S. 77 was misconceived in that there was no refusal according to the intendment of that section. There was a further plea denying the execution of the document by Prabhu Nath. The Court below overruled both these pleas and decreed the plaintiff's suit.

The defendants have come up in appeal to this Court and the contentions raised by them in the Court below were repeated in the arguments before us. It is said that the order of the Sub-Registrar and of the Registrar in appeal did not, in so many words, refuse registration but that they left the matter in abeyance pending the appointment of a successor to Prabhu Nath and that the intention underlying the orders passed by the Sub Registrar and the Registrar was that the document may be re-presented after a successor was duly appointed to Prabhu Nath. We have given the matter our very best consideration and considered the authorities on the subject. We are satisfied that the orders passed both by the Sub-Registrar and the Registrar in substance and in effect are tantamount to an order of refusal within the meaning of S. 77 of the Indian Registration Act. It must be noted that the document itself was returned to the presentor of the document and was not retained either by the Sub-Registrar or by the Registrar in his office for further action to be taken at a future date. We think that the matter is settled by the following authorities.

Hayat Ali v. *Muhammad Sadiq* (1), *Abdul Hakim Khan* v. *Chandan* (2), and *Gangadara Mudali* v. *Sambasiva Mudali* (3). There is a case of this Court, *Kirpa Ram* v. *Asa Singh* (4) where the law is very succinctly laid down in consonance

(1) [1912] 9 A. L. J. 756=16 I. C. 97.
(2) [1912] 34 All. 165=13 I. C. 83=9 A. L. J. 4.
(3) [1917] 40 Mad. 759 = 40 I. C. 192 = 33 M. L. J. 51.
(4) [1917] 41 P. R. 1917 = 41 I. C. 76 = 55 P. W. R. 1917.

with the authorities quoted above. In all these matters we have to look to the substance and not to the mere form in which a particular officer chooses to express his meaning.

In the present case we have not the slightest doubt that both the officers, i. e., the Sub-Registrar and the Registrar, having regard to the peculiar circumstances of the matter before them, really declined to exercise their powers of registration and stayed their hands. This is refusal and the plaintiffs were entitled, after this order, to institute the present suit under the provisions of S. 77 of the Indian Registration Act.

As regards the question of the execution of the document by Prabhu Nath, we have been taken through the evidence by the parties and we are satisfied that the evidence of the marginal witnesses sufficiently establishes the fact of execution by Prabhu Nath. Other pleas were taken touching the validity and the binding effect of the document and also as to the capacity of Prabhu Nath to execute the same, but the Court below very properly declined to go into these matters and no argument was addressed to us on this part of the case. We think that the decision of the Court below was perfectly correct. We accordingly dismiss the appeal with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 396

TEK CHAND, J.

Dil Mohammad and *another*—Defendants—Petitioners.

v.

Sain Das and *others*—Plaintiffs—Respondents.

Civil Revision Petition No. 760 of 1926, Decided on 7th February 1927, from the decree of the Small Cause Court Judge., D/- 30th August 1926.

(a) *Evidence Act, S. 45—Evidence of expert accepted by party without formal proof—Party cannot challenge it.*

Where a party accepts the certificate of a thumb-impression expert without formal proof in the trial Court, he cannot be allowed in appeal to say that his evidence should be excluded for want of proof. [P 397 C 1]

(b) *Provincial Small Cause Courts Act. S. 25—Wrong decision on point of limitation—Substantial justice done—Revision would not lie.*

A wrong decision on a question of limitation is not a valid ground for interference on revision under S. 25 when substantial justice has been done: 93 *P. R.* 1911 and 59 *P L. R.* 1918, *Rel. on.* (P 397 C 2)

(c) *Contract Act, Ss. 134 and 139—Omission to sue principal in time—Surety is not discharged.*

A creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by S. 134 or S. 139 whereby the surety is discharged: 7 *Bom.* 146; 12 *Cal.* 330: 33 *Mad.* 308 and *Carter* v. *White*, (1884) (25 *Ch. Div.* 666), *Appr.* [P 397 C 2]

(d) *Contract Act, Ss. 134 and 139—Omission to sue one debtor—Surety is not discharged.*

It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within Ss. 134 and 139 of the Contract Act, [P 398 C 1]

Dev Raj Sawhney—for Petitioners.

Gopal Chand—for Respondents.

Judgment.—On the 13th August 1917, Dil Mohammad and Imam Din as principal debtors and Dula as surety executed a bond in favour of Plaintiff No. 1 and the predecessors-in-interest of Plaintiffs Nos. 2 and 3, for Rs. 200 bearing interest at 2½% p. m. On the 15th June 1925 the plaintiffs brought a suit in the Court of Small Causes at Lahore for recovery of Rs. 500 on foot of this bond against Dil Mohammad and Imam Din the principal debtors, and Dula, the surety. It was discovered soon after that Imam Din had been dead for a long time. The plaintiffs accordingly made a statement giving up their claim against Imam Din and his name was removed from the record. In the plaint it was alleged that the suit was within limitation by virtue of certain payments of interest which were noted on the back of the bond and which bore the thumb-impressions of one or other of the defendants. A decree has been passed against both Dil Mohammad and Dula for Rs. 500 with costs and they have come up to this Court on revision.

The first point taken by Mr. Dev Raj Sawhney for the petitioners was that the suit has been instituted on the 24th June 1925, and that even if the alleged payment of interest be held to be proved the suit would still be barred by time under the Repealing (Punjab Loans Limitation Act) 1923, as amended by the Act of 1925, according to which the last date for filing such suit was the 15th

June 1925. Mr. Dev. Raj Sawhney seems to have been misled by a mistake in the copy of the judgment of the lower Court where the date of presentation of the plaint is given as 24th June 1925. I have referred to the original plaint and find that it was presented on the 15th June 1925. This contention is, therefore, incorrect and is overruled. On the main point arising in the case Mr. Sawhney has contended that the finding of the learned Judge is based upon the report of the Fingerprint Bureau at Philour where the thumb-impressions of Dil Mohammad were examined by an expert, but that this expert has not come into the witness box and this report remains unproved, and is inadmissible in evidence. From the record, however, it appears that the document was sent to Philour at the instance of the defendant Dil Mohammad himself and that the report was received on the 14th July 1926. The case was put up for hearing on five occasions after this date, but no request was made by the defendant Dil Mohammad to summon the expert. Under these circumstances it must be held that the defendant accepted the certificate without formal proof and he cannot now be allowed to argue that this evidence should be excluded for want of proof. In any case, even if the certificate and the conclusions that have been drawn therefrom by the learned Judge are excluded from consideration, there is ample evidence on the record to prove that the payment of Rs. 25 was made by Dil Mohammad on account of interest on the 27th July 1919. There is the evidence on oath of the plaintiff himself and also that of P. W. 1, Nanak Chand, which has been accepted by the learned Judge as reliable. I must therefore hold that the requirements of S. 20 of the Indian Limitation Act had been fulfilled and the suit is within limitation so far as Dil Mohammad is concerned.

As regards Dula, surety, Mr. Sawhney has in the first place contended that there being no acknowledgment of payment of interest by him, the suit is barred by limitation so far as he is concerned and the plaintiffs cannot under S. 21 of the Limitation Act rely on the payment of the interest on 27th July 1919, by Dil Mohammad, one of the principal debtors, in order to bring the suit within time against Dula. In support of this contention Mr. Sawhney has cited *Gopal Daji* v. *Gopal* (1); *Abde Ali* v. *Askaran* (2) and *Lodd Govindass Krishnadas* v. *Rukmani Bhai* (3), and a number of other rulings. The view taken in these rulings, however, is opposed to that of Martineau, J., in *Harbans Lal* v. *Nathu* (4) which was cited without disapproval by Campbell and Zafar Ali, JJ., in *Nihal Chand* v. *Khuda Bakhsh* (5). I am not sure of the correctness of the ruling of Martineau, J., and if the decision of the case had turned upon this point only I would have been inclined to refer the matter to a larger Bench for an authoritative decision, but here assuming that the lower Court has come to a wrong decision on the question of limitation so far as Dula surety is concerned I am not inclined to interfere on the revision side. It has been held over and over again by the Chief Court and this Court that a wrong decision on a question of limitation is not a valid ground for interference on revision, under S. 25 of the Small Cause Courts Act when substantial justice has been done-vide *Ghasita* v. *Sultan* (6) and *Sarab Dial-Ishar Das* v. *Devi Ditta Mal-Gordhan Das* (7). I therefore decline to interfere with the judgment of the lower Court against Dula on this point.

Mr. Sawhney, has, however, raised a further contention that in this case the surety is discharged firstly by reason of the failure of the plaintiff to sue Imam Din within the period of limitation and, secondly, by reason of the plaintiff having given up Imam Din or his legal representatives after the institution of the suit. Now, with regard to this contention it has to be borne in mind that neither of these points was taken by the defendant in the Court below. Moreover a creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by S. 134 or S. 139 of the Indian Contract Act whereby the surety is discharged. The High Courts of Bombay, Calcutta and Madras

(1) [1904] 28 Bom. 248=5 Bom. L. R. 1020.
(2) A. I. R. 1924 Nag. 411=20 N. L. R. 140.
(3) [1915] 38 Mad. 438=21 I. C. 302=1 M. L. W. 529.
(4) [1919] 105 P. R. 1919=53 I. C. 586.
(5) A. I. R. 1924 Lah. 534.
(6) [1911] 93 P. R. 1911=228 P.L.R. 1911=11 I. C. 445=151 P. W. R. 1911.
(7) [1918] 59 P. L. R. 1918=46 I. C. 541=139 P. W. R. 1918.

have consistently taken this view vide *Sankana Kalana* v. *Virupakshapa Ganeshappa* (8); *Krishto Kishori* v. *Radha Romun* (9) and *Subramania Aiyar* v. *Gopala Aiyar* (10), and it is in consonance with the dicta of the Court of appeal in England Per Lindley, L. J., in *Carter* v. *White* (11). The contrary view taken by the Allahabad Court in *Ranjit Singh* v. *Naubat* (12) and the rulings cited therein does not appear to me as correct.

The other point that the claim against Imam Din was given up by the plaintiffs during the pendency of the suit has no force whatever. It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others, does not bring the case within Ss. 134 and 139 of the Contract Act.

For the foregoing reasons I see no reason to interfere with the decision of the Court below and reject this petition, but in view of all the circumstances I leave the parties to bear their own costs in this Court.

D,D. *Petition rejected.*

(8) [1883] 7 Bom. 146.
(9) [1886] 12 Cal. 330.
(10) [1909] 33 Mad. 308=7 I. C. 898=20 M. L. J. 633.
(11) [1884] 25 Ch. D. 666=54 L. J. Ch. 138=32 W. R. 692=50 L. T. 670.
(12) [1902] 24 All. 504=(1902) A. W. N. 166.

A. I. R. 1927 Lahore 398 (1)

JAI LAL, J.

Uram Bakhsh—Plaintiff—Appellant.

v.

Mast Ram and *others*—Defendants—Respondents.

Second Appeal No. 2713 of 1926, Decided on 16th March 1927, from the decree of the Dist. J., Hoshiarpur, D/- 10th August 1926.

Civil P. C., O. 3, R. 4—Telegram informing pleader to file appeal and informing that proper authority was being sent is no authority to act.

A telegram from the client in which the pleader is asked to file the appeal and informs that the power of attorney was being sent does not amount to an authority in writing entitling the pleader to file an appeal or to act on behalf of his client. [P 398 C 2]

Sardha Ram Kapur—for Appellant.
Shambhu Lal Puri—for Respondents.

Judgment.—A preliminary objection that this appeal has not been properly instituted must be allowed. It appears that the appeal was filed by Mr. Sardha Ram, Advocate, on behalf of the appellant. He, however, did not file any authority in writing signed by the appellant authorising him to act on his behalf. A telegram was sent to him by his client in which he was asked to file the appeal and was informed that the power of attorney was being sent; but Mr. Sardha Ram says that he received no power of attorney and consequently treated the telegram as his authority in writing and filed this appeal. No authority has been cited by counsel in support of his contention that a telegram amounts to an authority in writing entitling him to act on behalf of his client. On the other hand, it appears that another authority in writing was clearly contemplated by the message contained in the telegram and it was not intended that the telegram should be treated as the authority of the counsel to file the appeal.

I must, therefore, dismiss this appeal, but under the peculiar circumstances leave the parties to bear their own costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 398 (2)

BROADWAY, J.

Babu Ram and *others*—Accused—Petitioners.

v.

The Crown—Opposite Party.

Criminal Revision No. 1229 of 1926, Decided on 15th November 1926, from the order of the S. J., Jullundur, D/- 14th June 1926.

Criminal P. C., Ss. 407 and 408—Trial began by a Magistrate when possessed with second class powers and concluded when possessed with first class powers—Appeal lies to Sessions Judge.

In a case where the accused are convicted on a trial held by a Magistrate who started with second class powers but at the time when he concluded the trial was possessed of first class powers, the appeal lies to the Sessions Judge; *A. I. R.* 1925 *Patna* 112, *Foll.* [P 399 C 1]

T. D. Khanna—for Petitioners.

Broadway, J.—The petitioners in this case have been convicted of offences under Ss. 325 and 323, Indian Penal Code. They preferred an appeal to the learned Sessions Judge who returned the same to the Advocate of the appellant

directing him to lodge it before the District Magistrate. He passed this order in the following circumstances:—On the 3rd May 1924 when the case was started the Magistrate had only second class powers. For some reasons or other the proceedings were protracted and the case was ultimately decided on the 29th March 1925. During the pendency of these proceedings the Magistrate was given first class powers by a Notification dated the 6th August 1925. In these circumstances the learned Sessions Judge, apparently following the decision of the Lower Burma Chief Court in *King Emperor* v. *Nagpaw* (1) held that the appeal was not cognizable by him but by the learned District Magistrate. Against this decision the petitioners have come up to this Court on revision through Mr. T. D. Khanna who has urged that the view taken by the learned Sessions Judge is erroneous, and that when a trial is held by a second class Magistrate and is completed by the same Magistrate after he has been given first class powers the appeal would lie to the Sessions Judge.

Under S. 407 (1), Criminal P. C., any person convicted on a trial held by any Magistrate of the 2nd or 3rd class may appeal to the District Magistrate and under S. 408 any person convicted on a trial held by * * * a Magistrate of the first class may appeal to the Court of Session. In the present case the petitioners were convicted on a trial held by a Magistrate who started with second class powers but at the time when he concluded the trial was possessed of first class powers. In these circumstances I am of opinion that the appeal lay to the Sessions Court, and in this view I am supported by *Sheobhanjan Singh* v. *Emperor* (*A. I. R.* 1925 *Patna* 472)a case decided by Mullick and Bucknill, JJ., of the Patna High Court. There the facts were very similar to those of the present case. The trial had been commenced by a second class Magistrate who had been given first class powers a short time before the trial concluded. I therefore hold that the appeal had been properly filed in the Sessions Court, and accepting this petition I direct that the appeal be re-admitted in that Court and be disposed of in accordance with law.

G.B. *Revision allowed.*

(1) [1908] 4 L. B. R. 239=8 C. L. J. 48.

A. I. R. 1927 Lahore 399

CAMPBELL, J.

Kirpa Ram—Defendant—Petitioner.

v.

Bhupa and *others*—Plaintiffs—Respondents.

Civil Revision Petition No. 865 of 1925, Decided on 25th March 1927, from the decree of the 4th Sub-J., Bhawan, D/- 12th August 1926.

(a) *Provincial Small Cause Courts Act, Art.* 35 (*ii*)—*Scope.*

A suit for the value of trees wrongfully cut and misappropriated falls within Art. 35 (ii). [P. 400 C 1]

(b) *Provincial Small Cause Courts Act, S.* 25—*Jurisdiction.*

Where the plea of jurisdiction is not taken in the lower Court, but is raised for the first time in revision in the High Court the High Court is not bound to interfere: *A. I. R.* 1923 *All.* 428, *Foll.* [P 400 C 1]

Nawal Kishore for *Mehr Chand Mahajan*—for Petitioner.

Mukand Lal Puri—for Respondents.

Campbell, J.—This was a suit for Rs. 8-8-0 on account of the price of trees and damage to fencing. The plaint alleged that two years before suit the defendant cut the trees standing in khasra Nos. 580 and 582 belonging to the plaintiffs and damaged the plaintiffs' fencing. Later on the plaintiffs' boundary had been demarcated and the fact came to light that the trees cut by the defendant had stood in the plaintiffs' land. Hence the claim for compensation was preferred. The defendant pleaded that he cut the trees from his own land and that no damage was done to the fencing.

The suit was tried by a Court of Small Causes which framed issues and held apparently a complete enquiry in the course of which a local commission was issued to a retired Patwari to take measurements and ascertain in what field numbers the trees had stood. The Court decided that the trees had belonged to the plaintiffs and that no damage to any fencing had been proved. The plaintiffs were given a decree for Rs. 4-8-0. The defendant has now come to this Court on revision with a plea that the Court of Small Causes had no jurisdiction to entertain the suit by reason of the prohibition contained in Article 35 (ii) of the second schedule to the Provincial Small Cause Courts Act. This plea was not raised in the Court below.

In several cases of suits for the value of trees wrongfully cut and misappropriated it has been held that the suit fell within Article 35 (ii), but the present case is on all fours with one decided by Mr. Justice Lindsay of the Allahabad High Court and printed as *Kunwar Pal* v. *Bakhshi Madan Mohan* (1). That was a suit for Rs. 10, the value of a tree alleged to have been wrongfully cut by the defendants, the tenants of the plaintiff. A lengthy trial was held and the plea of jurisdiction was not taken in the Court below but was raised for the first time in revision to the High Court. The learned Judge held that, in any case he would not interfere, as he was not bound to do so, and that secondly, bearing in mind the defence set up by the defendants, they could scarcely come to the High Court and say that the act in respect of which the suit was brought was an act amounting to an offence, their whole case being that the tree in question was theirs and had been cut in exercise of their own rights.

In the present case moreover it is doubtful whether the terms of the plaint can be said to contain a definite allegation of a criminal offence. I am not prepared to interfere and I dismiss the petition with costs.

R.D. *Petition dismissed.*

(1) A. I. R. 1923 All. 428.

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* A. I. R. 1927 Lahore 400

ADDISON, J.

Khuda Yar and *others*—Plaintiffs—Appellants.

v.

Muhammad Yar and *others*—Defendants—Respondents.

Second Appeal No. 234 of 1926, Decided on 3rd November 1926, from the decree of the Dist. J., Mianwali, D/- 31st August 1925.

(a) *Custom (Punjab)—Succession—Awans of Mianwali—Whole brother excludes half-brother.*

By custom amongst Awans of village Nammal of the Mianwali District a brother of the whole blood succeeds to his deceased brother's estate to the exclusion of his brother of the half-blood. [P 400, C 2 P 402, C 1]

(b) *Custom (Panjab)—Succession—Whole and half-blood succeed together if property of common ancestor is distributed per capita unless members of whole blood have formed separate group.*

In the case of collateral succession, in a contest between the whole blood and the half-blood, the Court may presume, until the contrary is proved, that when the property of the common ancestor was distributed per capita (pagwand) the whole blood and half-blood succeed together but where brothers of the whole blood subsequently form separate groups and so regulate succession among themselves as to alter the rule of distribution, the presumption will cease to operate. [P 400, C 2]

G. R. Khanna—for Appellants.

M. L. Puri—for Respondents.

Judgment.—The sole question in this appeal is whether by custom amongst Awans of village Nammal of the Mianwali District a brother of the whole blood succeeds to his deceased brother's estate to the exclusion of his brother of the half-blood. The trial Court found that he did not, while the lower appellate Court found that he did. The plaintiffs have preferred this second appeal after obtaining the necessary certificates under S. 41 (3) of the Punjab Courts Act.

It is common ground that the Pagwand rule (per capita) has now superseded the chundavand rule (per stirpes) so far as succession to the father's estate is concerned. That being the case, the general rule of custom is stated as follows in paragraph 26 of Rattigan's Digest of Customary Law :

> In the case of collateral succession, in a contest between the whole blood and the half-blood, the Court may presume until the contrary is proved, that when the property of the common ancestor was distributed per capita (pagwand) the whole blood and half blood succeed together ; but where brothers of the whole blood subsequently form separate groups and so regulate succession among themselves as to alter the original rule of distribution, the presumption will cease to operate. The initial onus therefore, lay on the defendant, but in order to discharge it it was sufficient for him to establish that he and his full brother now deceased, formed subsequently a group amongst themselves distinct from their half-brother, whose sons the plaintiffs are. This plea was taken by the defendant, but the trial Court decided against him on that question. The District Judge on appeal held that in the present case there was evidence that the deceased and his full brother lived

together, cultivated their land jointly, and formed a separate group from their half brother. It was objected that this was not a proper finding and did not conclude the matter as he should have called the evidence on the point "good" or evidence "which proved." It is clear, however, that he meant it to be a full finding. In all probability he had the report *Sherkhan* v. *Mahomed Khan* (1) 5 L. 117 at 120 Para (3) before him when he was writing. It is there said :

> It may be said at once that there is no evidence of the respective descendants of the two mothers having formed themselves into separate distinct groups.

The District Judge's meaning was that this was not the case here, though he might have expressed it more clearly. Besides it is established that, though the holding remained joint the revenue papers up to 1921 after 1908 showed the two full brothers cultivating jointly the land, which they held while the half brother cultivated his separately. This amounted to a private family partition. This condition of affairs was also supported by oral testimony which should not have been rejected in face of the revenue entries. There is no doubt, therefore, that the two full brothers did constitute themselves into a distinct group separate from their half-brother. It follows that there is no presumption that the whole and half blood succeed together. In connexion with this question I might also refer to the remarks in *Khudayar* v. *Ahmad* (2).

I next come to the customary Law of Mianwali District. In the Riwaj-i-am prepared in the settlement of 1878, it is said that after the death of a sonless brother his full brother excludes his half-brother whether the land is ancestral or not, but it is added in families where the half brothers are stronger than the full brothers and the property is still joint, then all succeed equally, though, if the property is divided then in no case does the half brother take a share. An instance from Chakrala village is given in that Riwaj-i-am in which the full brother excluded his half-brother. In the Riwaj-i-am of 1908 it is recorded that though sons of all wives inherit equally from their father yet on the death of the son the custom as to succession by brothers is different. Among Pathans with three exceptions, and among Syeds, the full brothers succeed in preference to the half brothers. Among the three exceptions to the Pathan rule and among Hindus, the full and half blood succeed equally. The Jats also said that they followed the rule of equal succession but several instances have been quoted among them in which full brothers excluded half-brothers. The Blochis are equally divided as to which custom they follow. The Awans are also divided on this question succession having taken both ways. Four instances are given in this Riwaj-i-am where Awans of Nammal the village in question in this case followed the rule of succession by the full blood. while five instances are given where Awans of the Chakrala Thamewali tract follow the rule of equal succession. This means that ten instances are given in the two Riwaj-i-ams namely one instance from Chakrala given in the first document of 1878 where the full blood succeeded while five instances are given in the 1908 document from the Chakrala tract where there was equal succession and four instances are given from Nammal where the whole blood excluded the half blood. All these instances are admitted and are not in dispute. The latter instances, which will be discussed hereafter, are also not in dispute. It followed that the old Riwaj-i-Am, which remains a valuable piece of evidence [see *Masta* v. *Pohlo* (3)] was in favour of the full blood excluding the half-blood, but that in the interval between 1878 and 1908 some Awans stated that they followed one rule and some that they followed the other. The instances in favour of equal succession were all from the Chakrala tract and instances the opposite way from Nammal The new Riwaj-i-am shows further that some tribes still adhere completely to the old rule of the full blood while other tribes, including the Awans are about equally divided in opinion between the two rules. While there was thus a general rule in 1878, the rule of the full blood had come into some disfavour by 1908, but it still preponderated on the whole though the Awans were divided as to it.

There are two distinct tracts in Mianwali District where Awans reside. One

(1) A. I. R. 1924 Lah. 505=5 Lah. 117.
(2) [1919] 83 P.R. 1919=51 I. C. 298.
(3) [1896] 52 P. R. 1896.

is the High lying tract of Chakrala Thamewali which is at a long distance, and separated from the low lying tract of Nammal Dhiba. There is nothing to show that the Awans in these two tracts belong to different sub-divisions, but the instances already quoted go to show that in the Chakrala tract the Awans changed from the full blood to the equal succession between 1878 and 1908 while in the Nammal tract the instances are all of full blood succession. This seems to have furnished the ratio decidendi in *Ghulam Mahomed Khan* v. *Narkhan* (4) where it was held that in Chakrala amongst Awans all brothers succeeded equally. It was pointed out there that the rule of succession as between brothers varied according to the Customary Law of the district, and that none of the instances relating to the exclusion of the half-blood came from Chakrala itself. The old Riwaj-i-am does not seem to have been quoted and there was no question in that case of separation into two groups. By analogous reasoning it seems to follow that the Awans of the Nammal tract have adhered to the old custom which still prevails in full force amongst them.

Even though the Awans of the two tracts cannot be said to constitute two different sub-divisions it does not follow that these Awans must necessarily follow the same custom in matters of succession like the present. Custom does vary from locality to locality. The Awans of the Nammal tract are obviously more conservative than members of their tribe living in the other tract and have continued to follow the old customary rule which is also the rule of succession according to their personal law (Muhammadan). It remains to examine the other instances proved. In favour of the full blood I have already noted the instance from Chakrala given in the 1878 Riwaj-i-am, and the four instances from Nammal (one of them is in fact an instance from the neighbouring village of Dhiba) given in the 1908 document. The sixth instance is a judicial one, *Muhammad* v. *Tara* (Civil Appeal No. 286 of 1898). It was held by the Chief Court in that case, which came from Nammal, that half brothers had not succeeded in proving that they succeeded along with full brothers and that the Riwaj i-am was against their contention. The fact that this case went to the Chief Court was not apparently brought to the notice of the learned Judges who decided *Sher Khan* v. *Mahomed Khan* (1)

The seventh instance of full blood succession comes after 1908 and is a case from Dhiba (adjoining Nammal). In 1910 on the marriage of the widow of Sultan his four full brothers, Rahman, Khan Zaman, Jehan and Muhammad Zaman, excluded three half-brothers Bega, Fajra and Nur Nai.

Again (8th instance) in Nammal in 1920, on the death of the widow of Muzaffar his full brother Allah Yar excluded the half-brother Shar.

Lastly (9th instance) in 1923 in Nammal, on the death of Ghulam Muhammad, his full brother, Muhammad Khan, excluded two half-brothers Ahmad and Shera.

The last two instances are not without value, though there may yet be time to dispute them, as they clearly show that in Nammal up to the present day the old rule persists. Of these nine instances of full blood succession six come from Nammal, two from the neighbouring village of Dhiba, and one from Chakrala, the solitary instance in the latter place being prior to 1878. On the other hand, there are four instances of equal succession in the Chakrala Thamewala tract given in the Riwaj-i-am of 1908. The fifth instance of equal succession comes from Dher Yaru Wala village, new Mianwali town, removed from the two main Awan tracts (see survey map attached to the judgment of the District Judge). This is also given in the 1908 Riwaj-i-am. The only other case is that reported as *Sher Khan* v. *Mahomed Khan* (1) and it comes from Nammal. The plaintiff in it set up a special family custom and failed to prove it, and that fact being emphasised frequently in the judgment, it is impossible to say that the decision in that suit would have been, had the case set up been that the Awans of Nammal had continued to follow the old custom, given in the first Riwaj-i-am, as that document was not before the Court in that suit. Further, it was held that there was no evidence of separation in that case. It cannot, therefore, be taken as an authority binding upon me in this case, though even in it the difference as regards this custom

(4) [1917] 65 P. R. 1917=41 I. C. 897=105 P. W. R. 1917.

between the two tracts was apparent. I have already discussed *Ghulam Mahomed Khan* v. *Nur Khan* (4).

In Nammal, therefore, it has been established beyond doubt (there being no exception to the rule there except the case reported as *Sher Khan* v. *Mahomed Khan* (1) where the plaintiff set up a special family question and failed to prove it) that the rule of succession amongst Awan brothers is that the full blood excludes the half-blood. This is in accordance with the old Riwaj-i-am and with the personal law of the parties. Though, therefore, the Awans of the two tracts were divided in opinion when the Riwaj-i-am of 1908 was drawn up, it is clear from the instances quoted that the Nammal villagers adhered to the old customary rule and that the villagers of the Chakrala tract favoured the newer rule of equal succession. The fact that these latter villages have changed an old custom cannot affect the villagers of Nammal, who have adhered to it. In my judgment, therefore, the decision of the learned District Judge was correct.

A decision strictly in point is *Khuda Yar* v. *Ahmad* (2) though it was about Jats of the Mianwali tahsil and district. The Jats, according to the later Riwaj-i-am, asserted the rule of equal succession though there were instances of the full blood excluding the half-blood, whereas the Awans did not assert the rule universally but were divided as to what the custom was. Yet in a case similar to the present, it was held that the burden was upon the half-brothers to establish that they succeeded with full brothers and that they had failed to discharge it. The evidence in the present case goes further and proves that in Nammal amongst Awans the full brother excludes the half brother, this being the invariable rule followed from ancient times, though amongst the Awans of the separated Chakrala tract a new custom appears to have arisen, as held in *Ghulam Muhomed Khan* v. *Nur Khan* (4).

For these reasons I dismiss this appeal with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 403

DALIP SINGH, J.

Ram Parshad—Defendant—Petitioner.

v.

Jauhri Mal and *others*—Plaintiffs and Defendant—Respondents.

Civil Revision Petition No. 766 of 1926, Decided on 7th February 1927, from an order of the 3rd Cl. Sub.-J., Jullundur, D/- 4th February 1926.

Civil P. C., Ss. 151 and 152—Application under—Court cannot amend decree which is in conformity with judgment.

There is no power in the Court to amend the decree which is in conformity with the judgment and to amend the judgment on an application under Ss. 151/152. [P 404 C 1]

R. C. Soni—for Petitioner.

Jagan Nath Agarwal — for Respondents.

Judgment.—In this case the plaintiffs brought a suit against Mt. Sukh Devi widow of Lachman and Ram Parshad, son of Lachman, on a bond executed by Mt. Sukh Devi on behalf of herself and as guardian of Ram Parshad defendant. Various issues were framed and the Court held that the plaintiffs were entitled to sue, that consideration was proved, that there was no need to reduce interest, that there was no proof of settlement on payment of Rs. 688, that the money was not spent for the benefit of Defendant No. 2, the son who was a minor, nor was it spent on joint family interest, and gave a decree to the plaintiff for Rs. 1,000 and costs against Mt. Sukh Devi alone. A decree was drawn up in conformity with this judgment. The decree is dated the 4th January, 1926.

On the 2nd February 1926, the plaintiff applied that the property of Lachman deceased should have been made liable as it had been proved that the amount in suit was raised for the benefit of the defendants' family and that most of the debt had been incurred by Lachman deceased. They, therefore, prayed that the property of Lachman deceased might be made liable for the payment of the debt. Without issuing notice to the other side the trial Court passed an order saying that it had seen the original records and there was a clerical mistake. It ordered amendment in the decree-sheet and directed that the following words be added in the judgment:

"Decree is passed also against the property of Lachman deceased."

Defendant No. 2 has come in revision. His counsel contends that no such order could be passed without notice to him and that, secondly, there was no power in the Court to amend the decree which was in conformity with the judgment and that the Court had no power to amend the judgment on an application under S. 151/152 of the Civil P. C. Counsel for the respondents concedes that the Court had no such power, but he contends that the respondents have been greatly prejudiced by the Court's action, because if the Court had not accepted their application they could have appealed from the order of the trial Court and that now they may be barred by limitation. I am unable, however, to see how this fact can affect my decision in this revision. The Court had no power to do what it did and the plaintiff-respondents misconceived their remedy. Whether they can now file an appeal or not, or whether the time spent by them should be allowed or not, is a matter for them and for the District Judge to decide if an appeal is presented.

I accept the revision and setting aside the order of the Court amending the judgment and the decree restore the original order and decree. The petitioner will have the costs of this revision.

R.D. *Revision accepted.*

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* A. I. R. 1927 Lahore 404

BROADWAY AND ZAFAR ALI, J.

Mt. Ram Kaur—Plaintiff—Appellant.

v.

Atma Singh and *another*—Defendants—Respondents.

First Appeal No. 2060 of 1922, Decided on 11th November 1926, from the decree of the Sr. Sub-J., Amritsar, D/- 24th July 1922.

* *Will—Construction—Absolute estate conferred on legatee but legatee to take some time after attaining majority—No interest conferred on anybody for the time between the majority of legatee and his getting the property—Legatee takes as soon as he attains majority.*

Where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, unless the will confers an interest in the property upon some person for the intervening period, and the legatee is entitled to have the property handed over to him as soon as he attains his majority. [P. 407, C. 1]

A will provided: "After my death the aforesaid two sons of mine and other sons who will be born in future will become the owners (malik wa qabiz) of every kind of property left by me in equal shares. But the property owned by the legatees will remain under the management of my wife Mt. R. during her lifetime. Mt. R, during her lifetime will be competent to make every kind of management of their property and to look after them. No legatee will have a right to interfere in her management to get the property of his share partitioned and to alienate it or to encumber it with any charge. If any legatee violates the above condition, the aforesaid R, the manager, will be competent to have the attachment and sale proceedings set aside and the property released." On attaining majority one of the sons alienated his share and R sued to set aside alienation. [P. 405, C. 1]

Held: that the estate that passed under the terms of the will to the two sons was an absolute one and that the right of management and the right to enjoy the rents conferred on Mt. R. was not such an interest as could be given effect to, to postpone the making over of the corpus of the estate to the legatees as soon as they attained majority and the alienation therefore was not illegal. [P. 408, C. 1]

Held: further that attestation of the will by the son would not operate as estoppel against him: 30 *All.* 84 (*P. C.*) and 24 *Cal.* 44, *Ref.* 26 *Bom.* 319, *Rel. on.* [P. 408, C. 1]

Tek Chand and *Jagan Nath Bhandari*—for Appellant.

Manohar Lal and *Mehr Chand Mahajan*—for Respondents.

Broadway, J.—One Mohkam Chand, an Ahluwalia of Amritsar, died on the 11th of August 1920, leaving him surviving a widow, Mt. Ram Kaur, and two sons, Gurbakhsh Das and Narsingh Das, the former of whom was a major, while Narsingh Das was a minor. On the 10th of August 1920 Mohkam Chand had executed a will which had been attested as a witness by Gurbakhsh Das. The attestation included a statement by Gurbakhsh Das, aged about 18 years to the effect that he had read the will and that it was correct. On the 12th of March 1921 Mt. Ram Kaur propounded the will and asked for probate thereof as the executrix. This application for probate was opposed by Bala Mal and Gurbakhsh Das, Bala Mal claiming to be an alienee from Gurbakhsh Das. Gurbakhsh Das later withdrew his caveat and despite Bala Mal's objections probate was granted to Mt. Ram Kaur on the 4th of February 1922. In the meantime, on the 17th

of August 1921, Gurbakhsh Das had executed a deed of sale in favour of one Atma Singh, purporting to sell his (Gurbakhsh Das's) half share in three specific shops which had formed part of Mohkam Chand's estate. On the 31st of August 1921, Mt. Ram Kaur instituted a suit against Atma Singh and her son Gurbakhah Das asking for a declaration that the sale in question was null and void and therefore incompetent. It was also urged that it had been made without consideration. Her suit having been dismissed she has come up to this Court in appeal through Mr. Tek Chand, while Atma Singh has, through Mr. Manohar Lal, filed a cross appeal relating to the question of costs.

The main question in this appeal is whether the will has been correctly interpreted by the trial Court. This will is to be found printed at pages 3 to 7 of the paper book. It commences with the statement of the testator's position in life and the motive which induced him to execute the will and also names of the members of his family. After giving a description of his property he proceeds to deal with it, the important clauses being Clauses 2, 3 and 4. Clause 2 is as follows:

> After my death the aforesaid two sons of mine and other sons who will be born in future will become the owners and possessors (malik wa qabiz) of every kind of property left by me in equal shares. But the property owned by the legatees will remain under the management of my wife Mt. Ram Kaur during her lifetime. Mt. Ram Kaur mother of the legatees, during her lifetime will be competent to make every kind of management of their property and to look after them. None of the legatees during the lifetime of their mother will take management of his property into his hand. No legatee will have a right to interfere in her management to get the property of his share partitioned and to alienate it or to encumber it with any charge. No creditor or decree-holder of a legatee will be competent to realize his demand from the share of the said legatee by means of attachment and auction sale through Court. If any legatee violates the above condition, the aforesaid Mt. Ram Kaur, the manager, will be competent to have the attachment and sale proceedings set aside and the property released.

It is in reliance on this clause that this suit has been instituted. Reading this clause by itself, in my judgment, it is perfectly clear that the sons of the testator acquired absolute right to the properties devised to them. It has, however, been urged by Mr. Tek Chand that in order to interpret the will as it should be interpreted it is essential that the whole of it should be examined and duly weighed. In this view he is of course perfectly correct, for it is quite possible that one clause which prima facie would devise an absolute estate on a legatee might be governed by a later clause reducing that estate to something other than an absolute one. It has been further urged that the mere use of the expressions 'malik wa qabiz' do not of themselves connote the passing of an absolute estate and on this point various authorities have been cited. Turning to the other clauses of the will it will be seen that in Cl. 3 it is laid down that Mt. Ram Kaur is to be fully competent to realize all the debts due to the estate and to carry on the current business, a part of which was a contract of sale of liquor, under her own personal supervision. The immovable property was to be managed by her, she being responsible for the realization of the rents as well as the settlements of the rents. She was to be responsible for the repairs to the houses. Then come the following words:

> She will have full powers to spend the income of rent, interest and profits of the trade business on expenses relating to the family, education, betrothal, marriage and other expenses of her children. Each and every night the legatees will give the daily income of the shops to her, and they will get money from her according to their need. In other words she will be competent to make management of every kind. None will have a right to interfere in her management and to take an account from her. But she will not be competent to waste, destroy and alienate the property of the legatees.

It has been urged by Mr. Tek Chand that under the terms of these two clauses the corpus of the property was vested to a limited extent in the two sons but that they had been deprived of the enjoyment of the income thereof, the enjoyment of the same being made over to Mt. Ram Kaur for her life. He, therefore, urged that the estate that vested in the sons on the death of their father was one other than an absolute one and that, therefore, the alienation of a portion of the corpus of the estate by one of the legatees being opposed, not only to the will but to the estate which was taken by him under the will, must be declared void. In the alternative he urged that assuming that the estate taken by the sons was an absolute one, nevertheless the income having been made over to Mt. Ram Kaur for her life entitled her to retain possession of the entire estate of the testator during her lifetime and

that, therefore, in any event, she would be entitled to a declaration to the effect that she could retain the property and enjoy the income thereof during her life. On the other hand it was urged by Mr. Manohar Lal that once the estate had vested absolutely in the legatees any conditions or directions restricting their enjoyment of the property as owners should be disregarded. He also urged strenuously that by a proper reading of this will it should be held that the view taken by the trial Court was correct and that the estate that passed was an absolute one. Attention was drawn to various authorities, such as Mulla's Hindu Law, Majumdar's Hindu Wills Act, Gour's Hindu Code and Mayne's Hindu Law. At page 371 of the 4th edition of Mulla's Hindu Law para. 318 runs as follows :

> Where property is bequested absolutely to a person, but the will contains a direction that it shall not be alienated, or partitioned, or that it shall be applied or enjoyed in a particular manner, such direction is inoperative, and the legatee is entitled to receive the property as if the will had contained no such direction.

Again in the next para. 319 it is said that :

> where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, and the legatee is entitled on attaining his majority to receive the property as if the will had contained no such direction, unless during the interval the income of the property is clearly disposed of in favour of some other person.

The passages referred to by the learned counsel in the other works cited are to the same effect. In applying these principles to the present case it is first necessary definitely to construe the terms of this will. After giving full weight to Mr. Tek Chand's arguments and the authorities cited by him it seems to me that the correct interpretation of the document in question is that the estate taken by the two sons was an absolute one. I have borne in mind what has been said at the Bar with regard to the value to be placed on expressions such as *milkiyyat* and *malik wa qabiz*.

I have also borne in mind that their Lordships of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (1) and other similar authorities, while laying down that the expression *malik wa qabiz* raises a presumption that full ownership is intended to pass, held that it is a presumption which the surrounding circumstances may rebut. In the present case I am unable to see any circumstances which could or should reduce the meaning of these expressions to anything less than a full and absolute estate or ownership. It was urged that the will clearly contemplated that the mother should remain in possession and that, therefore, the use of the word *qabiz* clearly was not meant to give the legatees a right to take possession of the property. As I read the document, however, the expressions used are those that have become more or less recognised as the correct expressions to be used in documents of this nature, connoting clearly the intention of the testator to pass an immediate estate to the legatee. It will be seen that the property is referred to repeatedly in this document as belonging to the legatees. In Cl. 2, after a declaration that the sons are to become the 'owners and possessors' of the testator's property of whatsoever description, we have a reference to 'the property owned' by the legatees which is to remain under the management of their mother who will again be competent to make every kind of management of 'their property.' Again, none of the legatees during the lifetime of their mother will take the management of 'his property' into his hands, and yet again no legatee will have a right to interfere in her management to get the 'property of his share partitioned' and to alienate it or to encumber it with any charge.

In this view of the case it remains to be seen whether there has been a disposal of the income during the interval in favour of some other person. As to this, it has been urged that Mt. Ram Kaur must be held to have been given a life interest in the income, for, although according to Clause 3, she is directed to spend the income of the property on expenses relating to the family generally, it is specifically declared that nobody will have a right to interfere in her management and to take an account from her. In this respect it was urged that the fact that she had been given full control over the income without being liable to render accounts to anyone clearly indicated that she had an interest in the income of this property.

(1) [1907] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P.C.).

Now, such a dealing with property is, and has always been, recognised by the Courts of this country and of England. In *Gosling* v. *Gosling* (2), Vice-Chancellor Wood is reported as having said that

> the principle of this Court has always been, to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a Will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age; unless, during the interval, the property is given for the benefit of another.

This principle has been recognized and followed in decisions of various High Courts in this country. In *Lloyd* v. *Webb* (3), a testator dying in 1896 bequeathed the whole of his property, with the exception of an annuity, to his wife and some other specific legacies, to his only son, who had attained majority at the date of his father's death, but subject to the restriction that he should not be allowed to enjoy it until the end of the year 1900; and appointed two trustees to carry out his wishes. It was held that the son took an immediate vested interest in the estate of the testator and that the condition restricting his immediate enjoyment was a condition repugnant and was invalid. *Gosling* v. *Gosling* (2), was referred to with approval in this case.

A case, which has, to my mind, a strong resemblance to the present one, is that of *Husenbhoy* v. *Ahmedbhoy* (4), where it was held that

> where a Will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, unless the Will confers an interest in the property upon some person for the intervening period, and the legatee is entitled to have the property handed over to him as soon as he attains his majority.

There was a clause in the will which was practically identical with the third clause of the will now under consideration. After making a bequest of the property, moveable and immovable, to the legatee in that case the testator went on to say that

> when the said Husenbhoy Ahmedbhoy attains the age of twenty-five years my 'executors' shall make over my said property to him and till then my 'executor' Ahmedbhoy Habibhoy shall keep with him the whole of that property. And as to such interest as may be realized by him he shall deal with the same in such manner as he thinks fit. The said Husenbhoy Ahmedbhoy or anyone else has no right to ask for an account, etc., in respect of that matter.

Here, there was a Will containing a clause postponing the enjoyment of the income of certain property which had vested in the legatee to a specific period and a provision was made for the executor to use and enjoy the income of the said property as he pleased with the provision that neither the legatee nor anybody else had a right to call upon the said executor to call for an account thereof. It was held in that case that the legatee took an immediate estate and that the executor was bound to hand over the estate to him without waiting for the period laid down. In the present case there is a similar provision making Mt. Ram Kaur manager of the property (and in more places than one in this will she is referred to as the manager) and directing her to use the property not at will but for the use and benefit of herself and her sons (the legatees), a provision being made that neither the said legatees nor anybody else should call upon her to render an account of her management. I agree with Mr. Tek Chand that this does not make her an ordinary guardian of the property but it seems to me that it cannot be said that the estate or interest given to her under the will was one carved out of the absolute estate that was given to Gurbakhsh Das and his minor brother under the will, and I cannot regard the proviso with regard to the income of the estate as falling within the purview of the proviso referred to in *Gosling* v. *Gosling* (2), para. 319 of Mulla's Hindu Law. I cannot hold that during the interval that elapsed from the death of the husband to her own death the income of the property had been disposed of in "favour of some other person." Admittedly conditions restraining alienations or partition must be disregarded. That is perfectly clear from para. 318 of Mulla's Hindu Law, a paragraph based on certain definite authorities. This interpretation is in my judgment, further supported by the fact that in para. 4 of this will provision is made for Mt. Atma Devi, the stepmother of the testator. There certain shops and houses specified are made over to her and then come the following words:

> She will be fully competent to locate and eject tenants. She will be bound to effect repairs out

(2) [1859] 123 R. R. 107.
(3) [1897] 24 Cal. 44.
(4) [1901] 26 Bom. 319=4 Bom. L. R. 336.

of the income of the rent. She will be fully competent to spend the remaining income of rent. But she will have no right to alienate the above shops and houses.

That is the creation of a life estate in favour of Mt. Atma Davi in connexion with certain specified property. Similar words are not used in dealing with the rest of the property which was to be under the management of Mt. Ram Kaur. It may be that it was the intention of the testator, while giving his property to his sons, to place the management of the said property in the hands of his wife in whose business capacity, honesty and reliability he obviously had the utmost confidence. But what we have to see is whether he has been able to carry out his intentions or wishes in this connexion, and after a most careful perusal and study of this document I am forced to the conclusion that the view taken by the Senior Subordinate Judge is correct and that the estate that passed under the terms of the will to the two sons was an absolute one and that the right of management and the right to enjoy the rents conferred on Mt. Ram Kaur is not such an interest as can be given effect to, to postpone the making over of the corpus of the estate to the legatees. Gurbakhsh Das, therefore, was not acting illegally in making the alienation that he did, and I would, therefore, dismiss this appeal with costs.

With reference to the cross appeal, having regard to the fact that the defence set up by the defendants during the trial amply justified the orders passed as to costs by the trial Court, I would dismiss it also with costs.

In conclusion, although the above disposes of the appeal, I would note that I do not think that it has been proved that the property in suit was joint property. I would also hold that Gurbakhsh Das's attestation of the Will does not operate as an estoppel.

Zafar Ali, J.—I agree.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 408

CAMPBELL AND TEK CHAND, JJ.

Alliance Bank of Simla, Ltd.—Plaintiffs—Appellants.

v.

Ghamandi Lal-Jaini Lal—Defendants—Respondents.

First Appeal No. 357 of 1925, Decided on 14th February 1927, from the Preliminary decree of the 1st Cl. Sub-J., Delhi, D/- 23rd December 1924.

(a) *Contract Act, Ss.* 171 *and* 176—*Distinction between lien and rights of creditor indicated—One is mere right of retention, in the other special property in the chattel is created.*

The distinction between the general lien of a bailee (whether he be a banker or not) and the right of a creditor who advances money to accommodate his customers to buy goods and deposit them with him on what is called the "godown system" is important. The former merely confers on the lien-holder the right to retain the goods until payment and does not carry with it the right of sale to secure the debt or indemnity, but the latter conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In one case a mere right of retention or retainer is given, and in the other a special property in the chattel bailed is created in favour of the pledgee. [P. 410, C. 2]

(b) *Contract Act, S.* 176—*Conditions necessary for exercise of pawnee's right of sale are indicated.*

Where no period was fixed for the repayment of the loan or the redemption of the pledge in order to enforce the right of sale under S. 176. it was necessary for the pawnee to prove : (a) a demand for the amount due ; (b) a default by the pawnor ; (c) a notice of sale giving reasonable time to the pawnor to pay ; and (d) an actual sale. [P. 410, C. 2]

(c) *Tort—Conversion—Measure of damages is value of goods on date of conversion.*

In the case of wrongful conversion it is well-settled that the measure of damages is ordinarily the value of the goods on the date of such conversion. [P. 411, C. 2]

W. M. O'Connor—for Appellants.

Sardha Ram and *Mehr Chand Mahajan*—for Respondents.

Tek Chand, J.—On the 30th January 1923, the Alliance Bank of Simla, Limited, instituted a suit against the firm of Messrs. Ghamandi Lal-Narain Das, piecegoods merchants, Delhi, for recovery of Rs. 7,160 alleged to be due on foot of an account, which began under an oral agreement between the parties according to which the Bank was to advance moneys on the security of piecegoods purchased by the defendants, the goods were to be kept in the Bank's

godown and in case of failure of the defendants to repay on demand the amount due, the Bank was authorized to sell the goods and apply the sale-proceeds towards reduction of the amount. It was alleged that the defendants had after demand failed to pay the amount due and the plaintiff Bank had been compelled to sell a part of the goods hypothecated, and after giving credit for the price realized, Rs. 7,160 was still due for which sum a decree was claimed.

The defendant denied the alleged oral agreement and pleaded that they had an ordinary cash credit account with the Bank in which money was found due some time to the defendants and some time to the Bank, that this account had nothing to do with the goods which had been stored in the Bank's godowns on payment of rent and not as security for the advances, that the Bank had no authority to sell the goods, that, in fact, no demand was ever made, that no sales actually took place and in any case the alleged sales were not properly advertised or conducted and were not binding on the defendants.

Before the issues were framed the plaintiff's pleader put forward an alternative claim to the effect that irrespective of the agreement alleged in the plaint the plaintiff Bank had the power to sell goods "under the banker's lien both under law and usage." On the 27th April 1923, the Bank went into liquidation and the suit was continued by the liquidator.

The Sub-Judge held that the Bank had a general banker's lien on the goods bailed with it, as described in S. 171 of the Contract Act, which entitled it merely to retain the goods as security for their general balance of account, that its position was not that of a pledgee and consequently S. 176 being inapplicable the goods could not be legally sold. On the factum and validity of the sale the learned Judge found that even if S. 176 applied there was no proof of any demand having been made by the plaintiff or default in payment committed by the defendants and the sales not having been properly advertised were not binding on the defendants. On these findings, he thought that the only way to do justice to parties was to square the amount originally paid by the plaintiff on behalf of the defendants in relation to the goods sold against that realized on account of sale thereof and to wipe off the two items from the account. He accordingly passed a preliminary decree declaring that the plaintiff was not entitled to include in the account sued upon any item on account of the defendants' goods which it had illegally sold to third parties and directing that accounts be taken as to the amount due to the plaintiff from the defendants in accordance with the above decision.

The plaintiff Bank has appealed and the first point urged on its behalf by M. O'Connor is that the suit should be treated as one on a mere overdraft and a decree passed in favour of the plaintiff for the amount due to it irrespective of the sale of the goods in dispute, the defendants being left to seek relief in a separate suit for damages if the goods be held to have been wrongfully sold by the Bank. After fully considering the argument of the learned counsel, I am unable to accept this contention and hold that he cannot be allowed to set up an entirely new case at this stage. In the plaint the plaintiff definitely alleged that the goods had been pledged with it as security for the advances made, that the Bank, exercising its rights as a pledgee, had sold them and given credit to the defendants for the proceeds thereof. In the statement of the plaintiff's pleader the only alternative claim put forward was of on the basis of the "banker's lien" under which the goods could legally be sold. In the course of the trial in the Court below, there was no suggestion whatever that the plaintiff had sued on an ordinary overdraft account nor did the ground of appeal to this Court make mention of any such claim. The appellant must, therefore, be limited to the allegations in the plaint as amplified by its counsel before issues in the Court below.

As to the course of the business between the parties, I am of opinion that the learned Sub-Judge has in the opening para. of his judgment correctly summarized the position and this is fully borne out by Ex. P-1 which is a detailed copy of the defendants' account with the Bank, and by other documents on the file (Ex. P-2 to Ex. P-5, Ex. P-9 and Ex. P-10). These documents disclose that the defendants having entered into

contract for purchase of goods with third parties arranged with them, that they should draw on the defendants and send the drafts accompanied by the shipping documents or invoice to the Bank. The latter paid off the drafts and received the goods and stored them in its godowns. The defendants subsequently took delivery from the Bank against payments in accordance with the requirements of their business. Mr. Sardha Ram for the respondents made a faint-hearted attempt to contest this position and to argue that the Bank was merely a godown keeper or warehouseman for the defendants and that the goods were not kept with it as security for the advances. He was, however, unable to support this contention by any materials on the record.

He further urged that the plaintiff in the plaint had alleged a specific oral contract which had not been proved and that the suit should be dismissed on this ground alone. It is no doubt true that there are no materials on the record to prove the alleged oral contract but, as already indicated, the plaintiff's counsel before issues had claimed the right of sale under the law by making the security available for repayments of its debt and I will examine the case now in this light.

It seems to me that while the learned Sub-Judge has correctly described the course of business between the parties he has failed to appreciate the legal consequences flowing therefrom. It is obvious that S. 171 of the Contract Act has no applicability at all to the plaintiff's claim as disclosed by the course of dealings between the parties. That section refers to the lien of a banker, factor, or a wharfinger to retain as security for a general balance of account any goods bailed to him. In other words, if a certain sum is due to a Bank in one account it may, under certain circumstances, make available other moneys or moveables that come into its hands in another account and thus reimburse itself in the former account. In the present case it is clear that the goods in question had been bailed with the Bank as collateral security for payment of the moneys that had been advanced by it for purchasing these very goods. The case is, therefore, clearly one of a pledge as defined in S. 172 of the Indian Contract Act and consequently under S. 176 the Bank had the power, if default was made in payment on demand, to sell the goods, on giving defendants reasonable notice of the sale. The distinction between the general lien of a bailee (whether he be a banker or not) and the right of a creditor who advances money to accommodate his customers to buy goods and deposit them with him on what is called the "godown system" is important and must be carefully kept in view. The former merely confers on the lien-holder the right to retain the goods until payment and does not carry with it the right of sale to secure the debt or indemnity, but the latter conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In one case a mere right of detention or retainer is given and in the other a special property in the chattel bailed is created in favour of the pledgee.

It now remains to see whether the Bank in this case, possessing as it did the right of sale, exercised it in accordance with law. It is clear that no period was fixed for the re-payment of the loan or the redemption of the pledge. The plaint itself states that the amount was payable on demand. In order, therefore, to enforce the right of sale under S. 176, it was necessary for the Bank to prove :

(a) a demand for the amount due ;

(b) a default by the defendants ;

(c) a notice of sale giving reasonable time to the defendants to pay ; and

(d) an actual sale.

The plaintiff has not produced any documentary evidence to prove demand for repayment of the loan, but it is alleged that oral demands were made. The only witness to prove these is P. W. No. 2, Jagan Nath, Accountant of the Bank. His evidence on the point is, however, extremely vague and cannot in the absence of further corroboration be accepted. The plaintiff must, therefore, be held to have failed to establish the first necessary ingredient.

Assuming, however, that a demand was made and default committed it was still incumbent on the plaintiff to give the defendants reasonable notice of its intention to sell. There is no documentary evidence on this either, and here again we have only the vague statement of P. W. No. 2, Jagan Nath, who merely

states that one or more notices were served on the defendants before the goods were sold. He gives no particulars as to the time or nature of these notices nor is it indicated whether in the alleged notices reasonable time was given before the sale.

Lastly, as to the sale itself, the plaintiff seeks to establish that it was conducted privately through the firm of Harmukh Rai-Munna Lal, clothmerchants, Delhi, and that the following articles were sold :

(1) One bale of Kashmira No. 370, sold on the 21st November 1922, to the defendants on payment of Rs. 1,490 into the Bank.

(2) One bale of Kashmira No. 371, sold on the 8th Janury 1923, to Gopal Chand Sham Lal at Re. 1-14-0 per yard for Rs. 597-3-0.

(3) Twelve bales of waterproof sold on the 16th January 1923, to Suraj Bhan-Shibban Lal at Re. 1-4-0 per yard for Rs. 4,311-4-0.

(4) Two bales of mulls Nos. 1932 and 1934 on 16th January 1923 at Rs. 13-10-0 per piece to Chaman Lal Posti Mal for Rs. 2,711-6-0.

In the first place it is to be noted that P. W. Panna Lal of the firm Harmukh Rai-Munna Lal has not produced any account books showing these alleged sales. Indeed he definitely stated that his books did not contain any entry relating to these sales. It was alleged that the sales had been made through brokers, but Panna Lal could not give the amount of brokerage paid to them. He failed to produce any correspondence with the Bank relating to these sales. As noted above sales (3) and (4) are alleged to have been made to Messrs. Suraj Bhan-Shibban Lal and Chaman Lal-Posti Mal respectively, but D. W. No. 5 Mithan Lal and D. W. No. 7 Chaman Lal, who are the representatives of these firms definitely stated that they never bought these goods. These sales must, therefore, be held to be unproved. D. W. No. 6, Kirpa Ram, the representative of the firm Gopal Chand-Sham Lal, to whom the sale is alleged to have been made, deposed to having bought bale No. 371 of Kashmira cloth, but the rate at which he bought as given in his books is much higher than that for which Panna Lal represents the sale to have taken place. As to the transaction relating to bale No. 370 it is, no doubt, entered in the Bank's books that the defendant took delivery of his bale on payment of R. Rs. 1,490 and that a sum of Rs. 30 is shown there as representing the commission paid to Harmukh Rai-Munna Lal. But in the absence of any documentary evidence on the point and having regard to the unsatisfactory nature of the evidence of Panna Lal it cannot be held with any degree of certainty that the defendants had knowledge of the intention of the plaintiff to sell the goods. It is also to be borne in mind that the sales, if they were effected at all, were conducted in a hole and corner manner and were not made in the open market after proper advertisement. The Bank, therefore, cannot be held to have exercised its right of sale properly and I hold that the defendants are not bound by the alleged sales even if they did actually take place.

It remains now to see whether the learned Sub-Judge was justified in directing that the amount which was paid by the plaintiff originally on behalf of the defendants in relation to the goods sold as also the amount realised on the alleged sales, should be wiped off altogether from the account as has been done by the learned Sub-Judge. After fully considering the matter, I see no justification either in law or in equity for the course adopted. On the findings that the alleged sales are illegal and not binding on the defendants, they are legally entitled to be re-imbursed for the value of the goods wrongfully sold. The case is clearly one of wrongful conversion and it is well settled that in cases of this kind, the measure of damage is ordinarily the value of the goods on the date of such conversion. See *Henderson* v. *Willams* (1) and *Ebrahem Ahmed Mehter* v. *Samuel Balthazar* (2). There was, therefore, no justification for omitting from the account both the credit and debt entries relating to the goods in question but the proper order to pass was to let the debit entry stand and to allow the defendants credit for the price of these goods, as determined by the market rate prevailing on the dates of the alleged sales.

(1) [1895] 1 Q. B. 521=64 L. J. Q. B. 308=72 L. T. 98=14 R. 375=43 W. R. 274.
(2) [1916] 9 Bur. L. T. 224=34 I.C. 297.

For the foregoing reasons the appeal is accepted to this extent that in lieu of the lower Court's decree a preliminary decree be passed declaring : (a) that the Bank is not entitled to deduct Rs. 30 as commission fee in respect of the transaction relating to bale No. 370 of Kashmira ; (b) that the defendants are not bound by the alleged sales of bale No. 371 of Kashmira dated the 8th January 1923, 12 bales of waterproof dated the 16th January 1923, and two bales of mulls Nos. 1932 and 1934 dated the 16th January 1923, and (c) that the defendants are entitled to a credit for the price of these goods calculated according to the market rate prevailing on the dates of the alleged sales. The account will be gone into on the above basis and the lower Court will proceed to pass a final decree in accordance therewith. The order of the lower Court as to costs will stand but parties will bear their own costs in this Court.

Campbell, J.—I agree.

R.D. *Appeal accepted partly,*

A. I. R. 1927 Lahore 412

SHADI LAL, C. J., AND BROADWAY, J.

Siraj Din—Plaintiff—Appellant.

v.

Narain Das and *others*—Defendants—Respondents.

Letters Patent Appeal No. 29 of 1926, Decided on 3rd February 1927, from a judgment of Martineau, J., D/- 4th January 1925, in Civil Appeal No. 1089 of 1925.

Punjab Land Revenue Act, S. 117—Revenue Officer's power to decide question of title is limited only to partition proceedings.

Under S. 117 Revenue Officer can decide question of title only when that question arises in partition proceedings. Revenue Officer has no power to entertain any other suit simply because one of the issues involved therein relates to title. [P 412 C 2]

Nanak Chand—for Appellant.

Shamair Chand—for Respondents.

Shadi Lal, C. J.—This is an appeal under Cl. 10 of the Letters Patent against a judgment of Mr. Justice Martineau, holding that a Revenue Officer, acting under S. 117 (2) of the Punjab Land Revenue Act, has only a limited jurisdiction, namely, to determine only the question of title, and that he cannot entertain and determine any other suit.

The facts bearing on the question of jurisdiction may be shortly stated. In 1923 the plaintiff, claiming to be a co-sharer in a holding, applied for partition of his share. His title was denied by the defendant, and he was consequently directed by the Revenue Officer to bring a suit to establish his title to the property. It appears that he was not in possession of the property, and he accordingly brought the present suit asking for joint possession. The Revenue Officer, purporting to act under S. 117 (2) entertained the suit and granted him a decree for possession subject to his paying a certain sum of money due on a mortgage.

This decree has been set aside by the Single Judge on the ground that the Revenue Officer had no jurisdiction to grant a decree for possession. The learned Judge has based his conclusion upon the judgment of a Division Bench of the Punjab Chief Court in *Mt. Lachmi Bai* v. *Mt. Hondi Bai* (1) which apparently lays down that the only power which S. 117 of the Punjab Land Revenue Act gives to a Revenue Officer acting as a Court is to determine the question of title arising in the partition proceedings. It will be observed that a Revenue Officer as such has no jurisdiction to determine any civil dispute, but an exception has been made in the case of a Revenue Officer dealing with an application for partition. In such a case if a question of title is raised, he cannot order partition until that question is determined by a competent authority. A civil Court is the only authority having jurisdiction to adjudicate upon a dispute relating to title, but in order to expedite partition proceedings the legislature has created an exception to the ordinary rule and invested the Revenue Officer with jurisdiction to determine the question of title as if he were a Court. This special jurisdiction is however limited to a suit raising only the question of title, and the Revenue Officer has no power to entertain any other suit simply because one of the issues involved therein relates to title. Otherwise the limited jurisdiction conferred by S. 117 might be invo-

(1) [1913] 100 P. R. 1913=7 P. L. R. 1914=21 I. C. 719=14 P. W. R. 1914.

ked for the purpose of asking the Revenue Officer to assume jurisdiction over a redemption or a succession suit involving complicated questions of law and facts on the sole ground that the suit raised inter alia, the question of title. Such an extension of jurisdiction cannot be justified either on principle or on the language of the statute.

For the aforesaid reasons I affirm the judgment of the Single Judge and dismiss the appeal with costs.

Broadway, J.—I concur.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 413

ZAFAR ALI, J.

Ahmad Hussain and *others*—Defendants—Appellants.

v.

Qamar-ul-Zaman—Plaintiff—Respondent.

Second Appeal No. 262 of 1927, Decided on 21st April 1927, from the decree of the Dist. J., Sialkot, D/- 16th November 1926.

(a) *Muhammadan Law—Gift of musha is invalid.*

As musha or an undivided share does not admit of actual possession, it cannot form the subject-matter of a valid gift. [P. 413, C. 2]

(b) *Muhammadan Law—Gift—Admissions as to delivery of possession by donor has not the effect of actual delivery.*

Admissions as to delivery of possession by donor, firstly in the deed of gift itself, secondly before the Sub-Registrar, thirdly in the mutation proceedings, and fourthly in the jawab-i-dawa filed by him in a subsequent suit between the co-sharers of the holding, cannot have the effect of putting the donees in actual possession of the undivided share. [P. 413, C. 2]

(c) *Muhammadan Law—Gift of musha by one co-sharer to another is invalid.*

Co-sharers are distinguishable from co-heirs. The gift of an undivided share by one co-sharer to another is not valid : 15 *Cal.* 684 (*P. C.*), *Dist.* [P 414, C. 1]

(d) *Muhammadan Law—Gift—Revocation—Void gift need not be revoked—Suit to set it aside—No question of limitation arises.*

A void gift is inoperative and does not require revocation to cease to be enforceable, nor does the question of limitation arise for a suit to set aside : *A. I. R.* 1924 *All.* 370, *Rel. on.* [P. 414, C. 1]

Niaz Muhammad—for Appellants.

Nand Lal, Shambu Lal Puri and *Maya Das*—for Respondents,

Zafar Ali, J.—The plaintiff, a donor, sued for a declaration that the gift made by him was invalid and that he had revoked it. The subject-matter of the gift was his one-third share in a holding comprising several fields, and the donees were his two maternal uncles in whose favour a deed of gift was duly executed and registered on the 18th December 1919. The Courts below have found :

(1) that the plaintiff is still in possession of the property and was, therefore, competent to sue for a declaration ; (2) that the gift of an undivided share in a joint holding was invalid, and (3) that the gift was revocable and could be revoked.

It is clear that the gift of a musha or undivided share is invalid and the doctrine of musha has its origin in the basic principle of Muhammadan Law that a gift to be valid should be immediately followed by delivery of possession. As an undivided share does not admit of actual possession it cannot form the subject matter of a valid gift. It is argued on behalf of the donees (appellants) that the plaintiff should be deemed to have delivered possession because he admitted that he had done so, firstly in the deed of gift itself, secondly before the Sub-Registrar, thirdly in the mutation proceedings and fourthly in the jawab-i-dawa filed by him in a subsequent suit between the co-sharers of the holding. But these admissions could not have had the effect of putting the donees in actual possession of the undivided share. As a matter of fact the donor is still in possession.

Secondly it was argued on the basis of the proposition enunciated in Article 309 of Wilson's Muhammadan Law that the gift was valid as the property did not admit of a partition inasmuch as it contained a mosque, a well and graves. But the mosque, etc., occupy only a small area which could be left out ; the rest of the land could be partitioned. It may be noted here that this point was not taken in the Courts below nor has been taken in the grounds of appeal to this Court.

Thirdly, it was argued that as stated in the amended Article 310 of Wilson's Muhammadan Law the gift of an undivided share by one co-sharer to another was valid. The original Article 310 was that one of two co-sharers in any property may give his undivided share to the other. This was quite in accordance

with the basic principle that the gift is not valid unless possessed, because if one of the two co-owners walks out after donating his share to the other the latter takes possession of the whole. In *Muhammad Bakhsh Khan* v. *Hosseini Bibi* (1), their Lordships of the Judicial Committee held that the gift of an undivided share by one co-heir to another was valid. On the strength of this ruling Wilson modified Article 310, but in my opinion co-sharers are distinguishable from co-heirs, and the ruling in question cannot be taken to have modified the original principle of Muhammadan Law. This is also a point taken for the first time in this Court and finds no place in the grounds of appeal.

As the gift was void ab initio the suit was not barred by time as held in *Mulani* v. *Maula Baksh* (2). Similarly the question of the plaintiff's power to revoke the gift does not arise because, a void gift is inoperative and does not require revocation to cease to be enforceable.

I, therefore, dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) [1888] 15 Cal. 684=15 I. A. 81=5 Sar. 175 (P.C.).
(2) A. I. R. 1924 All. 370=46 All. 260.

A. I. R. 1927 Lahore 414

DALIP SINGH, J.

Umrao Singh—Defendant—Petitioner.

v.

Firm Banarsi Das-Dip Chand—Plaintiffs—Respondents.

Civil Revision Petition No. 608 of 1926, Decided on 1st February 1927, from the decree of the Sr. Sub-J., Ambala, D/- 30th January 1926.

(a) *Punjab Court of Wards Act—Contract Act, S.* 68—*Applicability.*

Section 68 is not excluded by the terms of the Court of Wards Act and therefore a suit based on a contract can be maintained in the alternative as a suit for necessaries supplied within the terms of S. 63. [P. 414, C. 2, P. 415, C. 1]

(b) *Contract Act,* S. 68—*Proof as to necessaries.*

Where no enquiry was made at the time that the goods were supplied as to the necessity, the plaintiff is not debarred from proving that the goods were necessary : 36 *Cal.* 786, *Expl.* [P. 415, C. 1]

(c) *Contract Act, S.* 68—*Interest.*

Interest on the value of necessaries cannot be allowed by way of damages. [P. 415, C. 1]

Mehr Chand Mahajan—for Petitioner.

M. Obedulla—for Respondents.

Judgment.—The plaintiff sued for the recovery of Rs. 496-13-0, principal and interest alleged to be due from the defendant. The allegation was that between the 20th February 1917, to the 1st of June 1918, the defendant purchased cloth worth Rs. 503-6-0 from the plaintiff and Rs. 234-9-0 was paid. The suit was for the balance, and interest according to the agreement was Rs. 1-8-0 per cent. per mensem. The defendant pleaded that he was under the management of the Court of Wards from 1909 to 1921 and that, therefore, no suit could lie for the recovery of the price. The trial Court dismissed the suit, but on appeal the learned Senior Subordinate Judge remanded the case holding that the suit was maintainable under S. 68 of the Indian Contract Act. After the order of remand the trial Court held that the defendant had taken the cloth in question and that this cloth fell within the definition of 'necesaries' as given in S. 68 and allowed interest at the rate of 6 per cent per annum. It, therefore, gave a decree for Rs. 344-13-0 that is to say Rs. 268-13-0 principal plus Rs. 76 interest.

On appeal the learned Senior Subordinate Judge held that the order of remand could not be attacked before him, that the plaintiff had supplied the cloth mentioned in the account to the defendant, that the cloth was a necessary as defined in S. 68 and that the interest was reasonable. He, therefore, dismissed the appeal,

In revision counsel contends that S. 68 of the Indian Contract Act does not apply. He refers to Ss. 15 and 16 (2) of the Punjab Court of Wards Act and he also refers to Ss. 24, 25 and 27 of that Act. He also contends that there is no special inclusion of S. 68 and, therefore, the special Act excludes the operation of the general law. On the other hand counsel for the respondents contends that there is no specific exclusion of S. 68. I consider that S. 68 is not excluded by the terms of the Court of Wards Act, and though the suit was based on a contract yet it could be maintained in the alternative as a suit

for necessaries supplied within the terms of S. 68.

The next point urged by counsel for the petitioner is that no enquiry was made at the time that the goods were supplied as to the necessity. He relies on *Jaraomull Marwari* v. *Mohadev Prasad Sahu* (1), as authority for this proposition. It is quite clear to me that *Jaraomull Marwari* v. *Mohadev Prasad Sahu* (1) does not lay down any such proposition. What it means is that it will be incumbent on the plaintiff in such a suit to prove that the supplies were necessary, and that for this purpose it is incumbent in the sense of prudent or desirable for the plaintiff to make enquiries before supplying. But it does not lay down that the plaintiff who had made no enquiries cannot, as a matter of fact, proceed to prove that the goods were necessary. This contention, therefore, has no force.

The last point raised by counsel for the petitioner is that interest cannot be allowed at all. Counsel for the respondents says that it may be allowed by way of damages. I fail to follow the arguments of the learned counsel nor how interest can be allowed as damages for the supply of necessary goods for which special provision is made in the Contract Act. I, therefore, hold that interest could not be allowed.

The revision is accepted to this extent that I reduce the decretal amount by Rs. 76. The petitioner will have his costs in this Court in proportion to his success. The plaintiff will have proportionate costs on Rs. 268-13-0 in both the Courts below.

R.D. *Revision partly accepted.*

(1) [1909] 36 Cal. 763=1 I. C. 724=13 C. W. N. 643.

A. I. R. 1927 Lahore 415

JAI LAL, J.

Phula Shah and *another*—Appellants,

v.

Ram Shah-Prem Das and *others*—Respondents.

Miscellaneous First Appeal No. 1682 of 1926, Decided on 22nd March 1927, from the order of the Dist. J., Attock, D/- 22nd March 1926.

Provincial Insolvency Act (1920), *S.* 53—*Transferee must prove consideration and good faith.*

In the case of application under S. 53 the burden is on the transferee to prove that the transaction under which he claims was for valuable consideration and made in good faith. [P. 416, C. 1]

Nawal Kishore—for Appellants.

Jai Lal, J.—This is an appeal from the order of the District Judge of Attock annulling a mortgage, dated the 29th April 1924, effected by Hem Chand insolvent in favour of Phula Shah and Diwan Chand. It appears that four days after the execution of the mortgage-deed an application was made to adjudicate the mortgagor an insolvent. After his adjudication an application was made under Ss. 53 and 54 of the Provincial Insolvency Act alleging that the mortgage was collusive without consideration and was not bona fide. The appellants produced two witnesses in support of their claim. One of them is the clerk of the Sub-Registrar who merely proved in examination-in-chief the registration of the deed but in answer to a question in cross-examination stated that the money was paid in his presence by the mortgagees to the mortgagor. Another witness produced on behalf of the appellants is a marginal witness to the mortgage-deed who generally supports the case of the mortgagees. One of the mortgagees also appeared as a witness and produced his account books in support of the claim but these were considered to be suspicious by the District Judge for reasons which I have no hesitation in agreeing with. Indeed the learned counsel for the appellant made only a half hearted attempt to support his case by the account books. He mainly relied on the oral evidence produced by his clients.

It is true that the learned District Judge's judgment is unsatisfactory inasmuch as he has not discussed the evidence of the appellants' witnesses at all and has based his conclusions more on the unreliability of the account books, the relationship of their one of late partners with the insolvent and the failure of the insolvent to give a satisfactory account of Rs. 360 out of the total consideration of Rs. 400 the remaining Rs. 40 being alleged to be previous debt due to the mortgagees. The existence of this debt of Rs. 40 has been held by the District Judge as not proved and

I see no reason to differ from this conclusion.

In the face of all the suspicious circumstances mentioned above it is not possible for me to hold that the appellants have established by reliable evidence that the mortgage was for consideration and consequently no question of bona fides arises. It is conceded that in the case of application under S. 53 the burden is on the transferee to prove that the transaction under which he claims was for valuable consideration and made in good faith. This the appellants have failed to establish. I dismiss this appeal. As the respondent is not represented before me there will be no order of costs of this Court.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 416

TEK CHAND, J.

Kunj Lal and *others*—Plaintiffs—Appellants.

v.

Ramji Lal and *others*—Defendants—Respondents.

Second Appeal No. 377 of 1926, Decided on 22nd February 1927, from the decree of the Senior Sub-J., Rohtak, D/- 16th November 1925.

(a) Co-sharer — Goredeh is part of common land reserved for common purpose — Plot encroached upon is small in size or no special damage is caused is no ground for encroachment.

The goredeh is a part of the common land of the village reserved for the common purpose of the proprietors and the mere fact that the plot encroached upon by one proprietor is small in size or that no special damage has been caused to the other proprietors is no ground for upholding the wrongful act of the former. In such a case it is not legally necessary to prove special damage: *A. I. R* 1921 *Lah.* 157, *Foll.*

[P. 417, C. 1]

(b) Adverse possession—Co-sharer—Trees—Individual proprietor, cannot, by planting trees on common land without consent of all, appropriate it to his use and claim adverse possession.

The planting of trees on the common land is a matter of common occurrence in India and is often done as an act of piety and public utility. It is well settled that an individual proprietor cannot by planting trees on common land without consent of all co-sharers appropriate it to his own use and therefore title by adverse possession cannot be acquired by such possession.

[P. 417, C. 1]

Shamair Chand—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Tek Chand, J.—The plaintiff-appellants instituted the present suit against the defendants-respondents for issue of a perpetual injunction directing the defendants to remove their possession from the plots of land in the vilage Goredeh, marked A B C D H K and D E F G respectively on the plan Ex. P. 1. It was alleged in the plaint that these parts were part of the common property of the parties and had been set apart for their common purpose and that defendants had recently taken illegal possession thereof by enclosing them and planting trees. The defendants pleaded that the portion D E F G had been purchased by them in a Court sale in 1909, that the other plot had been in their possession for over 12 years and that the suit for injunction was time barred. The trial Court upheld the plea of purchase with regard to the plot D E F G and finding that the defendants had planted trees on the other plot more than six years before the institution of the suit, dismissed it as time barred. The Senior Sub-Judge having dismissed the plaintiff's appeal, they have come to this Court on second appeal, and their learned counsel, Mr. Shamair Chand, has admitted before me that he cannot support his clients' claim with regard to the plot D E F G which the defendants are proved to have purchased in a Court sale. As regards the other plot A B C D E F however, he argues that on the facts as found by the Senior Sub-Judge, the defendants cannot be said to have acquired adverse possession of it.

From the plan it will be seen that this plot is sub-divided into two portions (i) A B H K over which there are seven neem and other trees planted; and (ii) B. C. D. H. which is an open courtyard in front of the defendants' house. Now, as to the latter plot no particular act of possession by the defendants is proved and all that the learned Senior Sub-Judge says is that

> it is of too small a size to be of particular use to anybody except the defendant himself and that there is no suggestion that its possession by him has diminished the utility of the thoroughfare or that it formed a part of the thoroughfare.

In my opinion this was insufficient to disentitle the plaintiffs from getting the

relief claimed by them. The goredeh is a part of the common land of the village reserved for the common purpose of the proprietors and the mere fact that the plot encroached upon by one proprietor is small in size or that no special damage has been caused to the other proprietors is no ground for upholding the wrongful act of the former. In such a case it is not legally necessary to prove special damage, nor is there any force in the contention that the plaintiffs' remedy is by way of a suit for partition: see *Manji* v. *Ghulam Muhammad* (1).

As to the plot A B H K Mr. Jagan Nath asserts that his clients have been in adverse possession of it, but the only possession that is alleged is that the defendants had planted a few trees on it six or seven years ago. I am not aware of any rule of custom or law and no authority has been cited before me, that a proprietor by merely planting a few neem and other trees of public utility on a part of the goredeh can be said to have taken exclusive possession of such land so as to become the exclusive owner thereof. The planting of trees on the common land is a matter of common occurrence in India and is often done as an act of piety and public utility. It is well settled that an individual proprietor cannot by planting trees on common land without consent of all co-sharers appropriate it to his own use (Rattigan's Digest S. 206). It is concluded that the enclosure around these trees has been very recently constructed. It is, therefore, clear that the defendants have not acquired any title to any part of the plot A B C D H K by adverse possession. As the adverse title can be said to have been asserted only when the enclosure was built, the suit is not time barred.

For the foregoing reasons I accept the appeal to this extent, that I pass a decree as prayed in favour of the plaintiffs against the defendants with regard to the plot marked A B C D H K but dismiss their suit with regard to the plot D E F G. As the plaintiffs have been only partially successful I order that the parties will bear their own costs throughout.

R.D. *Appeal partly accepted.*

(1) A. I. R. 1921 Lah. 157=2 Lah. 73.

A. I. R. 1927 Lahore 417

HARRISON AND DALIP SIGNH, JJ.

Dhan Singh—Defendant—Appellant.

v.

Mt. Ganesh Bai and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2212 of 1922. Decided on 15th March 1927, from a decree of the Sr. Sub-J., Mianwali, D/- 17th July 1922.

Fatal Accidents Act, S. 1—No rule exists as to how many years income is to be allowed as compensation—Possibility of earner's death, his age and earning capacity are to be considered.

No very definite rule has been laid down as to how many years' income should be allowed as compensation to the heirs of the deceased in a suit under the Act. Everything is to be taken into account, possibility of the earner's death, his age and earning capacity, for calculating the amount of damages. [P 418, C 1]

Jagan Nath Aggarwal, Anant Ram and *S. R. Laul* for *Udai Bhan*—for Appellants.

G. C. Narang, H. D. Bhalla and *Hargopal*—for Respondents.

Judgment.—The family of one Sawan Ram, deceased, consisting of his widow, his two minor sons and six minor daughters has brought this suit under Act 13 of 1855 claiming Rs. 8,000 damages on account of the loss resulting from the death of Sawan Ram, the allegation being that his death was caused by Dhan Singh and another, against whom no action has been taken as he was acquitted in the Criminal Court, and that the remaining defendants assisted in effecting the common object. A decree in full for Rs. 8,000 has been given against Dhan Singh and the suit has been dismissed against the remaining defendants. Both sides have appealed, the plaintiff claiming his decree against all and Dhan Singh challenging the correctness of the decision and the amount awarded and the remaining defendants claiming their costs, which had not been given in their favour.

So far as the principal question is concerned we find it established by the evidence that the death of Sawan Ram was caused by Dhan Singh and that the plaintiff is entitled to damages.

So far as the amount of damages is concerned we have found it far from easy to come to a satisfactory conclu-

sion. Sawan Ram was a member of a joint Hindu family consisting of his father, three brothers and himself. There was a family money-lending business and land owned by the whole family. Evidence has been produced which is far from convincing and very vague and this to the effect that Sawan Ram earned Rs. 2,500 or more a year. The income of the whole family was made up of the income from the business, the income from the land and the income from the cattle dealing, the total on which income-tax was paid being Rs. 4,000. Of this Rs. 1,000 may be allowed as the share of Sawan Ram and out of this Rs. 1,000 we calculate that roughly Rs. 300 may be considered to represent the actual earning of Sawan Ram as opposed to the income from the land and the business which still continued. Various authorities have been quoted but no very definite rule appears to have been laid down as to how many years' income should be allowed. Everything has to be taken into account, possibility of the earner's death, his age, earning capacity, and after so taking everything into account, we allow eight years' income or Rs. 2,500. We accept the appeal of Dhan Singh in so far as to reduce the amount of damages to Rs. 2,500 with proportionate costs.

So far as the appeal of plaintiff is concerned we find that it is not established that any of the other defendants is liable, We, therefore, dismiss the appeal with costs. So far as the remaining defendants are concerned we find, that the suit having been dismissed against them they were entitled to their costs in the trial Court and we accept the cross-objections with costs and order accordingly.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 418

SKEMP, J.

Mt. Bhagan—Defendant—Appellant.

v.

Buta Mal—Plaintiff—Respondent.

Second Appeal No. 2357 of 1926, Decided on 1st March 1927, from the decree of the Dist. J., Jhelum, D/- 29th May 1926.

(a) Civil P. C., O, 22, R. 4—Abatement.

Death of defendant who had expressed that he had no interest in suit does not cause whole suit to abate. [P, 419, C. 1]

(b) Civil P. C., O. 41, R. 31—Appellate Court basing its decision on obiter of trial Court—Judgment is not in accordance with law.

Trial Court decided a case on preliminary point but also expressed opinion on merits. Appellate Court reversed the decision on preliminary point and decided on merits basing its decision on the decision of that of trial Court;

Held: that the trial Court's judgment on merits being an obiter, and that of appellate Court being based on that, the latter was not a judgment in accordance with law. [P. 419, C. 2]

Nand Lal—for Appellant.

Dhan Raj Shah—for Respondent.

Skemp, J.—One Hari Ram sued for possession of a house on the ground that it had been sold to him by Devi Ditta Mal, deceased. He joined as defendants the two widowed daughters-in-law of Devi Ditta Mal, Mt. Bhagan and Mt. Shiv Devi. Mt. Bhagan denied knowledge of the sale, pleaded that Devi Ditta Mal had no right to sell and that the house was her exclusive property having fallen to her husband's share when the latter separated from his father 30 years previously. Mt. Shiv Devi admitted that Devi Ditta Mal had sold the house and said that she had no concern with it. The Subordinate Judge framed an issue: "Was Devi Ditta Mal vendor owner of the house and did he sell the house to the plaintiff?"

After this issue was framed the plaintiff died on the 10th of April 1924, and there was a contest who should be appointed his legal representative. This was not settled until the 22nd of January 1925 when the Subordinate Judge appointed one Buta Mal. Subsequently Mt. Bhagan pointed outthat Mt. Shiv Devi had also died; her petition stated that she had died on the same date as Hari Ram. No application was ever made to bring on the record any representative of Shiv Devi.

The Subordinate Judge held that the suit abated; he went on further to say quite briefly that the evidence proved the sale to Hari Ram. He dismissed the suit and Buta Mal appealed. On appeal the learned District Judge held that the suit abated only as far as Shiv Devi was concerned and could proceed against Mt. Bhagan. On the Subordinate Judge's own showing Buta Mal was entitled to a decree against Mt. Bhagan and this was granted.

Defendant has now come to this Court on further appeal on the points (1) that the suit abated and (2) that if not the District Judge should have remanded the case to the lower Court for decision on the merits.

On the question of abatement as already noted no successor to Mt. Shiv Devi was ever brought on the record and the date of her death is therefore not material. The sole question is whether she was a necessary party.

The appellant's argument is that the vendor Devi Ditta Mal had two sons; it was said that they predeceased him and that their respective widows each had no interest in the property, therefore Mt. Shiv Devi was a necessary party.

On the other hand Mt. Shiv Devi herself in her written statement stated that she had no connexion with the house. The learned District Judge wrote: "In my opinion she was not a necessary party and was impleaded as a matter of precaution only;" and with this I agree. If Mt. Shiv Devi had not been impleaded the suit could have been tried against Mt. Bhagan alone who asserted her exclusive rights of possession. I, therefore, hold that the suit can proceed against Bhagan.

On the second point the Subordinate Judge wrote as follows:

> The ownership of Devi Ditta Mal in respect of the house and its sale for consideration to Hari Ram has been satisfactorily proved by the evidence on the record and the defendant Mt. Bhagan has totally failed to establish the alleged exclusive ownership of the house by means of partition between her husband and father-in-law; and it is needless to go into details in regard to the original issue in the case as the suit has clearly abated.

That was all upon the merits, and that of course was obiter as he had already decided the point of abatement. When the case came before the District Judge, after deciding the question of abatement he cited these remarks and went on:

> The point of abatement having been decided in favour of the appellant Buta Mal is entitled to the decree for possession on the own showing of the learned Sub-Judge.

Therefore it is clear that the appellant has not had a reasoned finding on the evidence in either Court.

Mr. Dhanraj for the respondent Buta Mal suggested, though not seriously, that the findings were findings of fact; but no reasons are given to support them and the question becomes whether the judgments were in accordance with law. Mr. Dhanraj's serious contention is that Mt. Bhagan took cross-objections to the District Judge against the finding of the Subordinate Judge on the question of costs only and did not attack the finding that the sale was proved. Therefore he says Buta Mal cannot re-agitate this question now. The argument is that cross-objections are like an appeal; if no appeal is lodged against a decree the decree is final and similarly if no cross-objections are lodged against a point decided against a respondent then that point is final.

The argument is fallacious because the finding, if it can be called such, was not necessary to the determination of the suit which had already been decided by the Subordinate Judge on another point. I hold, therefore, that the plaintiff's omission to protest by way of cross-objection is no bar to his protesting now.

The judment of neither the Subordi- Judge nor the learned District Judge on this point was in accordance with law. O. 20, R. 4 (2) of the Code of Civil Procedure lays down that judgment should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Similarly O. 41, R. 31 lays down that the judgment of an appellate Court shall give the reasons for decision. In this case neither the Subordinate Judge nor the learned District Judge gave reasons for decision.

I, therefore, accept the appeal and remand the appeal to the Court of the District Judge with directions that he should do what ought to have been done in the first instance, i. e., remand the case to the Court of the Subordinate Judge for a reasoned decision on the first issue. I note each party closed its case in the Court of the Subordinate Judge and that neither has a right to produce any further evidence. The costs of this hearing are to be costs in the cause.

D.D. *Case remanded.*

* A. I. R. 1927 Lahore 420

CAMPBELL AND TEK CHAND, JJ.

Mohammad Ishaq and *others*—Defendants—Appellants.

v.

Mohammad Yusaf and *others*—Plaintiffs and Defendant—Respondents.

First Appeal No. 2142 of 1922, Decided on 22nd February 1927, from the decree of the 1st Cl. Sub-J., Delhi, D/- 20th May 1922.

(a) *Transfer of Property Act, S. 53 — Principles apply to Punjab.*

The principles of S. 53, Transfer of Property Act, apply to the Punjab. [P 420.C 2]

(b) *Transfer of Property Act, S. 53—Creditor must prove that alleged alienation is gratuitous, that it was made when he was a creditor of alienor and that his claim has been delayed or defeated.*

Where a gift is alleged to be affected by S. 53, the burden of proof is on the plaintiff to prove that at the time of the gift he was a creditor of the donor, (b) that the alienation was gratuitous and (c) that his claim against the donor had been defeated or delayed by it and then the Court would presume that the alienation had been made with intent to defeat or delay him as a creditor. [P 420 C 2]

* (c) *Transfer of Property Act, S. 53—No debts in existence at the time of gift—Subsequent indebtedness—Gift must be proved to have been with intent to defeat or delay creditors (Tek Chand, J.).*

In cases where there are debts due at the time of a gratuitous transfer, it will be presumed that the transfer was made with intent to defeat or delay the creditors. But where there are no debts due at the time and the transferrer runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferrer embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances, the transaction will be presumed to be bona fide and it will lie on the future creditors to prove that the transfer was made with an intent to defeat or delay them. [P 421 C 1]

Jagan Nath Aggarwal and *Anant Ram Khosla*—for Appellants.

Kishen Dayal and *Bishen Narain*—for Respondents.

Campbell, J.—On 22nd November 1920, Mt. Muhammad Zamani Begum obtained a decree for Rs. 5,500 against her husband Muhammad Ibrahim. On 19th August 1919, Muhammad Ibrahim gifted certain house property to his minor sons by another wife Mt. Bunyadi Begam. This property was attached by Mt. Muhammad Zamani Begam in execution of her decree. The donees lodged objections which were successful. Mt. Muhammad Zamani Begam then lodged the present suit on 5th August 1921, for a declaration that the gift was a nullity and that the gifted property was liable to be taken in satisfaction of her decree. The trial Court has given her the declaration sought and the donee defendants have appealed.

The lower Court struck the issue "Is the gift invalid" and held that it had been made in order to defraud the plaintiff, a creditor. The rule governing the disposal of the suit is that contained in S. 53 of the Transfer of Property Act, the principles of which section have been repeatedly applied by the Punjab Courts in dealing with similar questions. The burden of proof was on the plaintiff but if she succeeded in proving (a) that at the time of the gift she was a creditor of the donor, (b) that the alienation was gratuitous and (c) that her claim against the donor had been defeated or delayed by it, the Court was entitled to presume that the alienation had been made with intent to defeat or delay her as a creditor.

In my opinion if this presumption can be created the plaintiff must succeed, but otherwise she must fail. The case strikes me as having been conducted with great laxity on both sides and the evidence as recorded appears to me to be quite worthless.

The gift was a gratuitous alienation without doubt and it has defeated the claim of the plaintiff based on her decree, but the plaintiff has failed to prove that she was a creditor at the time of the gift. It is alleged and was alleged in the plaint that the decree was an ex-parte decree based upon a promissory note dated 1st October 1918, a date prior to that on which the gift was made, but this has not been proved. The defendant-appellants pleaded, as they were entitled to plead (being minors) that they knew nothing of either suit or promissory note. The plaintiff has failed to bring on to the record either the promissory note or a copy of the decree or a copy of the judgment on which it was based. At the most the plaintiff has established that a decree was passed against Muhammad Ibrahim in her favour after the gift was made. The question whether the exe-

cution of a promissory note by Muhammad Ibrahim in favour of Mt. Muhammad Zamani Begam constituted the latter his creditor within the meaning of S. 53 of the Transfer of Property Act would not arise until that execution is proved to have taken place before the alienation attacked in the suit. The learned Subordinate Judge has assumed without any support from the contents of the record that it did so take place, and all that the respondents' learned counsel can do to meet this defect in his case is to ask for an opportunity to lead fresh evidence, a request which I can see no reason for granting.

I would accept the appeal and dismiss the suit with costs throughout.

Tek Chand, J.—I agree and wish to add a few words with reference to an additional argument put forward on behalf of the respondents, that under S. 53 of the Transfer of Property Act, it is not only the creditors, who have actually a debt due to them at the time of the voluntary transfer who are entitled to impeach it, but that the transaction can be annulled at the instance of subsequent creditors also. This proposition is no doubt true, but it has to be borne in mind, that in such cases the allocation of onus will be regulated on entirely different considerations. In cases where there are debts due at the time of a gratuitous transfer, it will be presumed, as has been pointed out by my learned brother, that the transfer was made with intent to defeat or delay the creditors. But where there are no debts due at the time and the transferrer runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferrer embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances the transaction will be presumed to be bona fide and it will lie on the future creditors to prove that the transfer was made with an intent to defeat or delay them.

In my opinion a voluntary settlement by a person, who owes no debt at the time, in favour of his children for natural love and affection cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying the subsequent creditors. Story in his Equity Jurisprudence Volume I, S. 361 has thus summed up the law on the subject, in the words of Chancellor Kent :

> Fraud in a voluntary conveyance is an inference of law in so far as it concerns existing debts, but there is no such legal presumption as regards subsequent debts. There must be proof of positive fraud in fact, to vitiate a voluntary conveyance.

Similarly May, in his standard work on Fraudulent Conveyance and Dispositions of Property, says :

> Where the settler was not indebted at the time, the onus of proving the fraud is thrown on those who impeach the settlement, for fraud is not to be presumed. The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors.

The onus thus being on the plaintiff and he having failed to place on the record any materials to discharge it, it cannot be said that the gift was made with intent to defeat or delay the plaintiff.

I, therefore, concur in the conclusions arrived at by my learned brother.

D.D. *Appeal accepted.*

** A. I. R. 1927 Lahore 421

ZAFAR ALI AND JAI LAL, JJ.

Jesa Ram—Petitioner.

v.

Commissioner of Income-tax—Respondent.

Civil Reference No. 20 of 1926, Decided on 15th January 1927.

** *Income-tax Act* (1922), *S.* 33—*Rectification to assessee's prejudice—Limitation of one year applies.*

The expression "subject to the provisions of this Act" in S. 33 (2) includes the restriction as to limitation imposed on other income-tax authorities, and, consequently, rectification of a mistake by Commissioner to the prejudice of the assessee after the expiry of one year from the date of the demand made upon the assessee is not authorized by law. [P 422 C 2]

Jagan Nath Aggarwal—for Respondent.

Order.—This is a reference under S. 61 (1) of the Indian Income-tax Act by the Commissioner of Income Tax Punjab and North-West Frontier Province, and the question on which we are asked to give our opinion is

whether under the circumstances of the present case there is any legal limitation preventing the Commissioner from passing his order under S. 33 dated the 15th December 1925, the result of which is an enhanced demand.

The circumstances referred to are that the assessee was assessed to income-tax on an income of Rs. 28,434 but in actually calculating the tax the income-tax officer made calculations at the rate of Re. 0-1-0 in the rupee instead of Re. 0-1-3 which was the proper rate of tax on the amount concerned. In his order, however, the income-tax officer clearly stated that the amount of tax had to be and was calculated at the latter rate. It will thus be observed that there was a mistake of calculation apparent from the record of the assessment. The assessee, however, was not satisfied with the amount on which he had been assessed and claims a reduction of Rs. 8,111, said to be irrecoverable loans written off during the accounting period. He applied to the Commissioner to refer the matter to this Court or to exercise his powers of review under S. 33 of the Income-tax Act. The learned Commissioner entertained the application for review and finally decided to allow the assessee Rs. 1,905 as irrecoverable loans written off during the accounting period. The result was that the total assessable income was reduced to Rs. 21,529, but the Commissioner calculated income-tax thereon at Re. 0-1-3 per rupee. The result was that the actual amount of income-tax demanded from the assessee exceeded the amount for which a notice of demand had originally been issued by the income-tax officer on the 31st December 1923. The final order of the Commissioner was passed on the 15th December 1925, the date of the assessee's application to him being the 27th June 1924. It will thus be observed that the application for reference and review was presented within one year of the date of demand, but the actual rectification of the mistake was made by the Commissioner more than a year after that date. The learned Commissioner is of opinion that no question of limitation arises when he passes an order under S. 33 of the Indian Income-tax Act in exercise of his powers of review and that in the present case, as the review proceedings originated in the assessee's petition of the 27th June 1924, on which date action could have been initiated by the income-tax officer under S. 34 or 35 of the Act. the ordinary period of one year provided by those sections did not apply.

After giving our careful consideration to the above opinion and the arguments advanced before us by Mr. Jagan Nath Aggarwal, who appeared for the Crown we are of opinion that the question should be answered in the affirmative. S. 33 provides that the Commissioner may call for the record of any proceedings under the Act and after such enquiry as he may consider fit may pass such orders as he thinks fit but subject to the provisions of the Act. Now S. 35 provides that the income-tax officer may at any time within one year from the date of any demand rectify any mistake apparent from the record of the assessment. This power includes the rectification of a mistake which has the effect of enhancing an assessment. The words "subject to the provisions of this Act" contained in S. 33 leave no doubt in our minds that the Commissioner is not entitled to pass an order which he himself or another income-tax authority is not anthorized to pass under the other provisions of the Act. In the absence of an express provision enabling the Commissioner to pass orders prejudicial to an assessee without any limit of time we are of opinion that his powers are subject to the same restrictions as those of an income-tax officer under S. 35 which clearly provides that an income-tax officer is not entitled to rectify a mistake to the prejudice of an assessee after the expiry of one year from the date of the demand. Even if the case be governed by S. 34 which enables an income-tax officer to re-assess income, profits or gains when they have escaped assessment or have been assessed at too low a rate, the same remarks would apply mutatis mutandis as under that section also the powers must be exercised within one year. We are, therefore, of opinion that the expression "subject to the provisions of this Act" includes the restriction as to limitation imposed on other income-tax authorities, and, consequently, the rectification of the mistake in this case to the prejudice of the assessee after the expiry of one year from the date of the demand made upon the assessee, was not authorized by law. To hold otherwise would mean that there is no limit to the Com-

missioner's power to re-open and alter assessments to the prejudice of an assessee, a position that the legislature could not have contemplated. The fact that the assessee had moved the Commissioner under S. 33 would not, in our opinion, make any difference because the question of rectification was not covered by his petition.

With the above expression of opinion we return the case to the Commissioner. The assessee was not represented before us; there will, therefore, be no order as to the costs of this reference.

D.D. *Case returned.*

A. I. R. 1927 Lahore 423 (1)

DALIP SINGH, J.

Bhola Nath—Plaintiff—Petitioner.

v.

Mohammad—Defendant—Respondent.

Civil Revision No. 824 of 1926, Decided on 3rd February 1927.

Landlord and tenant—Death of lessee does not terminate lease—Heirs are liable till determination.

A tenancy does not terminate with the death of the lessee and his heirs and legal representatives are liable for the rent unless and until the lease is determined. [P 423, C 1]

Shamair Chand—for Petitioner.

Judgment.—In this case the plaintiff sued for recovery of rent from certain minor defendants. The Court framed the following issues :

1. Are the minor defendants tenants of plaintiff ?
2. What rent is due to the plaintiff ?

On Issue No. 1 it held that the father of the minors was admittedly a tenant of the plaintiff, but the minors were not tenants. It held that the minors had no use and occupation of the house because it was the minors' uncle who actually was in occupation of the house and the minors were only living with him.

In revision it is urged that a tenancy does not terminate with the death of the lessee and that his heirs and legal representatives are liable for the rent unless and until the lease is determined. There is no finding whether the lease had determined or not and, I therefore, accept the revision and remand the case for the determination of the question having regard to the above remarks.

R.D. *Case remanded.*

A. I. R. 1927 Lahore 423 (2)

JAI LAL, J.

Niadar and *others*—Plaintiffs—Appellants.

v.

Bhartu and *others*—Defendants—Respondents.

Second Appeal No. 1127 of 1926, Decided on 23rd March 1927, from the decree of the Dist. J., Karnal, D/- 7th January 1926.

Civil P. C., O. 41, R. 1—Lahore High Court—Copy of trial Court's judgment must be filed—Note to that effect that such copy is already filed in previous proceedings is not sufficient.

Every memo of appeal should be accompanied by a copy of the judgment of the trial Court. A note to the effect that the copy of the trial Court's judgment is already filed in the High Court, though in another case, but between the same parties arising practically out of the same proceedings, is not sufficient compliance with the rule. [P 424, C 1]

Mohsin Shah—for Appellants.

Shamair Chand—for Respondents.

Jai Lal, J.—A preliminary objection taken by the counsel for the respondents that this appeal has not been properly instituted as the memorandum of appeal is not accompanied by a copy of the judgment of the trial Court has force and must be allowed.

It appears that on a previous occasion a second appeal was filed by the present appellants against the decree of the District Judge. That appeal was accepted and the case remanded to the District Judge under O. 41, R. 23, for decision of the appeal on the merits. The learned Judge has now decided the appeal on the merits and the appellants have again filed this second appeal. A copy of the judgment of the District Judge appealed against has been filed with the memorandum of appeal, but with regard to the copy of the judgment of the trial Court a remark is entered at the back thereof that the same is "already in the High Court in Appeal No. 1382 of 1921 decided on the 27th of February 1925." Counsel for the appellant contends that the note made by him and alluded to above is a sufficient compliance with the provisions of the law, the object of which according to him is that the High Court should be able to lay its hands on the judgment of the trial Court. He further contends that as the copy of the judgment was in this Court, though in

another case, but between the same parties arising practically out of the same proceedings, it must be deemed that the copy of the judgment of the trial Court has been filed with the memo. of this appeal. The rule made by this Court provides that every memorandum of appeal, in addition to the documents mentioned in R. 1 of O. 41, "shall be accompanied" by a copy of the judgment of the trial Court. These provisions are mandatory and must be complied with. I am unable to hold that a mere note by the appellant such as is mentioned above is a sufficient compliance with such provisions of the law.

I hold that the appeal has not been properly instituted and as no prayer has been made for opportunity to file a copy now, and, as in any case the appeal is now barred by time, dismiss this appeal, but make no order as to costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 424 (1)

DALIP SINGH, J.

Gajjoo Mal—Plaintiff—Appellant.

v.

Chandoo and *others*—Defendants—Respondents.

Second Appeal No. 1854 of 1926, Decided on the 7th January 1927, from a decree of the Sr. Sub-J., Ambala, D/- 17th May 1926.

Civil P. C., O. 16, R. 10—Summonses duly served—Witnesses not appearing—Plaintiff offering to bring them—Court insisting on warrants to be issued is not legally wrong although it is harsh—High Court declined to interfere under S. 100.

Where certain witnesses of the plaintiff who were duly served did not appear on the date of hearing and thereupon the Court offered to issue warrants for them, the plaintiff declined to put in process-fee for warrants but offered to bring the witnesses with him on the next date.

Held : that the Court was not legally in error in not allowing the plaintiff to bring his own witnesses although under C. 16, R. 10, a discretion is given to the Court to do so and that though itacted harshly, the High Court will not interfere in second appeal. [P424 C 2]

Obedullah—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The only point in this appeal is that three witnesses of the plaintiff who were duly served did not appear on the date of hearing. Thereupon the Court offered to issue warrants for them. The plaintiff declined to put in process-fee for warrants, but offered to bring the witnesses with him on the next date. The Court, however, closed the case and proceeded to judgment. In appeal before the Senior Subordinate Judge the only argument urged was that the proper procedure for the Court was to fix a date for deposit of process-fee for warrants and if the plaintiff did not deposit the process-fee his case could then have been closed.

In appeal before me the matter has been put in a different way. The counsel urges that a fresh date would have had to be given even if warrants were issued, and that it was hard to insist on the plain tiff summoning the witnesses by warrants when he offered to produce them himself. If this was a first appeal I would certainly accede to this contention. But in view of the fact that the point as now urged was not urged before the Senior Subordinate Judge, and, secondly, that I cannot hold that the Court was legally in error in not allowing the plaintiff to bring his own witnesses, I am precluded in second appeal from interfering with the orders of the Courts below. Under O. 16. R. 10 a discretion seems to be given to the Court to adopt one of two methods for enforcing attendance. I cannot hold that the Court was wrong in insisting on the method though I certainly think it acted harshly. I, therefore dismiss the appeal but in the circumstances I do not allow the respondent the cost qua this appeal.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 424 (2)

JAI LAL. J.

Thakar Singh—Objector—Appellant.

v.

Ganga Singh and *others*—Respondents.

Misc. First Appeal No. 1907 of 1925, Decided on 11th April 1927, from the order of the Dist. J., Jhelum, D/- 15th June 1925.

(a) Provincial Insolvency Act, S. 75 (3)—Sanction.

Sanction cannot be deemed to have been granted by mere admitting an appeal to a hearing. [P 425 C 2]

(b) *Provincial Insolvency Act, S. 75—Appeal against order of District Judge—Creditor dying—Appeal does not abate.*

Where in an appeal against an order of District Judge a creditor died and no legal representatives are brought on the record within the time fixed by law, the appeal does not abate as the real person who is interested in the appeal is the Official Receiver. [P 425 C 2]

Muhammad Amin and *Muhammad Azam Khan*—for Appellant.

Nand Lal and *Devi Dayal*—for Respondents.

Jai Lal, J.—Thakar Singh, appellant, was adjudicated an insolvent on his own petition. In the schedule of his assets filed with his application for adjudication he mentioned certain occupancy rights in the land in dispute and described them as rights under S. 5 of the Punjab Tenancy Act. When proceedings were taken for the sale of the occupancy rights he raised an objection that the same could not be sold. This objection was sent for investigation to the Official Receiver who reported against the insolvent, but the latter presented another application before the District Judge stating that his objections had not been properly understood by the Official Receiver and that he meant to object to the sale of the rights on the ground that they were under S. 6 of the Punjab Tenancy Act. This application also was sent by the District Judge to the Official Receiver for enquiry. It may here be mentioned that it is common ground that rights under S. 5 can be sold, but those under S. 6 cannot. The Official Receiver again reported against the applicant. On receipt of the report, the learned District Judge apparently heard the arguments of counsel on both sides and disallowed the objection, and the rights having been sold in the meantime confirmed the sale. This is an appeal from the order of the learned District Judge disallowing the objections and confirming the sale.

The only ground urged in support of the appeal is that the learned District Judge should have given further opportunity to the appellant to prove his allegation that he was a tenant under S. 6 of the Punjab Tenancy Act and not under S. 5 as mentioned by him in his application for adjudication. It appears that such a request was made before the District Judge at the time of the arguments and I might have under the circumstances, considered the question of a remand to enable the appellant to produce further evidence, but a preliminary objection is taken on behalf of the respondents that the appeal does not lie without the sanction of the District Judge or of the High Court and that as no such sanction has been obtained in this case the present appeal is incompetent.

Counsel for the appellant replies to this objection by stating that sanction should be deemed to have been granted by the Division Bench when admitting this appeal to a hearing but the question of granting sanction or otherwise was not before the Division Bench and I am unable to hold that the Bench granted any sanction to the appellant. Then the counsel asked me to grant him sanction at this stage but I found myself unable to do so considering that the fact was not noticed by the counsel for the appellant till practically the whole case had been argued on both sides.

Another objection raised by the respondents that one of the creditor-respondents, having died and no legal representatives having been brought on the record within the time fixed by law the appeal had abated, has, in my opinion, no force as the real person who is interested in this appeal is the Official Receiver and he has already been made a respondent. In any case there are good grounds for condoning the delay in applying to set aside the abatement.

The result is that on my finding that this appeal is incompetent for want of sanction, I must dismiss it with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 425

SHADI LAL, C.J., AND BROADWAY, J.

Abdul Hamid—Plaintiff—Appellant.

v.

Muhammad Afzal—Defendant—Respondent.

Letters Petent Appeal No. 231 of 1925, Decided on 4th February 1927, from the judgment of Jai Lal, J., D/- 30th April 1925, in Civil Appeal No. 3141 of 1924.

Civil P. C., Sch. 2, Para. 15—Legal misconduct.

If an umpire makes enquiries behind the back of any party, he is guilty of misconduct, whether he recorded evidence at the time or not. [P 426 C 2]

Muhammad Amin—for Appellant.
H. C. Mital—for Respondent.

Judgment.—Certain disputes having arisen between one Muhammad Afzal and Abdul Hamid, they referred the same to arbitration. The agreement to refer contained a clause to the effect that in the event of the arbitrators named being unable to agree, one Muhammad Ashraf was to act as Umpire. The arbitrators named having differed, Muhammad Ashraf, as Umpire, made an award. Abdul Hamid filed an application under para. 20, Sch. II, of the Civil P. C., praying that the award should be filed and a decree passed in accordance therewith. Muhammad Afzal raised various objections to the award charging the Umpire with misconduct and pointing out that the award was defective owing to serious arithmetical errors.

The trial Judge found that no misconduct had been proved against the Umpire and held that he himself could correct the arithmetical errors. He accordingly directed the award to be filed and granted a decree in accordance with it as amended by him.

Against this Muhammad Afzal preferred an appeal to this Court which was heard by Mr. Justice Jai Lal who held that the award was vitiated owing to the misconduct of the Umpire and owing to the fact that the arithmetical mistakes could not be rectified by the Court and were illegalities apparent on the face of it. He accordingly accepted the appeal and dismissed the application to file the award.

Abdul Hamid has preferred this appeal under Cl. 10 of the Letters Patent and on his behalf Mr. Muhammad Amin has contended that the view taken by the learned Judge in Chambers on the points raised before him was erroneous. A great deal of argument centered round the question whether the Court had the power to correct arithmetical errors in an award. I do not think it necessary to discuss this point, however, as in my opinion the appeal must be dismissed on the ground that the learned Judge in Chambers is right in holding that the Umpire was guilty of misconduct. The Umpire when examined admitted that he made certain enquiries at Mouza Dulla in the absence of Muhammad Afzal although he denied that he recorded any evidence at the time. He also stated that he had informed the defendant of this fact later on. It seems to me that in making these enquiries behind Muhammad Afzal's back the Umpire was clearly guilty of misconduct, whether he recorded evidence or not, as, in my opinion, such an ex-parte enquiry should not have been made. It is impossible to determine what impression this ex-parte enquiry made on the mind of the Umpire and how far it affected his ultimate decision. I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 426

TEK CHAND, J.

Mehran—Plaintiff—Appellant.

v.

Rahimi and *others*—Defendants—Respondents.

Second Appeal No. 2847 of 1926, Decided on 7th February 1927, from the decree of the Senior Sub-J., Karnal, D/- 26th August 1926.

(a) *Civil P. C., S. 100—A claim altering nature of the case cannot be allowed in second appeal.*

Where a plaintiff did not come into Court claiming as the heir of his father :

Held : that he cannot be allowed to claim as such heir as it would be setting up a new case in second appeal. [P. 427, C. 1]

(b) *Co-sharer—Adverse possession—Co-sharer's possession though exclusive is not adverse.*

Though a co-sharer in certain property is in exclusive possession of that property, his possession cannot be adverse against the other co-sharers : 64 *P. R.* 1918 (*P. C.*), *Rel. on.* [P. 427, C. 2]

(c) *Limitation Act, Art. 144—Constructive possession of gift property—Suit within 12 years from date of gift is within time.*

If a person is in constructive possession of certain property up to the date of a gift of that property, a suit by his donee within 12 years from such date is within time. [P. 427, C. 2]

Shamair Chand—for Appellant.
Mohammad Amin—for Respondent.

Tek Chand, J.—The relationship of the parties will be clear from the following pedigree-table :

MUNNI

Muhammada	Rahimi (defendant)	Faiza (died childless)
Mt. Mehran (daughter) plaintiff		

On the 7th of July 1924, Mt. Mehran instituted the present suit for possession of a house alleging that Faiza was its original owner and that he had gifted it to her by a registered-deed dated the 1st of May 1913. The defendant Rahimi resisted the suit on the ground that he was the owner in possession of this house for more than twelve years. The trial Court finding for the plaintiff, decreed her suit with costs. On appeal the learned Senior Sub-Judge found that the house originally belonged to Munni on whose death it descended to his three sons, Muhammada, Rahimi and Faiza in equal shares and that it belonged jointly to all three of them. He found that Faiza's share in the house was ⅓rd and therefore he could make a gift to that extent only. He held the gift proved but holding that Faiza died more than twelve years before suit, and that there was no reliable evidence to show that the plaintiff ever came into possession of Faiza's share, dismissed her suit as time barred.

The plaintiff has come up to this Court on second appeal and Mr. Shamair Chand on her behalf has conceded that the finding of the lower appellate Court that the house belonged to Muhammada, Rahimi and Faiza jointly must stand. He admits that on this finding his client has no right to ⅓rd of the house which belonged to Rahimi, but he argues that Mt. Mehran, the plaintiff, is entitled to the remaining ⅔rds: (*a*) to ⅓rd by virtue of succession to her father Muhammada; and (*b*) to ⅓rd by reason of the gift dated the 1st May 1913, by Faiza in her favour. He also argues that the finding of the lower appellate Court on the question of limitation is erroneous.

Now, qua the share of Muhammada I am of opinion that the contention of the learned counsel cannot be sustained. The plaintiff did not come into Court claiming as the heir of her father Muhammada, and she cannot be allowed to set up a new case in second appeal. There is nothing on the record to show whether the parties are governed by Muhammadan Law or custom and what the share of the plaintiff in Muhammada's estate would be. Moreover Mudammada admittedly died more than 12 years before suit and plaintiff's claim as to his share would obviously be time barred. The claim with regard to this ⅓rd share must, therefore, fail.

As to the remaining ⅓rd, however, I am of opinion that the appeal must succeed. Both the Courts below have held the gift by Faiza in favour of the plaintiff to be proved. This gift is dated the 1st of May 1913, the present suit was instituted by Mt. Mehran on the 7th of July 1924, i. e., within twelve years from the date of gift. Under the circumstances I fail to see how Mt. Mehran's suit qua the ⅓rd can be said to be time barred. It is admitted that Faiza was a co-sharer in this house to the extent of ⅓rd and even if Rahimi was in possession of the whole of the house, his possession cannot be held to be adverse against his brother and co-sharer Faiza: *Hardit Singh* v. *Gurmukh Singh* (1). If Faiza was in constructive possession of the house up to the date of the gift a suit by his donee within twelve years from this date is clearly within time. Mr. Muhammad Amin for the respondent has cited *Udi* v. *Maru Mal* (2), but that ruling instead of supporting his client's case helps the appellant. It was ruled there that a transferee or an assignee from a co-sharer does not by the mere fact of transfer of assignment become a co-sharer if his rights as such are denied by the other co-sharers and that a suit by such transferee or assignee to recover possession of the share transferred to him from the co-sharers of his transferrer or assignor must, therefore, be brought within 12 years of the date of the transfer or assignment in his favour. Here, as already pointed out above, the suit has been brought within 12 years of the transfer. It may be noted that the lower appellate Court in its judgment has remarked that Faiza died more than 12 years before suit, and in support of this remark it relied upon the statement of the plaintiff dated the 18th December 1925. But I have referred to this statement, and it appears to me that Mt. Mehran, the plaintiff, was giving only approximately the period that had elapsed from Faiza's death and that she cannot be pinned down to such a vague statement. Admittedly Faiza was alive on the date on which he made the gift in favour of Mt. Mehran. This deed of gift

(1) [1918] 64 P. R. 1918=47 I. C. 626=20 Bom. L. R. 1064 (P. C.).
(2) A. I. R. 1924 Lah. 682.

was executed and registered on the 1st May 1913, and Mr. Muhammad Amin has in view of the finding of the lower Court as to the execution of the deed of gift, conceded that Faiza must be considered to have died within 12 years of the suit. The claim qua this 1/3rd is therefore, clearly within time.

For the foregoing reasons I accept the plaintiff's appeal to the extent of passing a decree in her favour for 1/3rd of the house. As both parties have partially succeeded I direct that they will bear their own costs throughout.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 428

JAI LAL, J.

Bhai Gopal Singh Wadehra & Sons—Defendants—Appellants.

v.

Pera Mal & Sons—Plaintiffs—Respondents.

Miscellaneous First Appeal No. 2403 of 1926, Decided on 22nd February 1927, from an order of the Addl. Dist. J., Gujranwala, D/- 11th August 1925.

Civil P. C., O. 3—Statement in power of attorney as to Vakil's being engaged only for a particular place—Transfer of the case to another place—After transfer notice served on vakil, is sufficient notice to client.

The provision in the power-of-attorney that the counsel has been engaged only to represent the appellant in a particular place is made merely to safeguard against his liability to be called upon by the appellant to appear for him on the fees paid to him at any station outside that place. For the purpose of accepting notice on behalf of the appellant the vakil still continues to be the recognised agent of the appellant within the meaning of O. 3 even after the transfer of the appeal to the other place. [P. 429, C. 1]

Mukand Lal Puri—for Appellants.

Jai Gopal Sethi—for Respondents.

Judgment.—A suit for recovery of Rs. 3,389-14-0 was instituted by the firm of Pera Mal & Sons against the Firm Bhai Gopal Singh Wadehra & Sons in the Court of the Senior Sub-Judge of Gujranwala and was partially decreed. The defendant filed an appeal in the Court of the District Judge of Gujranwala from the decree awarded against him. It was fixed for hearing on the 14th July 1926, but was transferred to the District Judge of Sialkot who is also the Additional District Judge for Gujranwala. The District Judge of Sialkot fixed the 13th May 1926, for the hearing of the appeal and sent two notices giving intimation of the date fixed for the hearing of the appeal to the appellant. One notice was addressed to L. Bhim Sain, Vakil of Gujranwala, who had originally filed the appeal on behalf of the appellant and the other notice was addressed to the appellant personally at Gujranwala.

It appears that the appellant was not found at Gujranwala and both the notices were tendered to L. Bhim Sain who wrote on the back of both that they should be served on the appellant personally at the address mentioned by him. When these notices were received by the District Judge a note was made at the back of the notice which was sent to L. Bhim Sain that it had been served but on the other notice, that is the one which was addressed to the appellant personally an order was made that it should be served on the appellant personally on the address supplied by the vakil. Apparently at the date of the hearing of the appeal this notice had not been received by the District Judge but the learned Judge held that the service of notice on L. Bhim Sain was sufficient notice to the appellant and in the absence of any appearance on his behalf he dismissed the appeal in default. In the meantime cross-objections had been filed on behalf of the appellant-respondent claiming a decree for the balance of his claim which had been dismissed by the Senior Sub-Judge.

The cross-objections were filed on the 6th May 1926, and it appears that a copy was sent to L. Bhim Sain by the counsel for the respondent by registered post from Amritsar. When the cross-objections were filed in Court an order was recorded by the District Judge that a copy thereof be served on the appellant No notice was, however, served upon the appellant. When the appeal and the cross-objections came up for hearing before the District Judge he held that service of the cross-objections on L. Bhim Sain by registered post in the manner already described was sufficient compliance with the provisions of the law, and proceeded to hear them ex-parte against the appellant and finally increased the amount decreed against him. An appli-

cation was then presented by the appellant praying that the ex-parte order against him be set aside, that the appeal be re-admitted and that the same and the cross-objections be heard on the merits in his presence. The ground of this application was that the appellant had no notice of the date fixed for the hearing of the appeal and that a copy of the cross-objections was not served upon him as required by law, and that in any case he could not appear in Court owing to illness. This application has been dismissed by the learned District Judge.

The present appeal is against the order of the District Judge refusing to re-admit the appeal and to hear the same with the cross-objection on the merits. It is contended on behalf of the appellant that L. Bhim Sain was engaged to represent the appellant only in the Court of the District Judge, Gujranwala, and that the appeal having been transferred to the District Judge of Sialkot the authority of L. Bhim Sain to represent the appellant came to an end and that, therefore, the service of the notice on him was not sufficient notice of the hearing of the appeal to the appellant. An examination of the power-of-attorney filed by L. Bhim Sain, no doubt, shows that he was engaged only for the hearing of the appeal at Gujranwala, but that his authority to represent the appellant came to an end as soon as the appeal was transferred to Sialkot. The provision in the power-of-attorney that L. Bhim Sain had been engaged only to represent the appellant in Gujranwala was made merely to safeguard against his liability to be called upon by the appellant to appear for him on the fees paid to him at any station outside Gujranwala. For the purpose of accepting notice on behalf of the appellant the learned vakil still continued to be the recognised agent of the appellant within the meaning of O. 3 of the Code of Civil Procedure even after the transfer of the appeal to Sialkot. He was not, therefore, justified in refusing to accept notice of the hearing of the appeal on behalf of his client. The service of notice on a recognised agent is as effectual as on the principal. I must, therefore, hold that notice of the hearing of the appeal was served on the appellant in this case.

As regards the second contention of the learned counsel that his client was prevented by illness from appearing in Court it has to be noted that according to his own allegation the appellant started from Jharia, which is a station in Bengal, on the 13th May which was the date fixed for the hearing of the appeal in Sialkot and it was in the way that he alleges to have fallen ill. No cause whatever has been shown why the appellant could not and did not start from Jharia in time to be able to appear in the Court of the District Judge at Sialkot on the 13th of May. The subsequent illness in the way, therefore, is no excuse for the appellant's absence from the Court on the 13th May. The appellant's case is that he had no knowledge of the date fixed for the hearing of the appeal. The question of his having been prevented on account of illness from appearing in Court does not, therefore, arise. Moreover, there is no evidence in support of the allegations of the appellant. His application in the lower Court was not supported by any affidavit.

I hold, therefore, that the appellant has failed to establish that he was prevented by sufficient cause from appearing in Court on the 13th May, and, therefore, that the learned District Judge was justified in declining to re-admit the appeal.

With regard to the cross-objections however, I hold that the appellant did not receive notice thereof under O. 41, R. 22, Cl. (3) which provides that

> unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

It is clear that no such written acknowledgment was filed by the respondent with his cross-objections and consequently the learned District Judge passed an order that a copy of the objections be served on the appellant but no such copy was actually served. Under the circumstances the learned District Judge was not entitled to proceed with the hearing of the cross-objections ex-parte in the absence of the appellant. The result is that this appeal is accepted in so far as the order of the District Judge refusing to re-admit the cross-objections and to hear them in the presence of the appellant is concerned and is dismissed so far as his order refusing to re-admit the

appeal of the appellant is concerned. The case should go back to the learned District Judge with directions to re-admit the cross-objections and to hear them in the presence of the parties. The parties will bear their own costs in this Court.

R.D. *Case remanded.*

A. I. R. 1927 Lahore 430 (1)

HARRISON, J.

Khazan Chand—Accused—Petitioner

v.

The Crown—Opposite Party.

Criminal Revision No. 1309 of 1926, Decided on 24th January 1927, made by the S.-J., Ludhiana, on 20th August 1926.

Criminal P. C., S. 144—Breach of peace anticipated—Action should be taken against potential law-breakers.

When a breach of the peace is anticipated, action is to be taken against the potential law-breakers and not against the peaceful citizens whom, it is expected, that the law-breakers will molest : *A. I. R.* 1922 *Cal.* 483 and *A. I. R.* 1924 *Patna* 767, *Fell.* [P 430 C 2]

Tek Chand—for Petitioner.

Order.—This is an application made by the Sessions Judge of Ludhiana asking that an order passed by the District Magistrate of Ludhiana, under S. 144 of the Criminal Procedure Code be quashed. This order was originally passed as a sort of perpetual injunction restraining two persons from using a certain well until they had established their right to do so, but was subsequently modified on 2nd August 1926, on its being pointed out to the District Magistrate that under this section an order could only be passed which would operate for two months. I have doubts as to the legality of this revising order, but, as the question is not before me, it is not necessary to decide it. Although the two months have expired counsel asks for an adjudication as to the propriety of the order in the hope that it may have the effect of stopping any more orders of this nature under this or any other section of any Act or Code which will have the effect of cancelling or setting at naught the previous orders passed by the Court.

The facts are simple enough: Two Chamars, Khazan Chand and Garja Singh, persist in asserting their right to draw water from a public well. A section of the population objects. Both Chamars were put on security under S. 107 of the Criminal Procedure Code, and that order was quashed by me. A new order has now been passed under S. 144 of the Criminal Procedure Code forbidding them using this well. In my pervious order it was made very clear that they were entitled to do so, and that the proper persons to be proceeded against, if a breach of the peace was anticipated, were the persons who wished to interfere with the exercise of the right. In spite of this, action has been taken under S. 144, and steps have been taken to prevent them from exercising their right. It has been laid down in *Mohammad Ismail* v. *Barkat Ali* (1) and *Blong* v. *Emperor* (2) and indeed the fact requires no authority at all, that when a breach of the peace is anticipated, action is to be taken against the potential law-breakers and not against the peaceful citizens whom, it is expected, that the law breakers will molest. I have no hesitation in setting aside the order passed by the District Magistrate and I express a hope that he will refrain from taking action under any other section of any Act or Code with a view to stultifying this order.

D.D. *Order set aside.*

(1) A. I. R. 1922 Cal. 483.
(2) A. I. R. 1924 Pat. 767.

A. I. R. 1927 Lahore 430 (2)

SHADI LAL, C. J.

Jagan Nath—Petitioner.

v.

Koshallia Devi—Respondent.

Criminal Revision No. 1811 of 1926, Decided on 11th February 1927, reported by the Addl. Sub.-J., Lahore, on 8th December 1926.

Criminal P. C., S. 488—Maintenance to child—Order cannot be passed without proof of neglect or refusal to maintain it.

An order under S. 488 for the maintenance of a child cannot be passed against the father unless it is proved that he has neglected or refused to maintain it. [P 431 C 1]

Nand Lal—for Petitioner.

Daulat Ram—for Respondent.

Facts.—Jagan Nath, Khatri of Kasur, has been ordered under S. 488, Criminal

P. C., by the Court of the First Class Magistrate at Kasur to pay Rs. 10 per mensem for the maintenance of his daughter Mt. Koshallia Devi aged 13 or 14 years. The finding of the Magistrate is that Jagan Nath took a second wife into his house with the consent of his first wife, in order to obtain male issue. The arrangement did not prove satisfactory to the first wife, who went off to live with her son-in-law, taking her daughter with her. Not only is her father willing to take the daughter into his house, but he has applied in the civil Courts to be appointed as her guardian. This application has been dismissed.

After efforts to obtain a reasonable compromise between the parties the learned Magistrate found that there were reasonable grounds for supposing that there was ill-feeling between the two wives. For this reason he considered that it would not be safe to compel the daughter to live with her father, and that it would not be proper for her to reside with her father unless her mother returns. He then proceeded to pass the order already mentioned.

Grounds.—An order under S. 488, Criminal P. C., for the maintenance of a child can only be passed on proof of refusal or neglect to maintain it. As there is a definite finding in the present case that there has been no refusal or neglect on the part of the father, who is anxious to obtain custody of the child the order cannot be upheld. Possibly the learned Magistrate is confusing the case with that provided for in the first proviso to Cl. 3 of the section, which allows maintenance for a wife who refuses to live with her husband if the Magistrate considers that there are just grounds for making the order. The proviso 3 is limited to wives and cannot be extended to children. It is accordingly recommended that the order of the lower Court be cancelled.

Order.—I agree with the learned Sessions Judge that an order under S. 488, Criminal P. C., for the maintenance of a child cannot be passed against the father unless it is proved that he has neglected or refused to maintain it. No such refusal or neglect on the part of the father has been established in the present case.

Accordingly, I accept the application made by the petitioner Jagan Nath and quash the order of the Magistrate directing him to pay Rs. 10 per mensem for the maintenance of his daughter.

R.D. *Application accepted.*

A. I. R. 1927 Lahore 431

JAI LAL, J.

Dhani Ram—Plaintiff—Petitioner.

v.

Fida Hussain—Defendant — Respondent.

Civil Revision Petition No. 912 of 1926, Decided on 7th April 1927, from the decree of the Small Cause Court J., Lahore, D/- 30th June 1926.

Civil P. C., O. 8, R. 7—No set-off claimed—Court cannot reduce the amount claimed by plaintiff.

In a suit for rent and compensation for holding over the premises rented to the defendant, the defendant asserted that, on account of his having done some work as a tailor for the plaintiff, his sister and his son, certain amounts were due to him and that on his presenting a bill to the plaintiff a settlement of the account was made between both the parties leaving a balance of Rs. 5 due to the plaintiff. It was held by the lower Court that there was no settlement of account between the parties as alleged by the defendant but that Rs. 60-6-0 was due to him on account of the work done by him for the plaintiff,

Held: that there being no set off claimed by the defendant and, consequently, after finding that there was no settlement between the parties as alleged by the defendant, the Court was not entitled to go into the accounts and to reduce the amount found to be due from the defendant.

[P 432 C 1]

Ram Lal Anand—for Petitioner.

Kidar Nath Chopra—for Respondent.

Jai Lal, J.—The petitioner instituted a suit in the Court of Small Causes at Lahore against the respondent for the recovery of Rs. 200, being Rs. 176 as rent and Rs. 24 as damages for the contumacious holding over of the premises rented to the latter. The defendant denied that there was any contumacious holding over and disputed the correctness of the amount claimed by the plaintiff on account of rent. He further pleaded that on account of his having done some work as a tailor for the plaintiff, his sister and his son, certain amounts were due to him and that on his presenting a bill to the plaintiff a settlement of the account was made between both the parties leaving a balance of Rs. 5 due to the plaintiff. The plaintiff denied such a settlement of account. The Judge,

Small Cause Court, has held that Rs. 176 was due to the plaintiff as rent and that there was no contumacious holding over and, therefore, no compensation was claimable by the plaintiff on that account. He further held that there was no settlement of account between the parties as alleged by the defendant, but that Rs. 60-6-0 was due to him on account of the work done by him for the plaintiff, his sister and his son, and therefore granted the plaintiff a decree for Rs. 115-10-0.

It is contended on behalf of the plaintiff-petitioner that the Judge, Small Cause Court, should have awarded him Rs. 24 compensation for contumacious holding over of the demised premises by the respondent; but, as held by the learned Judge, Small Cause Court, there is no good proof on the record to show that any notice to quit was given by the plaintiff to the defendant which was not complied with so as to make the tenant's possession of the premises contumacious. Counsel for the petitioner attacks this finding of the learned Judge below, but I see no reason to differ from him.

The next ground taken by counsel is that there was no set off claimed by the defendant and consequently, after finding that there was no settlement between the parties as alleged by the defendant, the Court was not entitled to go into the accounts and to reduce the amount found to be due from the defendant. There is force in this contention. An examination of the written statement of the defendant shows that he did not claim a set off, nor did he pay any Court-fee on the amount claimed by him; nor is there any detail of the amount claimed by him from the plaintiff. His plea merely was that there was settlement of the account and he allowed his defence to stand or fall by that plea. Under the circumstances the lower Court was not entitled to decide what amount, if any, was due to the plaintiff from the defendant with a view to deduct the same from the plaintiff's claim.

I accept this petition and give the plaintiff a decree for Rs. 176 with costs in proportion in both Courts. The defendant may, if he is so advised, claim the amount alleged to be due to him from the plaintiff in separate proceedings.

D.D. *Petition accepted.*

A. I. R. 1927 Lahore 432

DALIP SINGH, J.

Allah Din and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 1744 of 1926, Decided on 12th February 1927, reported by the S. J., Sialkot, on 20th November 1926.

Penal Code, S. 498—Accused not charged with knowledge of marriage but knowing what they were charged with—Case is not affected—Criminal P. C., S. 537.

Where in a prosecution under S. 498, Indian Penal Code, the accused were not charged with knowledge or reason to believe that the abducted woman was a married woman and the accused knew what they were charged with and what it was necessary for the prosecution to prove.

Held: that this fact by itself would not affect the case. [P 432 C 2]

Order.—This case has been referred under S. 438, Criminal P. C., by the learned Sessions Judge, Sialkot. The facts are as follows: The three petitioners Allah Din, Karam Singh and Mt. Hakim Bibi were convicted under S. 498, Indian Penal Code, and sentenced to imprisonment and fine. The allegation for the prosecution was that the complainant Jiwan married Mt. Naziran about five years ago at Quetta and settled at Jaito Gul village in the Pasrur Tahsil. About the 31st October 1925 Jiwan went to Sialkot for finding work and in his absence the three petitioners enticed away Mt. Naziran, his wife, and kept her first at Pasrur, and subsequently at Lahore for a long time. Mt. Naziran eventually wrote to her mother at Quetta and the mother came and rescued her at Lahore and took her back to Quetta. The appeal of the petitioners was dismissed by the learned District Magistrate.

The case is reported on the ground, firstly, that the charge-sheet is defective. The petitioners were not charged with knowledge or reason to believe that Mt. Naziran was a married woman. This fact by itself would not affect the case and I have little doubt that the petitioners knew what they were charged with and what it was necessary for the prosecution to prove.

The next ground is that the marriage of Jiwan and Mt. Naziran is not properly proved. The statements of Jiwan,

Mt. Naziran and her mother show that Jiwan was married to Mt. Naziran at Quetta. The evidence is not very satisfactory, but I cannot hold that it is false.

The next point is that Jiwan first instituted a complaint on the 9th November 1925, which was dismissed under S. 344, Criminal P. C., on the 23rd December 1925, because Jiwan said that press of private business prevented him from prosecuting the case. A similar complaint was lodged on the 13th February 1926, but on 25th May 1926, it was consigned to the record room because Jiwan complainant could not secure witnesses. A third complaint which resulted in a conviction was instituted on the 9th of June 1926. Now, the only evidence against the accused persons apart from the statement of the woman is that of two witnesses Jalal and Nawab. Both live near Jiwan's house and it is not shown why he was unable to produce them earlier. The evidence of these witnesses as rightly remarked by the learned Sessions Judge becomes, therefore, worthless and it is hardly likely that Allah Din and his wife together enticed away this woman Mt. Naziran.

I, therefore, accept this revision and acquit the petitioners. The fine paid by Mt. Hakam Bibi will be refunded.

D.D. *Revision accepted.*

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* A. I. R. 1927 Lahore 433

FFORDE AND HARRISON, JJ.

Bhim Singh—Defendant—Appellant.

v.

Basheshar Nath and *others*—Plaintiffs—Respondents.

First Appeal No. 2776 of 1922, Decided on 21st October 1926, from the order of the Dist. J., Delhi, D/- 30th August 1922.

* (*a*) *Limitation Act, Art.* 36—*Application under S.* 235, *Companies Act is governed by Art.* 36.

An application under S. 235 of the Companies Act of 1918 to recover compensation from an ex-director of a company in respect of an alleged act of misfeasance or breach of trust, is by virtue of Cl. (3) of the section governed by Art. 36, Limitation Act: *A. I. R.* 1923 *Lah.* 58, *Foll.*; *and A. I. R.* 1925 *All.* 519, *not Foll.* [P 434, C 1]

(*b*) *Companies Act* (1913), *S.* 235—*S.* 235 *only provides mode of enforcing rights.*

Section 235 does not create any new rights, liabilities, but simply provides a summary mode of enforcing rights which might otherwise have been enforced bysuit: *A. I. R.* 1923 *Lah.* 58 *Foll.*, *In re City Equitable Fire Insurance Company Limited*, (1925) *Ch. D.* 407, *Appl.*; *A. I. R.* 1924 *Lah.* 435, *Dist.* [P 434, C 1]

Tek chand and *C. L. Mathur*—for Appellant.

Moti Sagar and *Mool Chand*—for Respondentts.

Fforde, J.—This is a misfeasance application brought by the Official Liquidator of the Union Bank of India Limited, Delhi, under S. 235 of the Indian Companies Act (7 of 1913) asking that the several respondents be made to recoup the Bank for various losses incurred by reason of their neglect and default in the management of the Bank's affairs.

The facts are very fully and clearly stated in the judgment of the Court below, and for the purposes of this appeal I do not think it necessary to restate them. The first question which we have to decide is whether or not this application is barred by limitation. It is admitted that the various misfeasances complained of took place more than three years before the date of the present application. The latest of them is alleged to have occurred on the 11th of June 1914. Mr. Tek Chand, who appears for one of the directors, contends that Art. 36 of the Indian Limitation Act (9 of 1908) governs this case. This Article provides a two years period of limitation for a suit for any malfeasance, misfeasance or nonfeasance independent of contract, and not specially provided for in that Act, time to run from the date when the malfeasance or nonfeasance took place. If this article is held to apply the present application is admittedly barred.

Mr. Mool Chand on behalf of the liquidator contends that Art. 120 applies, which provides a six years period for suits for which no period of limitation is provided elsewhere in the schedule and time is expressed to run from the date when the right to sue accrues. In the alternative it is urged that Art. 90 applies which relates to suits, other than those mentioned in Arts. 88 and 89, by principals against agents for neglect or misconduct, and provides, a

three years' time limit from the date when the neglect or misconduct becomes known to the plaintiff. Mr. Mool Chand argues that S. 235 of the Indian Companies Act confers upon a liquidator a new right, not previously possessed by the Company or its shareholders, to enforce claims of the nature provided by that section and that this right comes into effect from the date of his appointment. For this proposition he has referred us to *In the matter of the Union Bank Allahabad, Limited* (1), relying upon the following observations of Walsh, J., which appear at page 686 of the Report:

It has been said that S. 235 creates no new rights but as is pointed out in the latest edition of Buckley on Companies (1924) the statement is only practically accurate. No doubt it provides machinery for enforcing claims which exist independently of the section, but so far as a liquidator is authorised by this section to apply in the interests of creditors and depositors who have lost their money, to enforce a claim against the directors under the section. It seems to me that a new right in him is created. If any article is to be applied at all to the date from which the liability first came into existence by reason of the act of misfeasance, or breach of trust, which the person is proved to have committed it seems to me that the only article which at all fits the case is Art. 120 which provides a term of six years for every case not otherwise provided by the Act.:

In adopting this view the learned Judge has expressly dissented from a decision of a Division Bench of this Court in *The Bank of Multan* v. *Hukam Chand* (2) a Letters Patent appeal, in which the Court held that an application under S. 235 of the Companies Act of 1918 to recover compensation from an ex-director of a Company in respect of an alleged Act of misfeasance or breach of trust, is by virtue of Cl. (3) of the section governed by Art. 36 of Sch. 1 to the Limitation Act, and is barred unless made within two years of the act complained of. The learned Chief Justice in his judgment says at page 702:

It must be remembered that S. 235 does not creat any new rights or liabilities but simply provides a summary mode of enforcing rights which might otherwise have been enforced by suit. If any authority is needed on the subject I would refer to the judgment of James, L. J., In *Canadian Land Reclaiming and Colonizing Co.*: *in re Coventry and Dixon's* case (3) which deals with the corresponding section of the English Companies Act. It is to be observed that S. 235 does not take away the remedy by suit but provides an alternative remedy by which the liquidator may enforce rights in expeditious manner without incurring the expenses entailed by a regular suit.

Since these cases were decided the matter has been finally set at rest by the decision of the English Court of appeal *in re City Equitable Fire Insurance Company Limited* (4) in which Pollock, M. R., at page 507 expresses himself as follows:

Now the claim is brought in accordance with the procedure which is rendered available by S. 215 of the Companies (Cosolidation) Act, 1903, and as an argument was presented to us for which some foundation could be suggested based in substance upon S. 215. I desired to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abundantly shown by *Coventry and Dixon's* case (3), *in re Brazilian Rubber Plantations and Estates, Ltd.* (5) and *Cavendish Bentinck* v. *Fenn* (6). Lord Macnaghten gives in a sentence or so the principle of which the other cases are illustrations. He says: That section creates no new offence, and it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity.

Then he goes on:

It has been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the Company.

This authority, endorsing the view held by this Court in the *Multan Bank* case (2) concludes the point so far as this Court is concerned. Mr. Mool Chand, however, has referred to another decision of this Court which at first sight appears to be at variance with the last mentioned case, namely, the case of *Daulat Ram* v. *Bharat National Bank Ltd., Delhi* (7). In that case it was held that a suit by the Bank against a local director for recovery of loss through his negligence, was governed by Art. 90 of the Limitation Act which prescribes three years as the period of limitation. It must be borne in mind, however, that in that case it was held that the direc-

(1) A. I. R. 1925 All. 519=47 All. 669.
(2) A. I. R. 1923 Lah. 58.
(3) [1880] 14 Ch. D. 660=28 W. R. 775=42 L. T. 559.
(4) [1925] Ch. 407=133 L. T. 520=17 L. L. Rep. 225=94 L. J. Ch. 445=40 T. L. R. 853=133 L. T. 520.
(5) [1911] 1 Ch. 425=18 Manson 177=80 L. J. Ch. 221=103 L. T. 697=27 T. L. R. 109.
(6) [1887] 12 A. C. 652=57 L. T. 773=57 L. J. Ch. 552=36 W. R. 441.
(7) A. I. R. 1924 Lah. 435=5 Lah. 27.

tor in question had been acting as an agent for the Bank in respect of certain matters, and, accordingly the suit was one by a principal against an agent for compensation for neglect of the latter in his conduct as such agent. It was not a suit for compensation for any malfeasance, misfeasance, or nonfeasance independent of contract. The proper distinction to be drawn between the *Multan Bank* case (2) and the case of *Daulat Ram* v. *Bharat National Bank* (7) is that one was a suit by a principal against an agent, and the other was an application for compensation for misfeasance in the nature of breach of trust independent of contract. So far as certain observations of mine contained in that judgment may be taken to throw doubt upon the decision in the *Multan Bank* case (2), I need only say that the question of limitation governing an application under S. 235 of the Companies Act was not fully dealt with. In my opinion all applications under S. 235 of the Indian Companies Act are governed by Art. 36 of the Indian Limitation Act, and as none of the misfeasances averred in the present application are within two years the matter is barred by limitation. The preliminary objection, therefore, must prevail, the appeals, be accepted with costs throughout and the application dismissed. The cross-objections are also dismissed.

Harrison, J.—I agree that this application is barred by limitation. Not only does it disclose nothing beyond misfeasance, malfeasance and nonfeasance, but in his statement at page 166 the liquidator has definitely defined and limited his position and made it impossible to substantiate the contention that the application can be governed by any article other than Art. 36.

D.D. *Application dismissed.*

A. I. R. 1927 Lahore 435 (1)

ZAFAR ALI, J.

Shadi Khan—Applicant.

v.

Mt. Gul Begam—Respondent.

Criminal Revision Petition No. 317 of 1927, Decided on 24th February 1927, reported by S. J., Mianwali.

Criminal P. C., S. 342—*Section is not applicable to a case under S.* 488—*Criminal P. C., S.* 488.

Section 342 is not applicable to summons cases and therefore a case under S. 488 is not governed by the Section ; *A. I. R.* 1926 *Lah.* 667, *not Foll.* ; *A. I. R.* 1924 *Mad.* 15 (*F. B.*), *Foll.*

Reference.—This is a petition for revision of the order of Sh. Asghar Ali, Magistrate, First Class, Mianwali, ordering the petitioner to pay Rs. 10 per mensem as maintenance to his wife under S. 488, Criminal P. C. I find that after the close of the prosecution evidence, the Magistrate omitted to examine the petitioner, in contravention of the provisions of S. 342, Criminal P. C. The omission of the Magistrate to examine the accused has vitiated the order granting the maintenance : vide *Demello* v. *Demello* (1).

Accordingly I accept the petition for revision and submit the case to the High Court with the recommendation that the order of the Magistrate be set aside and the case remanded to be tried in accordance with law.

Order.—In maintenance cases evidence is recorded in the manner prescribed in S. 335 of the Criminal P. C. for summons cases : see Rules and Orders Vol. II, page 199.

In *Ponnusami Olayar* v. *Ramasami Thathan* (2) a Full Bench of a Madras High Court held that S. 342 of the Code of Criminal Procedure was not applicable to summons cases.

In view of the above it does not appear necessary to interfere in the present cases.

G.B. *Reference rejected.*

(1) A. I. R. 1926 Lah. 667.
(2) A. I. R. 1924 Mad. 15=46 Mad. 753 (F. B.).

** A. I. R. 1927 Lahore 435 (2)

TEK CHAND, J.

Sikandar Khan and *others*—Plaintiffs —Appellants.

v.

Biland Khan and *others*—Defendants —Respondents.

Civil Revision Petition No. 119 of 1927, Decided on 18th February 1927, from the order of the Dist. J., Gurdaspur, D/- 23rd April 1926.

✲✲ (a) *Civil P.C.*, O. 43, *R.* 1 (*w*), *and O.* 47, *R.* 7—*Rules are to be construed together—O.* 43, *R.* 1, *gives right of appeal and O.* 47, *R.* 7, *prescribes extent of that right—Apparently inconsistent provisions should be reconciled and, if they are repugnant last prevails—Interpretation of status—Civil P. C., O.* 47, *R.* 7.

Clause (w) of O. 43, R. 1 has to be read along with O. 47, R. 7, which specifically lays down that an order granting an application for review can be objected to in appeal only on one or the other of the three grounds specified therein. [P 437 C 2, P 438 C 1]

There is no real inconsistency between the two rules, the former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. The one gives the right to appeal and the other defines the extent to which that right can be exercised and according to the well-established rule of construction that where two coordinate provisions in an enactment are apparently inconsistent, an effort be made to reconcile them; the two must be read together and taken together and thus they do not give an unlimited right of appeal. And even assuming that the rule that if "if two sections of a statute are repugnant, the last must prevail and override the earlier" applies. O. 47, R. 7, should be held to control and restrict the earlier rule: *Ebbs.* v. *Boulnois* (*L.R.* 10 *Ch.* 479) and *Wood* v. *Riley* (*L.* R.'3 *C. P.* 26), *Foll.*; *A.I.R.* 1926 *Bom.* 121, *Diss.*; *from.*; 11 *P. R.* 1913 *and cases of other High Courts Ref.* [P 438 C 1, 2]

✲ (b) *Civil P. C., O.* 47, *R.* 7—*Rule is permissive—If party chooses to appeal, he must restrict to grounds specified therein.*

Though the phraseology used in R. 7 is that "an order granting an application for review may be objected to" on the three specified grounds, and other grounds are not specifically excluded, it is obvious that the language used is permissive only in the sense that it is not obligatory on the person aggrieved by the order granting the application for review to appeal against it, but if he chooses to so appeal, the rule forbids him from objecting on any other ground: *Craies Treatise on Statute Law*, *3rd Edn. p.* 253 and *Taylor* v. *Taylor*, (1876) 1 *Ch. D.* 426, *Foll.* [P 438 C 2]

✲ (c) *Interpretation of statutes—No provision should be held as superfluous as far as possible.*

The settled cannon of construction is that a statute ought to be so construed that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant: *Ditcher* v. *Dennison*, 11 *Moo. P. C.* 324, *Appl.* [P 439 C 1]

✲ (d) *Civil P.C., S.* 115—*One of several plaintiffs dying during suit but representatives not brought on record—Suit decreed and decree appealed from—Appeal dismissed but on review appellate Court expressing the lower Court's decree to be nullity—Order is bad and is open to revision.*

A suit by several plaintiffs was decreed and appeal was filed therefrom. Appellants finding one plaintiff-respondent dead applied for substitution of his representatives. The appellate Court held the application out of time and declared as abated. It was however discovered that the plaintiff had died during suit. The appellants therefore applied for review and the order on review was that the decree of the lower Court being against dead person was nullity and therefore no appeal lay.

Held: that the order on review created an anomalous position and therefore should be set aside in revision. [P 439 C 2]

✲ (e) *Civil P. C., O.* 22, *R.* 6—*Decree against dead person is not necessarily nullity.*

A decree passed in favour of a number of plaintiffs, one of whom is dead at the time is not necessarily a nullity in its entirety in every case. A decision of this matter will depend on a variety of considerations: 33 *Mad.* 167 and *A. I. R.* 1926 *Patna* 504, *Ref.* [P 440 C 2]

There is a great deal of difference between a suit instituted by a number of persons, one of whom dies and whose representatives are not brought on the record within limitation, and an appeal against a joint and indivisible decree in favour of a number of persons the death of one of whom takes place during the pendency of the appeal against the decree and no steps are taken under O. 22, to implead his representatives. In the latter case it is only the decree appealed against that is to be looked at, whereas in the former it is necessary to examine the nature of the claim, the terms of the plaint and the relief asked for. [P 440 C 2, P 441 C 1]

Mehr Chand Mahajan—for Petitioners.

Bishan Nath—for Respondents.

Judgment.—Baland Khan and others, who are defendants in this case, applied to the Collector, Gurdaspur, under the Redemption of Mortgage Act, 11 of 1913, for redemption of the land in suit from the present plaintiffs. The application was granted by the Collector on the 13th November 1922. The defendants deposited in the Collectorate the amount that had been adjudged to be due on the mortgage by the Collector and obtained possession of the land. On the 1st October 1923, the plaintiffs, five in number, instituted the present suit alleging that the land in question originally belonged to one Malla Khan who had mortgaged it in favour of the plaintiffs' ancestor about 60 years ago and that the defendants were not the representatives-in-interest of Malla Khan, mortgagor and were not entitled to redeem. They prayed for a declaration that the order of the Collector passed in summary proceedings under Act 11 of 1913 was erroneous, that they had been wrongly dispossessed and were entitled to recover possession of the land.

The defendants pleaded inter alia that they had lawfully succeeded to Malla Khan's rights in the land, and being the

owners of the equity of redemption were entitled to redeem, that the order of the Collector was correct and that the plaintiffs' suit was time-barred. The Subordinate Judge overruled the defendants' contentions and finding for the plaintiffs, decreed the suit on the 2nd December 1924.

On 2nd January 1925, Baland Khan, defendant, preferred an appeal to the Court of the District Judge. On the 17th February 1926 he filed an application under O. 22, R. 4, stating that Ghazi Khan, one of the plaintiffs respondents had died about a year before, i. e., during the pendency of the appeal and that his son Azim Khan be brought on the record as his heir and legal representative. This application was accompanied by an affidavit by Baland Khan, who also made a statement on oath in Court the next day supporting the allegation in the application. On the appeal coming up for decision on the 9th March, Beli Khan, one of the plaintiffs respondents was examined and he also stated that his brother Ghazi Khan, plaintiff, had died about a year before. Baland Khan's pleader, however, asked for an adjournment in order to show, contrary to his client's original assertion, that Ghazi Khan had really died before the date of decision of the suit in the trial Court. The learned District Judge declined to adjourn the case and ruled that the appellant must be confined to the statement made by him in his application of the 11th February 1926 to the effect that Ghazi Khan, plaintiff, had died during the pendency of the appeal. On this assumption he held that the defendants' appeal had abated against the deceased plaintiff, and as the appeal was against a joint decree in favour of all the plaintiffs-respondents, it could not proceed against the others and it must be dismissed.

On the 19th March 1926 the defendant Baland Khan filed an application under O. 22, R. 9, and under O 47, R. 1, Civil P. C., alleging that Ghazi Khan, plaintiff, had really died on the 3rd October 1923, two days after the institution of the suit in the trial Court and that the plaintiffs themselves had taken no steps in that Court to bring the deceased's representatives on the record. He also stated that as Ghazi Khan, had never appeared before the trial Court and as his name had been shown in the decree of that Court, his pleader had been misled into showing Ghazi Khan as a respondent to the appeal. Along with this appilcation he filed a certified copy of an extract from the death register showing that Ghazi Khan had died on the 3rd October 1923, and also filed an affidavit to the same effect. This application was heard by the learned District Judge on the 23rd April 1926 when he passed the following order :

> A review of my judgment dated the 9th of March 1926, is sought on the ground that Ghazi Khan actually died on the 3rd of October 1923, only two days after the suit was instituted, and upwards of a year before it was decided. A death certificate is attached and its accuracy is not questioned. My judgment declaring that the appeal abated is, therefore, based on erroneous grounds and should I think be reviewed.
>
> The decree of the lower Court being passed in favour of a dead person along with others is a nullity and, therefore, no appeal lies; *Gohar v. Muhammad* (1).
>
> Lala Moti Ram now attempts to argue contrary to his previous argument, which is accepted in the judgment that the suit was not a joint one. The suit was one for possession of land on the ground that the Revenue Assistant had erroneously allowed the defendants to redeem that land. Ghazi Khan and four others brought the suit as joint owners of the land and it is hard to see how the suit could have proceeded without bringing Ghazi Khan's representatives on the record. The appeal is dismissed on the ground, to be embodied in the decree, that the decree of the lower Court is a nullity.

A decree was accordingly prepared in these terms. Against this decree the surviving plaintiffs have preferred a miscellaneous appeal to this Court purporting to be under O. 43, R. 1 (w), and (k) of the Civil P. C., and the first question that has to be decided is whether an appeal on behalf of the plaintiffs-appellants is competent. Appellant's counsel has not sought to support the appeal under O. 43, R. 1 (k) for the simple reason that the order of the lower Court was not passed under O. 22, R. 9, but he has strenuously contended that an appeal does lie under O. 43, R. 1, (w). I am, however, unable to accept this contention. It is, no doubt, true that Cl. (w) of R. 1, of the 43rd Order says that an appeal shall lie from an order under R. 4 of O. 47, granting an application for review, but this rule has to be read along with O. 47, R. 7 which specifically lays down that an

(1) [1889] 7 P. R. 1889.

order granting an application for review can be objected to in appeal only cn one or the other of the three grounds specified therein. I am aware that the contrary view has been taken in a recent case decided by the Bombay High Court reported as *Dass Keshav Panchabhai* v. *Karbasappa* (2) where it was held that under O. 43, R. 1, (w) an appeal lies against an order granting an application for review, quite irrespective of the qualification contained in O. 47, R. 7, Macleod, C. J. who delivered the main judgment in that case, after comparing the relevant provisions of the Codes of 1882 and 1908 remarked that the general right of appeal given by O. 43, R. 1, (w) could only be restricted by direct prohibition. Being pressed with the apparent inconsistency between the two rules, the learned Chief Justice came to the conclusion that the result of making an order granting a review appealable under O. 43, R. 1, (w) was to render O. 47, R. 7, superfluous. The other learned Judge, Madgavkar, J. thought that O. 43, R. (1) being a new provision, added by the Code of 1908, was perhaps not present in the minds of authors when they reproduced the old S. 629 in the form of O. 47, R. 7.

I venture to think, that there is no real inconsistency between the two rules, the former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to. That is a matter dealt with in O. 47, R. 7. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. The one gives the right to appeal and the other defines the extent to which that right can be exercised. It is a well established rule of construction, that where two co-ordinate provisions in an enactment are apparently inconsistent, an effort must be made to reconcile them. As observed by Lord Justice James in *Ebts* v. *Boulnois* (3):

> It is a cardinal principle in the interpretation of Statutes that if there are two inconsistent enactments, it must be seen if one is a qualification of the other.

Applying this rule, it must be held that the two must be read together and taken together and they do not give an unlimited right of appeal.

If, however, it be supposed that the inconsistency between the two parts of the Code is so great and real, that it is impossible to reconcile them, the rule must be applied that "if two sections of a statute are repugnant, the last must prevail and over-ride the earlier": per Keating, J. in *Wood* v. *Riley* (4). For this reason also O. 47, R. 7 should be held to control and restrict the earlier rule.

Nor does the suggestion appeal to me that while re-enacting S. 629 of the old Code in the form of O. 47, R. 7 the authors of the Code of 1908 had forgotten or overlocked the provisions of O. 43, R. 1 (w) which they themselves had newly introduced in the same Code, thus supplying an omission in the earlier Code. Another reason given in the Bombay judgment in support of its conclusions is that O. 47, R. 7 is not exhaustive of the grounds of which an order granting a review may be objected to in appeal, that it enumerates only three such grounds and cannot be taken as excluding all others. It is, no doubt, true that the phraseology used in R. 7 is that "an order granting an application (for review) may be objected to" or the three specified grounds, and other grounds are not specifically excluded, but it is obvious that the language used is permissive one only in the sense that it is not obligatory on the person aggrieved by the order granting the application for review to appeal against it, but if he chooses to so appeal, the rule forbids him from objecting on any other ground, Craies in his standard work Treatise on Statute Law (3rd Edition, p. 253) points out that in such cases language prima facie permissive not only allow a person to do a thing, which it says that he may do, "but it also prohibits that particular thing from being done in any other way." As pointed out by Sir George Jessel M. R. in the well known case of *Taylor* v. *Taylor* (5) when a statutory power is conferred and a mode of exercising it is provided for, "it means that no other mode is to be adopted."

In the Bombay case, the opinion is also expressed that on a strict construc-

(2) A. I. R. 1926 Bom. 121.
(3) 10 Ch. 479=33 L. T. 342=44 L. J. Ch. 691=23 W. R. 820.
(4) 3 C. P. 26=17 L. T. 216=37 L. J. C. P. 24=16 W. R. 146.
(5) [1876] 1 Ch. D. 426.

tion of the two rules, O. 47, R. 7, should be considered to have become superfluous. Here again the settled canon of construction is that a statute ought to be so construed that "if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant," and it is well to bear in mind the warning of their Lordships of the Judicial Committee that

> one who reads a legal document, whether public or private, should not be prompt to ascribe—should not without necessity or some sound reason, impute—to its language tautology or superfluity and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. *Ditcher* v. *Dennison* (6).

For the foregoing reasons I venture to think that the law has not been correctly laid down in *Daso Keshav Panchabhai* v. *Karbasappa* (2) and most respectfully dissent from that decision. And I do so the more readily, as I find that the contrary view is supported by a uniform series of rulings of all the other Courts.

In *Yusuf* v. *Nazee* (7) a Division Bench of the Punjab Chief Court held that the right of appeal against an order granting a review is limited to the three cases mentioned in O. 47, R. 7. The decision was followed by Johnstone, J. in *Atra* v. *Chaju* (8), Chevis, J. in *Faral Ahamad* v. *Khan Bahadur* (9), Shadi Lal J. in *Basher Nath* v. *Ram Kishen Das* (10) and Martineau, J. in *Uttam Chand* v. *Ganesha Mal* (11). The Calcutta High Court has also consistently taken the same view. In *Jagar Nath* v. *Ram Autar Singh* (12) Mookerjee, J. (Carnduff, J. agreeing) expressed the opinion

> that the two rules must be read together, otherwise the restrictive provisions contained in R. 7 would become absolutely nugatory. The object of the legislature plainly was to provide explicitly that an order granting review is appealable. This supplies the omission in the Code of 1882, under which the right of appeal was given only by implication and also makes it plain that a second appeal is barred under S. 104 (2).

Other Benches of that Court have followed this ruling in *Tripura Charan* v. *Shoroshi Bala* (13), *Hari Charan* v. *Baran Khan* (14) and *Nandu Lal* v. *Panchanan Mukerji* (15). The same view has found favour with the High Court of Madras in *M. Brahmayya* v. *V. Vellamma* (16) and *Seetharamayyah* v. *Tolashi Babu* (17), of Allahabad in *Sundar* v. *Hibab Chick* (18), *Narain Das* v. *Chiranji Lal* (19) *Madhori Saran* v. *Parbati* (20) and of Patna in *Sundar Lal* v. *Upendra Nath Seal* (21). There is thus a consensus of authority in support of the view that the right of appeal must be restricted to the three grounds specified in O. 47, R. 7. In the present case it is conceded that the objections taken to the order of the learned District Judge do not fall without any of the clauses of that rule. I must, therefore, hold that no appeal lies to this Court.

The question, however, remains whether under the circumstances of the case, the judgment of the learned District Judge should be allowed to stand or whether it is a fit case for the exercise of the revisional powers of this Court. Now it seems to me that a very anomalous position has been created by the decree as finally passed by the learned District Judge. He had on the 9th March 1926 dismissed the defendant's appeal and affirmed the decree of the trial Court in favour of all the plaintiffs. By his subsequent order, he on review directed that the defendants' appeal to his Court be dismissed on the ground, to be embodied in the decree, that the decree of the lower Court is a nullity. If the learned Judge was of opinion that no appeal lay to his Court, he should have merely stayed his hands and dismissed the defendants' appeal on that ground alone and not proceeded to incorporate in his decree the remark that the decree of the lower Court was a nullity. By doing so, he has virtually accepted the appeal of the defendants and dismissed the plaintiffs' suit. But while this is the real meaning and effect of the decree, its wording is such that it leaves the plaintiffs without any remedy whatever. They cannot

(6) 11 Moo. P. C. 324=6 W. R. 342.
(7) [1913] 11 P. R. 1913=17 P. L. R. 1913=16 I. C. 995=278 P. W. R. 1913.
(8) [1911] 49 P. W. R. 1911=12 I. C. 246.
(9) [1912] 10 P. L. R. 1912=12 I. C. 624=221 P. W. R. 1911.
(10) [1916] 48 P. W. R. 1916=32 I. C. 860.
(11) A. I. R. 1921 Lah. 395.
(12) [1912] 14 I. C. 39.
(13) [1914] 22 I. C. 773.
(14) [1914] 41 Cal. 746=25 I. C. 903.
(15) [1918] 45 Cal. 60=21 C. W. N. 1076=42 I. C. 484=26 C. L. J. 187.
(16) [1916] 31 M. L. J. 509=4 I. W. 408=36 I. C. 437=(1916) 2 M. W. N. 278.
(17) A. I. R. 1924 Mad. 602.
(18) [1920] 42 All. 626=18 A. L. J. 838.
(19) A. I. R. 1925 All. 364=47 All. 361.
(20) A. I. R. 1925 All. 552=47 All. 881.
(21) [1916] 1 Pat. L. J. 193=35 I. C. 15.

come to this Court in second appeal because the decree of the District Judge on the face of it affirms the trial Court's decree and dismisses the defendant's appeal to his Court. Nor can they execute the decree of the Subordinate Judge, which the learned District Judge purports to affirm, for as soon as they proceed to execute that decree, the judgment-debtors will be entitled to urge that the District Judge having held the decree to be a nullity, it is incapable of execution. On such an objection being taken the executing Court will be bound to give effect to it and refuse to execute the decree : see *Narendra Bahadur* v. *Gopal Shah* (22), *Topan Ram* v. *Tek Chand* (23). The appellate Court should have, therefore, either merely dismissed the appeal of the defendants without any remarks, leaving the question as to the effect of the death of Ghazi Khan on the decree as a whole for determination in appropriate proceedings, or the appeal should have been accepted and a decree passed dismissing the plaintiffs' suit thus enabling them to seek relief by way of second appeal to this Court, if so advised. The decree, therefore, cannot be allowed to stand in the form in which it has been passed.

In holding that no appeal lay to his Court the learned District Judge purports to follow *Gohar* v. *Muhammad* (1). But I think that that ruling is wholly inapplicable to the present case. There a decree had by inadvertence been passed by the Divisional Judge in favour of a dead person, who was the sole defendant in the case and the plaintiff had preferred a further appeal to the Chief Court making the representatives of the deceased (sole) defendant as respondents. It was held that the appeal was not maintainable against the representatives of the deceased defendant, who were not on the record. When the Divisional Judge, had decided the case, the Chief Court, however, acting on the Revision Side, set aside the decree of the Divisional Judge and remanded the case for disposal in accordance with law. The decision in that case proceeded on its peculiar facts and in my opinion the rule laid down therein is not applicable to cases in which a decree has been passed in favour of a number of persons, one of whom was dead at the time of the passing of the decree. An instance of such a case will be found in *Narain Das* v. *Kalu Ram* (24) where a decree had been passed by the District Judge in favour of four persons, one of whom was dead at the date of his decree, but the fact of whose death had not been brought to his notice at the time. The appeal of the opposite party was entertained by the High Court and was accepted, the decree of the District Judge being set aside and the case remanded to him for re-decision after adjudicating on the effect of the death of one of the plaintiffs on the whole case. Similarly in *American Baptist Foreign Mission Society* v. *Ramayya* (25) the Madras High Court entertained an appeal against a decree passed by the lower Court in favour of a number of defendants, one of whom was dead, but set it aside and remitted the case to the lower Court for re-decision. Other instances in which a similar course was adopted will be found in *Balaram Pal* v. *Kanysha Majhi* (26) and *Amanat Khan* v. *Mian Khan* (27). I may also point out that a decree passed in favour of a number of plaintiffs, one of whom is dead at the time, is not necessarily a nullity in its entirety in every case. A decision of this matter will depend on a variety of considerations, which it is not necessary to detail here. Attention may, however, be drawn to *Rama Aiyar* v. *Sundarammal* (28) and *Keshav Prasad* v. *Sham Nandan Rai* (29) and the authorities cited therein.

In arriving at the conclusion that the whole decree was a nullity in this case, the learned District Judge seems to have been pressed by the fact that the plaintiffs' counsel had, at the earlier hearing, urged that the appeal being against a joint decree in favour of five plaintiffs, one of whom was (at the time) wrongly supposed to have died during the pendency of the appeal, the appeal had abated in its entirety and that he should not be allowed to argue that the whole decree was not a nullity. It is, however, to be noted that there is a great deal of difference between a suit instituted by a

(22) [1913] 17 C. L. J. 634=20 I. C. 506.
(23) [1912] 5 S. L. R. 260=15 I. C. 832.
(24) [1920] 2 L. L. J. 144.
(25) [1918] 48 I. C. 859.
(26) [1919] 53 I. C. 548.
(27) [1920] 7 O. L. J. 20=55 I. C. 498.
(28) [1909] 33 Mad. 167=3 I. C. 739=6 M. L. T. 271.
(29) A. I. R. 1926 Patna 504=5 Pat. 233.

number of persons, one of whom dies and whose representatives are not brought on the record within limitation, and an appeal against a joint and indivisible decree in favour of a number of persons the death of one of whom takes place during the pendency of the appeal against the decree and no steps are taken under O. 22 to implead his representatives. In the latter case it is only the decree appealed against that is to be looked at, whereas in the former case it is necessary to examine the nature of the claim, the terms of the plaint and the relief asked for. In suits by a number of co-mortgagees it would be necessary to examine the terms of the mortgage, the shares of the mortgagees, their rights inter se and the nature of the claim put forward by them. The learned District Judge has not discussed this aspect of the case in any detail and I am not sure if full arguments were addressed to him on it. I would not express any final opinion on that point on the scanty materials before me, especially when I am dealing with the matter on the Revision Side. This must be left for consideration by the District Judge or the trial Court as the case might be.

For the foregoing reasons I am of opinion that this petition, being treated as one for revision, should succeed; and setting aside the decrees of the learned District Judge, dated the 9th March, and 23rd April, 1926, I remand the case to him for disposal with reference to the foregoing reasons.

As the plaintiffs have not been free from blame, I leave the parties to bear their own costs in this Court.

D.D. *Revision allowed.*

A. I. R. 1927 Lahore 441

CAMPBELL AND TEK CHAND, JJ.

Gurdial Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Bhagwan Devi and *others*—Defendants—Respondents.

First Appeal No. 2603 of 1922, Decided on 11th February 1927, from the decree of the Sr. Sub-J., Amritsar, D/- 15th June 1922.

(a) *Custom (Punjab) — Marriage—"Aurat Madkhula" means concubine—Words.*

"Aurat Madkhula" literally means a woman brought in the household, and the expression is used in common parlance to describe a "concubine" or a kept mistress in contradistinction to a wife, married according to strict religious ritual or by chadar andazi or other recognised form of marriage. [P 442 C 2]

(b) *Custom—It is a matter of proof.*

Custom is a matter of proof and not of conclusions based on a priori reasoning or deductions drawn from a comparative study of the laws of distribution prevailing among primitive societies. [P 443 C 1]

Nawal Kishore and *Parkash Chand* for *Manohar Lal*—for Appellants.

Mian Muhammad Shafi and *Khurshid Zaman*—for Respondents.

Judgment.—One Kaban Singh, a Khatari of Mauza Mehlanwala in the Amritsar District, was employed as an Inspector of Police in Oudh. He had by his married wife (who had predeceased him) two sons, whose descendants are the present plaintiffs. On his retirement in 1888, Kaban Singh returned to his native village and brought with him a Purbiani woman, named Mt. Kaushalya. In 1893 he executed three wills, by the first of which he gave the bulk of his property to his sons and grandsons by his married wife and we are not concerned with that property in this litigation. The second will, Exhibit D. 1, is dated the 5th December 1893, whereby he bequeathed a house at Amritsar to Mt. Kaushalya, who was described in the will as his Aurat Madkhula and she was given full power of enjoyment and disposition over the house. By the third will, Ex. D. 2., which was executed on the same day, he give another house to Mt. Jai Kuria, a sister of Mt. Kaushalya aforesaid, for her lifetime and provided that on Mt. Jai Kuria's death this house also would devolve on Mt. Kaushalya in absolute ownership.

On the death of Kaban Singh these three wills were duly acted upon and the legatees took possession of the properties that had been respectively devised to them. A few years later Mt. Jai Kuria died and the house, which had been given to her by the third will was taken possession of by Mt. Kaushalya. Mt. Kaushalya died childless in August 1920 and Defendants 1 to 3, who are the descendants of Mt. Chhadana, another sister of Mt. Kaushalya, took possession

of all her property including the two houses.

The present suit was instituted on the 31st of August 1920 by the grandsons of Kahan Singh, alleging that Mt. Kaushalya was the married wife of the Sardar and that on her dying childless the property would devolve on the plaintiffs who are the heirs of her "husband." It was also stated in the plaint that the houses were the ancestral property of the Sardar, that they had been given to Mt. Kaushalya for maintenance and residence only, and that Defendants 1 to 2 were in unlawful possession thereof. The defendants pleaded that Mt. Kaushalya was not the married wife of the late Sardar, but was his concubine, that under the wills, Mt. Kaushalya was the absolute owner of the houses and that on her death the property being her stridhana devolved upon her relatives, the defendants. The ancestral nature of the property was denied and it was averred that the Sardar had full power of disposition of the houses. It was further alleged that Mt. Kaushalya was a Purbiani, and that Kahan Singh, a Khatri, could not contract a valid marriage with her. These allegations were traversed by the plaintiffs in their replication, where it was also pleaded that the Sardar was governed by Customary Law under which a valid marriage between Kahan Singh and Mt. Kaushalya should be presumed from their having lived together as man and wife for many years. The lower Court found on all points against the plaintiffs and they have appealed.

Mr. Nawal Kishore for the appellants has contended that the houses were the self-acquired property of the Sardar, that he had bequeathed them to Mt. Kaushalya, and that under the terms of the wills they were her absolute property. It is, however, contended with great force that Mt. Kaushalya was the lawfully married wife of the Sardar and her stridhana would devolve upon the heirs of her husband both under Hindu Law and custom whichever might be found applicable. After a careful examination of the evidence. I am, however, of opinion that the findings of the lower Court on both these points are correct. The oral evidence as to the alleged chadar andazi is discrepant in material particulars and cannot be accepted. Moreover, it seems very unlikely that the late Sardar would, several years after his return to the village, go through the form of a chadar andazi marriage with a Purbiani woman, who had been living with him for many years before and who is described by the defendants' own witnesses as being over 50 years of age at the time. Mt. Nawal Kishore wanted to refer to a number of documents in which it was alleged Mt. Kaushalya had been described as the widow of the late Sardar. But these documents were not exhibited or proved in the Court below, and not being evidence in the case cannot be referred to in appeal. He also laid much stress on the fact that in the will, Ex. D. 1, Mt. Kaushalya was described by Kahan Singh as his Aurat Madkhula and he argued that this meant a wife married by chadar andazi as distinguished from aurat mankuha, which is a wife married with the ordinary ceremonies. This interpretation is however clearly erroneous and cannot be accepted. "Aurat Madkhula" literally means a woman brought in the household" and the expression is used in common parlance to describe a 'concubine' or a kept mistress' in contradistinction to a wife, married according to strict religious ritual or by chadar andazi or other recognized forms of marriage. I, therefore, hold that the relationship of husband and wife did not exist between Kahan Singh and Mt. Kaushalya.

However, even if I were to accept the contention of the plaintiffs and to hold that Mt. Kaushalya was the lawfully married wife of the Sardar, the plaintiffs' suit must still fail for want of locus standi. Under the Benares School of Hindu Law the stridhana of a married woman devolves, on failure of her own descendants, on her husband and after him on his heirs in order of their succession, only when the marriage had been performed in one of the approved forms. The text of the Mitakshara on this point is quite clear and explicit and is as follows :

> Of a woman dying without issue as before stated and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya the property as before described belongs in the first place to her husband. On failure of him it goes to his nearest sapindas. But in the other forms of marriage the property of a childless woman goes

to her parents that is to her father and mother. The succession devolves first on the mother. On the failure of them their next of kin take the succession (Mitakshara Ch 11 S. 11).

It is not necessary to enter into an elaborate description of the four approved forms of marriage. They will be found described in detail in Bannerjee's Hindu Law of Marriage and Stridhana (2nd Ed ; page 79) et seq ; and Mayne's Hindu Law (9th Ed.) at page 93. It is not pretended that the marriage by Chadar Andazi of Mt. Kaushalya with Kahan Singh (even if it be held proved) would be a marriage in one of the approved forms, and Mr. Nawal Kishore, was forced to admit that in this view of the law, the appellants are not Mt. Kaushalya's heirs and have no locus standi to maintain the suit.

As a last resort, the learned counsel contended that the succession to the houses would be governed by custom under which the plaintiffs are heirs to Mt. Kaushalya's special property. She, however, being a Purbiani woman from Oudh could not be governed by the Punjab custom ; and as to Kahan Singh I cannot find on the record any evidence whatsoever which might indicate that his tribe or family had ever been governed by custom in matters relating to marriage. Assuming, however, that he was so governed, I do not know of any rule of custom under which the special property of a married woman governed by Customary law devolves on her husband's heirs in preference to her own relations. The statement in Rattigan's Digest of Customary Law, paragraph 271 on which Mt. Nawal Kishore, relies, is not supported by any authority whatever and I am not prepared to follow it. Custom is a matter of proof and not of conclusions based on a priori reasoning or deductions drawn from a comparative study of the laws of distribution prevailing among primitive societies. The learned author of the Digest does not base his remarks on any entry in the Riwaj-i-am of any, district in the Punjab or on any decided case, reported or unreported, I must, therefore, respectfully decline to follow it. In the absence of any well ascertained custom relating to this matter we must fall back upon Hindu Law *Daya Ram* v. *Sohel Singh* (1) and as already stated under that law the plaintiffs are not the heirs.

For the foregoing reasons the appeal fails and I dismiss it with costs.

D.D. *Appeal dismissed.*

(1) [1906] 110 P. R. 1906=59 P. W. R. 1907= 31 P. L. R. 1907 (F. B.).

A. I. R. 1927 Lahore 443

FFORDE AND CAMPBELL, JJ.

Ishar Das Dharam Chand—Defendants —Appellants.

v.

Kannu Mal-Chamandi Lal—Plaintiffs —Respondents.

First Appeal No. 1351 of 1922, Decided on 18th January 1927, from the decree of the 1st Cl. Sub-J., Delhi, D/- 6th May 1922.

Contract Act, S. 117—Buyer taking delivery cannot sue for price of goods—He can sue for breach of contract if the goods do not correspond to sample and he has sustained damage.

A suit for the recovery of the price of good sold and delivered does not lie after the purchaser has accepted delivery. He can only sue for damages for breach of contract in the event of his being able to satisfy the Court that he had in fact sustained damages by reason of the goods not answering the description contracted for.

[P 444 C & 1, 2]

Moti Sagar and *Mehr Chand Mahajan* —for Appellants.

Sardha Ram Kapur and *Balwant Rai* —for Respondents.

Judgment.—By a contract in writing, dated the 27th of August 1919, the defendants agreed to sell and the plaintiffs agreed to buy 15 bales of unbleached Japanese longcloth, 44 inches in width and 38 yards in length described as Quality No. 5151 at Rs. 28, goods to be shipped in three lots with 60 days grace by February 1919 shipment. It is conceded on both sides that by "February 1919 shipment in 3 lots" is meant that the goods were to be shipped in the months of February, March and April respectively in lots of five bales in each shipment.

On the arrival of the first two lots the plaintiffs refused to accept them upon various grounds. The defendants then brought a suit for non-acceptance and got a decree in respect of these two consignments. The remaining five bales arrived on the 8th July 1919, an appropriate date under the contract, and notice of arrival was duly sent to the plaintiffs upon that date. Some cor.

respondence ensued and ultimately the plaintiffs took delivery of these five bales on the 3rd September 1919. On delivery of these five bales the plaintiffs paid the agreed price. No further steps, so far as the evidence before us goes, were taken by either party to this contract until the 2nd of January 1920, when the present suit was brought by the buyers for the recovery of the purchase price.

The case was tried by a Subordinate Judge of the 1st Class, Delhi, who found in favour of the plaintiffs. The learned trial Judge took the view that the goods were not of the description contracted for inasmuch as the bale numbers, when the bales were produced in Court, did not correspond to the numbers placed upon the bales by the shippers and on the further ground that the goods had been shipped via Bombay to Karachi instead of direct to Karachi.

Mr. Moti Sagar's first objection to the decree of the learned trial Judge is that a suit for the recovery of the price of goods sold and delivered does not lie inasmuch as the plaintiffs had accepted delivery, and accordingly could only sue for damages for breach of contract in the event of their being able to satisfy the Court that they had in fact sustained damages by reason of the goods not answering the description contracted for. Mr. Sardha Ram, who appears for the plaintiffs, contends that the goods were not finally accepted as his clients after examination definitely rejected them. But in support of this contention there is no evidence whatsoever. Mr. Sardha Ram relies upon some remarks made by Sundar Dal, D., W. 16 in the course of his cross-examination The statement in question is as follows :

When the goods were delivered, the purchasers complained that the goods were late and were purchased in the market in Bombay. Several settled and there is ligitation going on with others. Gordhan, Makhan settled but cannot say how. Plaintiff also brought the same complaints. I did not write to the proprietors regarding these complaints. Seth Ram Richpal came to Delhi and informed him of the complaint and he said that he would himself see to it.

There is thus no evidence that, beyond making certain complaints about the mode in which these goods had been shipped there was any rejection of the goods by the plaintiffs after they had been delivered. Though they were delivered on the 3rd of September 1919 nothing was done by the plaintiffs—no letter was written, no notice sent, until the action was brought on the 2nd of January 1920. The goods, therefore, remained in the plaintiffs' possession for four months during which time they had every opportunity to examine them and ascertain whether or not they corresponded to the contract. They also had ample time in which to write a simple letter definitely stating that having examined the goods they refused to accept them. In the absence of any notice of such refusal the plaintiffs must be deemed to have accepted the goods. I may further add, that even if it had been established that the numbers of the bales did not correspond to the numbers given in the invoice this in itself would not entitle the buyers to reject the goods. There is no term in the contract between the parties making it a condition precedent to the contract that the bales should bear any particular number. Similarly the plaintiffs' contention that the goods were shipped first to Bombay, even if established by evidence, would not give them a right of rejection provided the goods were of February shipment and corresponded in quality, nature and description to the goods contracted for. The contract merely provided that the goods should be available to the plaintiffs at the Karachi godown and they were so available. It follows that even on the plaintiffs' own case they had no right to reject the goods and their only remedy was to sue for breach of contract if they considered themselves to be in a position to prove that the goods were not in fact those which they agreed to buy.

Mr. Sardha Ram has argued in the alternative that this action should now be treated as one for damages for breach of contract. The objection to this suggestion is that there is no evidence whatsoever of any damages sustained by the plaintiffs. There is no evidence that the goods were not of the nature and quality and description contracted for. The plaintiffs did not even open the bales to see if they were the goods which they had bought. Their only contention is a purely technical one that the numbers of the bales were not those supplied to them in the invoice and secondly that they were booked to Bombay instead of Karachi. The only evidence on the question of these bale numbers is that at the time when they were produced

in Court four months after they had been in possession of the plaintiffs the bale numbers had been altered and so far as shipment to Bombay is concerned it is conclusively proved that these goods were sent to Karachi and unloaded there.

Under these circumstances it seems to me that the plaintiffs must wholly fail and I would accordingly accept the appeal, set aside the judgment and decree of the lower Court, and enter judgment for the defendants dismissing the plaintiff's suit with costs throughout.

Campbell, J.—I agree.

D.D. *Appeal allowed.*

A. I. R. 1927 Lahore 415

TEK CHAND AND AGHA HAIDAR, JJ.

Mangat Rai—Plaintiff—Appellant.

v.

Babu Singh and *another*—Defendants—Respondents.

First Appeal No. 1723 of 1926, Decided on 4th May 1927, from the decree of the decree of the Sr. Sub-J., Ambala, D/- 15th March 1926.

(a) *Contract Act, S. 74—Condition to pay compound interest as same rate of simple is not penal and it does become penal though the deed contains a separate unenforceable clause for compound interest at enhanced rate.*

A provision for charging compound interest at the same rate of simple interest, on failure of the mortgagor to pay the principal or interest on the due date, is perfectly legal and cannot be relieved against on the mere ground of hardship: 101 *P. R.* 1918 *P. C.*; 124 *P. R.* 1818 *P. C*; 31 *P. R.* 1918; *A. I. R.* 1924 *Lah.* 21 and 34 *Cal.* 150, *P. C. Foll.* [P. 446, C. 1]

Such a stipulation is not penal and it cannot become illegal and unforceable merely because there is to be found in the deed a further unenforceable condition that on default of payment of interest for two successive half-years interest and compound interest would be chargeable at an enhanced rate: 22 *Cal.* 143 and 29 *Cal.* 43, *Rel. on.* [P. 446, C. 2, P. 447, C. 1]

(b) *Civil P. C., S. 34—Section does not apply to mortgage suit—Civil P. C., O. 34, R. 6.*

Section 34 applies only to decrees for the payof money and has no applicability to a suit brought by a mortgagee to recover the amount due to him on foot of the mortgage executed in his favour and a mortgage decree until it reaches the stage shown by S. 90 of the Transfer of Property Act (O. 34, R. 6, Civil P. C.) cannot be said to be decree for money. [P. 447, C. 2]

(c) *Civil P. C., O. 34, R. 4—Interest—Contracted rate up to date of payment must be allowed.*

In passing a preliminary decree in a mortgage suit the Court has no power to award interest at other than the contractual rate up to the date fixed for payment unless of course it is penal: 36 *All.* 220, *Ref.* [P. 447, C. 2]

Shamair Chand and *Bisant Krishan*—for Appellant.

Tek Chand, J.—On the 15th February 1922 defendants-respondents Babu Singh and Tota Singh executed a deed of mortgage without possession in favour of Mangat Rai plaintiff-appellant in respect of certain house property situate in the town of Ambala for Rs. 2,700. It was stipulated that interest on the principal sum secured would be paid six-monthly at Re. 1-4-0 per cent per mensem, and on failure to so pay it, compound interest at the same rate would be charged. It was further provided that if the mortagors failed to pay interest for two successive half-years the rate of interest would be enhanced to Rs.2 per cent per mensem with retrospective effect from the date of the execution of the deed and in that event compound interest would also be charged at this enhanced rate. The deed specifically authorized the mortgagee to recover the principal with interest and compound interest and costs of litigation (if any) from the hypothecated property as well as from the other moveable property of the mortgagors and from their persons.

The mortgagors having paid nothing in discharge or reduction of their liability for the principal or interest, the mortgagee, on the 6th of October 1925 instituted the suit, out of which this appeal has arisen, for recovery of Rs. 6,000, consisting of Rs. 2,700, on account of the principal and Rs. 3,300, due as interest and compound interest calculated at the rate of Rs. 2, per cent per mensem from the date of the execution of the deed. Of the defendants Tota Singh did not appear and proceedings were ex-parte against him. Babu Singh defendant admitted the execution and consideration of the deed but prayed for reduction of interest. The issues framed were:

(1) Is the interest claimed excessive or exorbitant?

(2) Can the defendants claim reduction under the Usurious Loans Act or under any other law? If so, to what extent?

(3) What should be held to be the valid charge on the date of the suit?

The learned Senior Subordinate Judge in a brief judgment, which recites the

terms of the mortgage-deed inaccurately in several particulars and which does not discuss the legal points in any detail, allowed simple interest at the rate of Re. 1-4-0 per cent per mensem till the date of the suit, amounting to Rs. 1,473-12-0 and rejected the rest of the plaintiff's claim. He accordingly passed a decree for Rs. 4,173-12-0 with proportionate costs and future interest on Rs. 2,700 at Rs. 6 per cent per annum from the date of suit till realization. He also remarked that the decretal amount could be recovered from the hypothecated property only, as no relief had been asked against the person or other property of the defendants.

The plaintiff has appealed and in his memorandum of appeal he does not claim interest or compound interest at the enhanced rate. Mr. Shamair Chand, who appeared for the appellant, has conceded that the provision as to charging of enhanced interest at Rs. 2 per cent per mensem from the date of the mortgage transaction is penal and he is not claiming interest or compound interest at that rate. The principal point for determination, therefore, is whether the plaintiff-appellant is entitled to claim compound interest at Re. 1-4-0 per cent per mensem with six-monthly rests, as provided for in the first part of the deed. The learned Subordinate Judge has held that this provision is also penal and the mortgagee is not entitled to recover compound interest at all. He has, however, given no reasons to support his finding nor has he cited any authorities on which this conclusion is based. The rule of law is now firmly established that, in the absence of proof of undue influence, a provision for charging compound interest at the same rate of simple interest on failure of the mortgagor to pay the principal or interest on the due date, is perfectly legal and cannot be relieved against on the mere ground of hardship. In the present case undue influence was not pleaded, much less proved, and, therefore, the case does not fall within the exception. All that the respondents urged was that the term as to payment of compound interest was harsh. In *Aziz Khan* v. *Duni Chand* (1), interest and compound interest at the rate of 25 per cent. per annum., had been made payable and though it was found that the terms of the contract were onerous, their Lordships ruled that Courts had no power to refuse to give effect to them. Mr. Ameer Ali, who delivered the judgment of the Judicial Committee observed:

> The transaction was undoubtedly improvident but in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for a Court of justice to give relief on grounds of simple hardship.

Similarly in *Billa Mal* v. *Ahad Shah* (2), Lord Atkinson laid down that:

> there was nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accuring due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract.

It was definitely held that

> the mere fact that the principal sum now claimed exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable; see also the remarks of the learned Chief Justice to the same effect in *Allah Din* v. *Fateh Din* (3) and of Campbell, J., in *Khota Ram* v. *Nawaz* (4).

It must, therefore, be held that the condition securing to the mortgagee compound interest at Re.1-4-0 per cent. per mensem is not in itself illegal. That it is not penal within the meaning of S. 74 of the Contract Act is also well settled by a uniform series of decisions of all the High Courts, based on the leading Privy Council ruling in *Sundar Koer* v. *Rai Sham Krishen* (5), where at page 158 a distinction is drawn between cases in which compound interest is chargeable at the same rate at which simple interest was payable on the principal sum, and cases where it is chargeable at a rate exceeding it. It was ruled that in the former class, the condition as to payment of compound interest is perfectly legal and is not penal, whereas in the latter class,

> compound interest at a rate exceeding the rate of interest payable on the principal money, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty.

If this condition is in itself perfectly legal and enforcible, I fail to see how it becomes illegal and unenforcible merely because there is to be found in the deed

(1) [1918] 101 P. R. (1918)=165 P.W.R. (1918) =48 I. C. 933=23 C. W. N. 130 (P.C.).

(2) [1918] 124 P. R. (1918)=48 I. C. 1=35 M. L. J. 614 (P. C.).

(3) [1918] 31 P. R. (1918)=27 P. L. R. (1918) =45 I. C. 101=54 P. W. R 1918.

(4) A. I. R. 1924 Lah. 21=4 Lah. 76.

(5) [1907] 34 Cal. 150=34 I. A. 9=5 C. L. J. 106 (P. C.).

a further unenforcible condition that on default of payment of interest for two successive half-years interest and compound interest would be chargeable at an enhanced rate. The condition to pay interest at the rate originally fixed is an integral part of the primary obligation created under the deed and is wholly separate from and independent of the default clause under which interest and compound interest at enhanced rate was to be charged. Its validity is in no way affected by the decision that the condition to pay enhanced interest is penal. The question was considered by the Calcutta High Court in *Bud Nath* v. *Shamanand Das* (6), where the rate of interest originally fixed was 15 per cent. per annum., payable at the end of a year, and in default compound interest at the rate of 32½ per cent. was chargeable. The learned Judges while holding the provision for charging interest and compound interest at this enhanced rate to be penal allowed the creditor compound interest at the rate originally fixed i. e., 15 per cent per annum. The question was again considered by the same Court in *Rameswar Prosad Singh* v. *Rai Sham Kishen* (7), where it was held that though interest at the enhanced rate could not be allowed the creditor was entitled to compound interest at the same rate as that at which simple interest was payable under the terms of the bond, it being remarked that such condition "was not penal, but was a perfectly legal provision." I must, therefore, hold that the plaintiff is entitled to charge compound interest at Re. 1-4-0 per cent per mensem., with half-yearly rests from the date of the mortgage.

It may be noted that no attempt was made in the lower Court to bring the case within the provisions of the Usurious Loans Act, nor does the learned Subordinate Judge rely upon the provisions of that Act for reducing the rate of interest.

The learned Subordinate Judge has also gone wrong in not passing a decree in accordance with the provisions of O. 34, R. 4 Civil P. C., as he was bound to do. He is, further in error in remarking that no relief could be granted against the person or other property of the defendants. If the learned Judge had proceeded in accordance with the provisions of the Code, a decree should have been passed in Form No. 4 (Appendix D Civil P. C.,) prescribed for such decrees. In that case on the property being put to sale after the expiry of six months if the sale proceeds were found insufficient to meet the total mortgage charge, the decree-holder would have the right to apply under O. 34, R. 6 Civil P. C., for a personal decree aaainst the judgment-debtor for the recovery of the balance. It will thus be seen that the learned Sub-Judge in passing the decree under appeal has not only disregarded the express provisions of the Code but has also illegally deprived the plaintiff mortgagee of his statutory right to apply for a personal decree being passed against the defendant mortgagor, a right which had in this case been further secured to him by the express terms of the deed.

There is yet another mistake in the learned Subordinate Judge's judgment. He has allowed interest at the stipulated rate up to the date of the suit only and has directed that interest from that date till realization will be payable at 6 per cent per annum., only. In doing so he seems to have acted under the provisions of S. 34, Civil P. C., but it must be remembered that that section applies only to decrees for the payment of money and has no applicability to a suit brought by a mortgagee to recover the amount due to him on foot of the mortgage executed in his favour. As remarked by Sir Lawrence Jenkins in *Hargoan Das* v. *Mohanbhai* (8), a mortgage decree until it reaches the stage shown by S. 90 of the Transfer of Property Act (O. 34, R. 6 Civil P. C.,) cannot be said to be a decree for money. It is well settled that in passing a preliminary decree in a mortgage suit the Court has no power to award interest at other than the contractual rate up to the date fixed for payment : *Rajwanta Kunwar* v. *Shiam Narain Singh* (9). As pointed out by Mulla at page 106 of his Commentary on the Civil P. C., (8th edition) in such cases the Court is bound to award to the mortgagee interest on the principal sum from the date of suit up to the date fixed for payment of the mortgage debt at the rate stipulated in the mortgage, unless

(6) [1895] 22 Cal. 143 (145).
(7) [1902] 29 Cal. 43.
(8) [1905] 2 Bom. L. R. 225.
(9) [1914] 36 All. 220=23 I. C. 88=12 A. L. J. 283.

of course the rate is penal which is not the case here.

For the foregoing reasons I would accept the appeal, set aside the decree of the lower Court, and in lieu thereof grant a preliminary decree to the plaintiff-appellant against the defendants-respondents

(a) declaring that the amount due to the plaintiff on foot of the mortgage in suit is Rs. 2,700 (principal) together with interest and compound interest calculated at Re. 1-4-0 per cent per mensem, with six monthly rests from the date of the mortgage-deed to the date of this decree.

(b) directing that if the defendants pay into Court the amount so decreed on a day within six months from the date of this decree, the plaintiff shall deliver up to the defendants all documents in his possession or power relating to the mortgaged property and shall, if so required re-transfer the property to the defendants free from the mortgage and,

(c) in default of the defendants paying as hereinabove mentioned, the mortgaged property shall be sold and the proceeds of the sale shall be paid into Court and applied in payment of the amount declared due to the plaintiff as aforesaid together with subsequent interest and compound interest at Re. 1-4-0 per cent per mensem., and proportionate costs in both Courts.

It is, therefore, ordered that if for some reason the decree is not satisfied within six months from this date, simple interest subsequent to that date shall be paid at Re. 1-4-0 per cent per mensem., till realization.

Agha Haidar, J.—I agree.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 448

SHADI LAL, C. J., AND ZAFAR ALI, J.

Lajpat Rai and *others* — Plaintiffs—Appellants.

v.

Faiz Ahmad and *others*—Defendants—Respondents.

Letters Patent Appeal No. 253 of 1925, Decided on 25th March 1927, from the order of Broadway, J., D/- 1st July 1925, in Civil Appeal No. 160 of 1925.

(a) Civil P. C., S. 100 — Finding of fact based partly on inadmissible evidence.

A finding of fact based partly on evidence which is not admissible cannot be maintained. [P 449 C 1]

(b) Evidence Act, Ss. 11, 13 and 32—Document between strangers reciting ownership of parties to boundary lands is not admissible.

A document between strangers to the suit in which mention is made of one of the parties to the suit or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence: 46 *I. C.* 119, *not Foll.*; *A. I. R.* 1925 *Cal.* 1034 and 224 *P. L. R.* 1913, *Foll.* [P 449 C 1]

Fakir Chand and *C. L. Mathur* — for Appellants.

Naiz Mohammad—for Respondents.

Judgment.—The plaintiff laid claim to a site which was not in their possession, and in proof of their title to it they produced three documents and examined a number of witnesses. These documents are registered deeds of sale in favour of third parties relating to properties adjoining the site in question on three different sides. The plaintiffs relied on the recitals of boundaries in these deeds describing the site as plaintiffs' property. The trial Court dismissed the plaintiffs' suit, but on appeal the District Judge came to the conclusion that the oral evidence should be given credence to because it received support from the recital of boundaries in the said deeds, and thus relying upon the oral as well as documentary evidence he granted the plaintiffs a decree for possession of a portion of the site. The defendants appealed against that decree contending inter alia that the said documents were not admissible in evidence. On the authority of the rulings cited below [6 *Cal.* 268; 17 *All.* 428; 19 *I. C.* 615; 19 *C. W. N.* 468; *A. I. R.* 1922 *Cal.* 251; *A. I. R.* 1924 *Cal.* 1067 and *A. I. R.* 1925 *Cal.* 1034] this contention was accepted by the learned Judge of this Court who heard the appeal and he remanded the case to the District Judge for redecision on the basis of the admissible evidence.

The plaintiffs have preferred a Letters Patent Appeal against the said order of remand and their counsel, Mr. Fakir Chand, contends, (1) that the documents are admissible in evidence, and (2) that, even if they are not, the finding of fact arrived at by the District Judge could not be interfered with as it was based upon some evidence. Both these conten-

tions are untenable. As regards, (2) it may be stated at once that the finding of fact based as it partly was on evidence which was not admissible, could not be maintained because it was not possible to divine what value the District Judge would have attached to the oral evidence if the documentary evidence had been rejected.

On the first point the learned counsel relies upon (*a*) *Farzand Ali* v. *Zafar Ali* (1) and (*b*) *A. I. R.* 1927 *Calcutta* 230; was based upon *Dwarka Nath* v. *Mukunda Lal* (2) which was dissented from in *A. I. R.* 1922 *Calcutta* 251. In (*b*) also it was held inter alia that where the executant of a document was alive but was not produced there was a strong body of opinion that such document was not admissible either under S. 11 or S. 13 of the Evidence Act. As the executants were not produced in the present case, nor were stated to be dead, the documents were not shown to be admissible in evidenee. As observed in *A. I. R.* 1925 *Calcutta* 1034 :

> There was at one time a conflict of opinion upon the admissibility of documents between strangers, where one of the parties to the suit was mentioned as owner of the boundary land; but recent decisions have finally settled the point. At one time it was attempted to make such documents admissible in evidence under S. 11, Cl. (2) of the Indian Evidence Act. In some cases the admissibility of such documents was made to rest on S. 13 and in some other cases on S. 32, Cl. (3) of the Indian Evidence Act

and then the learned Judges who decided that case went on to say :

> We are of opinion that a document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence.

The same view was taken in *Mehiditta Mal* v. *Nicholson* (3) we are, therefore, of opinion that the learned Judges rightly held that the documents are not admissible in evidence, and we accordingly dismiss the appeal with costs.

G.B. *Appeal dismissed.*

(1) [1918] 132 P.W.R. 1918=45 I.C. 119.
(2) [1907] 5 C.L.J. 55.
(3) [1913] 224 P.L.R. 1913=19 I.C. 770=133 P.W.R. 1913.

A. I. R. 1927 Lahore 449

ADDISON AND AGHA HAIDER, JJ.

Labha Singh—Plaintiff—Appellant.

v.

Basant Singh and *others*—Defendants—Respondents.

First Appeal No. 2789 of 1922, Decided on 20th April 1927, from the decree of the 1st Cl. Sr. Sub-J., Amritsar, D/- 8th August 1922.

Civil P. C., O. 41, R. 1—Copy of part of judgment not filed until expiry of limitation—Case must be decided on its merits.

Where a copy of the part of the judgment (copy of an order on a preliminary issue) is not filed till after the expiry of limitation and when the appellant thought he had fully complied with the provisions of the law, a dispensation should be granted to him as regards that part of the judgment. Each case of this kind must be decided on its own merits : 67 *P. R.* 1917 and *A. I. R.* 1926 *Nag.* 57, *Rel. on.* Had that part of the judgment been attacked in appeal effect would have been different.

[P 451 C 1]

Mukand Lal and *Shambhu Lal Puri*—for Appellant.

Nand Lal and *A. R. Kapur*—for Respondents.

Addison, J.—The plaintiff Labha Singh of Vain Puin in the Amritsar District in the Punjab sued Basant Singh, a minor, and numerous alienees for possession of a large area of land in village Vain Puin, other large areas of land in village Tabar in the United Provinces, and two house properties in Tabar and Saharanpur in the United Provinces, on the allegation that he was the collateral of one Nihal Singh who lived in the United Provinces and died some fifty years before, and was thus entitled to possession of his property. After Nihal Singh's death he was succeeded by his widows, the last of whom Mt. Bishen Kaur alias Malan, died in October 1904. It was stated in the plaint that Defendant No. 1 was in possession, claiming to be the adopted son of Nihal Singh, while the other defendants were alienees in possession of parts of the property left by him. It was asserted that Defendant No. 1 was not the adopted son and that the alienations were without consideration and necessity. The suit was brought in the Court of the Sub-Judge 1st Class, Amritsar, on the 7th October 1919 as some of the property was in the Punjab and within his jurisdiction, and it has

been held by him that the suit was within time as the last widow died in October 1907 and the plaint was presented on the 7th day of October 1919, that is, the day when the Courts reopened after the September vacation, to which were attached certain Court holidays.

It was denied in the pleas that plaintiff was a collateral and it was claimed that the Defendant No. 1 had been validly adopted by Mt. Bishen Kaur under registered deed, dated the 8th July 1907, and that the suit was time barred. It was pointed out that in March 1908, 59 persons of the plaintiff's village, whose names are entered in the pedigree tables relied on by the plaintiff, had sued in the Court of the Subordinate Judge, Saharanpur, in the United Provinces for possession of the same properties. Their suit was dismissed by the Allahabad High Court on the 7th April 1913, while their appeal to the Privy Council was also dismissed : *Kalyan Das* v. *Maqbull Ahmad* (1). It was held then that no reliance could be placed on the pedigree tables. As that suit had been brought on behalf of all the alleged collaterals, the present suit was barred by the principle of res judicata. Some of the alienees also raised other pleas, but as the suit has been decided on certain preliminary issues, it is unnecessary to discuss them.

As regards one of the three preliminary issues, one Sub-Judge held, for reasons given in his order dated the 6th March 1922 that the suit was not time barred. His successor then went on with the trial of the two remaining preliminary issues and held for reasons given in his order, dated 8th August 1922 : (1) that the suit was not barred by the principle of res-judicata, and (2) that it had not been proved that plaintiff was a collateral of Nihal Singh. On the last finding the suit was dismissed and the plaintiff has appealed.

A preliminary objection was taken that the appeal was incompetent as the memorandum though accompanied by a copy of the decree, was not accompanied by a copy of the complete judgment on which the decree was founded as required by O. 41, R. 1, Civil P. C. A copy of the order dated the 8th August 1922, which disposed of two of the issues, was put in, but not a copy of the order, dated the 6th March 1922, disposing of the issue as to limitation. In the later order it is simply noted that the previous order had decided the question of limitation in a particular way. Two Division Benches of this Court have held that the judgment is contained in both the orders, that is, that the judgment recorded on the point of limitation is as much a part of the judgment as the judgment recorded on the other two issues. These two cases are Nos. 2450 of 1922, decided on the 18th June 1926, and *Abdullah* v. *Behari Lal* (2), and in my opinion these cases were rightly decided. In both these cases it was also mentioned in the second order what had been decided in the first. The record of these cases is reported in *Abdullah* v. *Behari Lal* (2).

Judgment is defined in S. 2 (9) of the Civil P. C. as the statement given by the Judge of the grounds of a decree or order, while it is further enacted in O. 20, Rr. 4 and 5, Civil Procedure Code, that in suits in which issues have been framed, the Court in its judgment shall state its finding, with the reasons therefor upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the case. The Court has done this and first gave its judgment on the question of limitation as that might have disposed of the whole suit, while it is still open to the respondents to argue that that issue was wrongly decided. It follows that a part of the judgment on which the decree was based did not accompany the memorandum of appeal.

A different view was taken by another Division Bench in *Morton* v. *Woodfall* (3), but with the very greatest respect to the Judges who decided that case I find myself unable to agree. It would appear from that judgment that the point was seriously taken or pressed.

The learned counsel for the appellant, however, argued that the appellate Court can dispense with the copy of the judgment under the provisions of O. 41, R. 1, Civil P. C. The relevant words are:

> The memorandum shall be accompanied by a copy of the decree appealed from, and unless

(1) A. I. R. 1918 P. C. 53=40 All. 497.

(2) A. I. R. 1926 Lah. 638.

(3) A. I. R. 1927 Lah. 103=8 Lah. 257.

the appellate Court dispenses therewith, of the judgment on which it is founded.

It was held in *Dhanpat Mal* v. *Mela Mal* (4) by a Judge in Chambers that where no copy of (any part of) the judgment was put in till after limitation had expired, and where no dispensation had been granted, the appeal would be time barred unless there was just cause for extending the time. It was argued that this authority laid down the principle that the dispensation must be granted before limitation had expired, and this is undoubtedly a possible view, though it is not clearly enunciated in the case in question. On the other hand, a different view appears to have been taken in *Agent, G. I. P. Ry. Co.* v. *Radha Kisan Jaikisan* (5) by a Division Bench of the Court of the Nagpur Judicial Commissioner. The memorandum of appeal stated that a copy of the judgment appealed against would be presented later. The appeal was admitted, but a copy of the judgment was not put in. It was contended that the appeal should be dismissed as it was not accompanied by a copy of judgment. It was held:

The memorandum of appeal stated that a copy of judgment would be given afterwards, and, as the appeal was admitted on presentation, notice being ordered to issue to the respondents, it must be taken that the Court dispensed with the copy of the judgment. In any case this is a matter between the Court and the appellant.

The last words are important, and I would hold that in the peculiar circumstances of the present case, when the appellant thought he had fully complied with the provisions of the law, a dispensation should be granted to him as regards the first part of the judgment, which has as a matter of fact been printed in the paper book. Each case of this kind must be decided on its own merits. Had the first part of the judgment been attacked in appeal, it might have been different and, when the law is better known, such a concession might not so easily be granted.

In any case I would have extended the time in the present case under S. 5 of the Limitation Act for the reason given above.

The next question is whether the plaintiff has established that he is a collateral of Nihal Singh. (After considering oral as well as documentary evidence his Lordship proceeded.) I agree with the trial Judge that the plaintiff has failed to prove that he is a collateral of Nihal Singh.

I shall touch briefly on the question of res judicata as that was discussed before us. The plaintiff relies on custom and has put forward tables which show that many other persons (who were unsuccessful in the first suit) are under custom entitled to succeed along with him according to ancestral shares. They have failed in their suit and the matter is at an end so far as their shares are concerned, Plaintiff's counsel stated before us that his client's share was 1/96th if Saido's descendants alone are considered, 1/192th if Ghasi's descendants also are included, as obviously must be done. Plaintiff in this way could only sue for a 1/192th share at most. It has not been explained how plaintiff was not a party to the first suit. He alone of Saido's descendants was omitted.

The question of limitation was not argued before us, as it was intimated to counsel that this was unnecessary on the view we took of the appeal.

I would dismiss the appeal with costs.

Agha Haider, J.—I agree generally.

R.D. *Appeal dismissed.*

(4) [1917] 67 P. R. 1917=41 I. C. 918=133 P. W. R. 1917.

(5) A. I. R. 1926 Nag. 57.

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* A. I. R. 1927 Lahore 451

HARRISON AND DALIP SINGH, JJ.

Mt. Fazl-un-Nissa—Defendant — Appellant.

v.

Didar Hussain—Plaintiff — Respondent.

First Appeal No. 2228 of 1922, Decided on 3rd May 1927, from the decree of the 1st Cl. Sub-J., Lahore, D/- 14th August 1922.

* (a) *Civil P. C., O. 41, R. 1—Preliminary issues decided—Decision attacked in appeal from final judgment—Final judgment not referring to decision on the preliminary issues—Copy of that decision must be filed with memo.*

Two preliminary issues were struck as to the frame of the suit and the valuation, and were decided by the trial Court. In the final judgment no reference was made to these preliminary issues and a decree was given to the plaintiff. The defendant in the memorandum of appeal took four grounds against the findings on the preliminary issues. No copy of the order

passed on the preliminary issues was attached to the memorandum.

Held : that it was absolutely essential that a copy should accompany the memorandum and in absence of such copy the presentation of appeal was defective. [P 452 C 1, 2]

(b) *Civil P. C., O.* 41, *R.* 1—*Defective memo. admitted—Objection to memo. at a later stage may be barred.*

The admission of a defective memorandum of appeal may operate as a decision and bar a later objection where the defect is quite obvious. *A. I. R.* 1923 *All.* 579 and *A. I. R.* 1926 *Nag.* 57, *Ref.* [P 452 C 1]

Moti Sagar, Mehr Chand Mahajan and *Zahoorud-Din Naqshabandi* — for Appellant.

Mian Mohammad Shafi and *Barkat Ali*—for Respondent.

Harrison, J.—In this appeal a preliminary objection was taken that the appeal was defective inasmuch as no copy of the order passed on the preliminary issues was attached to the memorandum. The facts are that two preliminary issues were struck as to the frame of the suit and the valuation, and were decided by the first Subordinate Judge who handled the case. In the final judgment written by Pandit Omkar Nath no reference was made to these preliminary issues and a decree was given to the plaintiff. The defendant in her memorandum of appeal took no fewer than four grounds against the findings on the preliminary issues.

Various authorities have been relied on, counsel for the respondent quoting more especially *Abdullah* v. *Behari Lal* (1) which, in its turn, refers to Civil Appeal No. 2450 of 1922, while Mr. Moti Sagar for the appellant relies on *G. I. P. Ry. Co.* v. *Radha Kisan Jaikisan* (2), *A. I. R.* 1923 *All.* 579, and an unpublished ruling in *Morton* v. *Woodfall* (3). Out of the latter the first two deal with the question of whether the admission of a defective memorandum of appeal may operate as a decision and bar a later objection. They are both cases where there was no copy whatsoever of the judgment attached to the memorandum and where the admitting Judge could not have failed to realize the situation. If, therefore, while realizing that situation he admitted the appeal he must be held to have exercised his discretion under O. 41, R 1. *Morton* v. *Woodfall* (3) is somewhat similar to the present case, but the facts, in our opinion, are distinguishable; for it was clearly explained therein that the final judgment was a self-contained document and gave all that was required for compliance with the definition in S. 2 (9). The facts in Civil Appeal 2450 of 1922 and *Abdullah* v. *Behari Lal* (1) are, in our opinion, to all intents and purposes the same as in this case. There is, no doubt, this difference, that in both those cases the final judgment did refer to the earlier decision, whereas in this case it did not. Had counsel not taken four grounds of appeal against the previous order he could argue with some force that he had no reason to suppose that there was any such previous order and anyhow that he took no objection to it. Whether the final judgment contained any reference to the previous order or not, counsel was obviously well aware of its existence, and as it clearly forms part of the judgment on which the decree is based, we are of opinion that it was absolutely essential that a copy should accompany the memorandum. There is no reason for extending time as counsel was fully aware of the position and was not misled in any way. We find, therefore, that the preliminary objection must prevail and dismiss this appeal with costs.

D.D. *Appeal dismissed.*

(1) A. I. R. 1926 Lah. 638.
(2) A. I. R. 1926 Nag. 57.
(3) A. I. R. 1927 Lah. 103=8 Lah. 257.

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* A. I. R. 1927 Lahore 452

(Full Bench)

BROADWAY, FFORDE, ADDISON, TEK CHAND AND DALIP SINGH, JJ.

Cheta—Defendant—Appellant.

v.

Baija and *others*—Plaintiffs—Respondents.

Misc. Second Appeal No. 2539 of 1925, Decided on 25th May 1927, from the order of the Sr. Sub-J., Kangra, D/- 9th April 1925.

* (a) *Punjab Tenancy Act, S.* 77 (3) (*d*) *and proviso and Ss.* 45 *and* 43—*Suit under S.* 45 *decided against tenant—Tenancy ceases—Person so ejected can sue in civil Court for possession on the ground of occupancy right but proviso to S.* 77 (3) *applies.*

A civil Court has jurisdiction to try a suit brought by a person who has been dispossessed

from his tenancy after a notice issued to him under S. 43 of the Tenancy Act, and who has been unsuccessful in a suit under S. 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he had a right of occupancy therein, and S. 77 (3) (d) is no bar to such a suit, inasmuch as the person ceases to be a tenant, but if in the course of the trial of that suit it becomes necessary to decide any "matter" which can under sub-S. (3) of S. 77 be heard and determined by a revenue Court alone, the civil Court shall decline to proceed further and deal with the suit in the manner laid down in proviso (1) to S. 77 (3). [P. 453, C. 2 P. 455, C. 1, 2]

Therefore, if plea of res judicata has been raised, the civil Court should decide whether the rule of res judicata bars any further inquiry into the matter indicated, and it would only proceed to take action under proviso (1) if it holds that it was not res judicata : 49 *P. R.* 1919 and *A. I. R.* 1924 *Lah.* 539, *Appr.* [P. 458, C. 2]

(*b*) *Interpretation of statutes—Act excluding jurisdiction of ordinary Courts.*

Per Broadway, J.—An act by which the jurisdiction of the ordinary Courts is taken away must be strictly construed ; 45 *I. C.* 654, *Rel. on.* [P. 454, C. 2]

(*c*) *Jurisdiction — Allegations in plaint will determine.*

Per Broadway, J.—In order to ascertain the nature of a suit the general rule is that the allegations in the plaint must, primarily, be looked to and that these allegations govern the question of jurisdiction. [P. 454, C. 2]

(*d*) *Punjab Tenancy Act S. 77 (3), Proviso—"Matter" is used in contradistinction to "suit"—Whole suit is to be referred to revenue Court and not only such "matter".*

The word "matter" in proviso (1) to S. 77 is used in contradistinction to "suit" and the intention is that although the "suit" as laid would be within the jurisdiction of the civil Court if the pleadings raised any matter involving an issue which it becomes necessary to decide and the decision of which would necessitate the encroachment on the jurisdiction of the revenue Courts, the whole suit and not just the "matter" is to be referred to the revenue Courts for decision : 49 *P. R.* 1919, *Ref.* [P. 455, C. 2]

Mehr Chand Mahajan—for Appellant.

Mehr Chand (Dewan) — for Respondents.

Broadway, J.—The suit out of which this reference has arisen was instituted in January 1923, by Baija and others as plaintiffs against Cheta as defendant.

The plaintiffs claimed possession of 17 kanals 11 marlas of land on the following allegations: (1) That they and their ancestors had held the land as occupancy tenants for more than one hundred years. (2) That acting under the provisions of Ss. 42 (b), 43 and 45 of the Punjab Tenancy Act (16 of 1887) the defendant had a notice of ejectment issued to the plaintiffs by the revenue Officer. (3) That the plaintiffs had, under S. 45 (6) of the said Act, instituted a suit contesting their liability to be ejected, a suit that had been ultimately decided against them by the revenue Courts and their ejectment decreed. (4) That in execution of the decree they had been ejected.

The trial Court dismissed the suit holding that the plaintiffs were "tenants" at the date of the suit and consequently the civil Courts had no jurisdiction to try it. Reliance was placed on *Joti* v. *Maya* (1) and *Akbar Hussain* v. *Karam Dad* (2).

On appeal the learned Senior Subordinate Judge, relying on *Parman* v. *Lhassu* (3) and *Mahindar Singh* v. *Allah Ditta* (*A. I. R.* 1924 *Lah.* 539) came to the conclusion that the plaintiffs were not "tenants" and that the suit was cognizable by the civil Courts and remanded the case accordingly. Against this order of remand the defendant Cheta preferred a second appeal to this Court which came up for hearing before a Single Judge who referred it to a Division Bench. At the hearing before the Division Bench it was urged that the decisions in *Parman* v. *Lhassu* (3) and *Mahindar Singh* v. *Allah Ditta* (*A. I. R.* 1924 *Lah.* 539) were in conflict with the view taken in *Akbar Hussain* v. *Karam Dad* (2) and were not correct.

The Division Bench came to the conclusion that the decision in *Parman* v. *Lhassu* (3) required further consideration, and in order to determine the conflict of authorities referred the following question to a Full Bench :

Whether a civil Court has jurisdiction to try a suit brought by a person, who has been dispossessed from his tenancy after a notice issued to him under S. 43 of the Tenancy Act, and who has been unsuccessful in a suit under S. 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he had a right of occupancy therein, and whether S. 77 (3) (d) of the Act bars such a suit or not ?

The first point for determination is whether persons in the position of the plaintiffs fall within the determination of "tenant", for if they do it is clear that the civil Courts have no jurisdiction.

In Section 4 (5) the expression "tenant" is defined as meaning a person who holds land under another person, and is

(1) [1891] 44 P. R. 1891 (F. B.).
(2) [1918] 90 P. R. 1918=48 I. C. 8 (F. B.).
(3) [1919] 49 P. R. 1919=51 I. C. 443.

liable to pay rent for that land to that other person."

This definition was very carefully considered in *Joti* v *Maya* (1) and it was held that

to establish the complete relation of landlord and tenant between the persons, within the meaning of the Tenancy Act, it is essential that two things shall concur viz; (1) a right to enter upon and possess the land, and (2) an entry into possession. Upon entry and not before, the person having the right becomes a 'tenant' and 'holds' the land under the person called the landlord. But when once the person having the right has entered into possession, he does not merely by reason of a wrongful dispossession by the landlord or by a third person, cease to "hold" the land under the landlord, and is not deprived of the character of tenant. The legal relation of landlord and tenant continues notwithstanding the dispossession.

That is to say a person in possession of land without the right to possess it does not "hold" the land and is not a "tenant" within the definition, while a person who has been in possession of land with the right to possess it continues to "hold the land" and to be a "tenant" within the definition in spite of having been wrongfully put out of possession. Sections 42 (b), 43 and 45 prescribe the procedure to be adopted for the ejectment of a tenant, i. e., a person in possession of land with the right to possess it, and it will be seen that the notice of ejectment is issued through or by a revenue Officer. On being served with the prescribed notice the person or tenant in possession may, while still in possession, obtain an adjudication as to his right to possess by bringing a suit within two months, S. 45 (b), or he may wait till he has been put out of possession by the revenue Officer and then have this right to possess (and to possession) determined by bringing a suit within one year (S. 50).

Whichever course he elects to adopt, the suit must be heard and determined by a revenue Court, and by a revenue Court alone, and in each case the person bringing the suit would be a "tenant" within the meaning of the above definition, for though, in a case falling within the purview of S. 50, he would be out of possession, having once been in possession, notwithstanding his dispossession, he is still a "tenant" and continues to be one until his right to possess the other essential has been adjudicated upon by a revenue Court.

It seems to me clear that, in the circumstances above set out, it was the intention of the legislature to confine to the revenue Courts the jurisdiction to hear and determine all questions in which the right of a person to possess land as a tenant was involved.

In this connexion I adopt the following remarks from the judgment of Chevis, J. in *Akbar Hussain* v. *Karam Dad* (2) at page 300 :

Now reading the Tenancy Act as a whole, that Act seems to me, when dealing with suits and applications to mark off certain classes of suits and applications as cognizable only by revenue Officers or revenue Courts. The cognizance of civil Courts in all such cases is jealously excluded, see Ss. 76 (1) and 77 (3) of the Act. Certain matters are to be dealt with by revenue Officers and no Court is to take cognizance of any dispute or matter with respect to which any such application or proceeding might be made or had. Certain suits are to be heard and determined by revenue Courts and no other Court is to take cognizance of any dispute or matter with respect to which any suit might be instituted.

It has been contended, however, that when a notice under S. 42 (b) and 43 has been served if a suit is brought as provided by S. 45 (6) and the "right to possess" determined against the recipient of the notice and ejectment decreed by the revenue Court as soon as the decree is executed and the person in possession ejected he ceases to be a "tenant" within the definition and he can therefore have recourse to the civil Courts and claim to be put into possession, even if, before his claim can be decided, it becomes necessary for the civil Courts to decide whether or not he has a right to possess. This contention finds support in *Nihal Singh* v. *Kaman* (4), *Kharku* v. *Ditta* (5) and *Parman* v. *Lhassu* (3), and I may say at once that I am in agreement with the view that as soon as a person's "right to possess" as a tenant has been decided against him by a revenue Court he ceases to be a "tenant" I also accept the contention that an act by which the jurisdiction of the ordinary Courts is taken away must be strictly construed. *Mt. Kama* v. *Bhajan Lal* (6).

Further, I think that in order to ascertain the nature of a suit the general rule is that the allegations in the plaint must primarily be looked to and that these allegations govern the question of jurisdiction; and assuming that *Nihal Singh* v. *Kaman* (4) and *Kharku* v. *Ditta* (5)

(4) [1888] 9 P. R. 1888 (F. B.).
(5) [1893] 70 P. R. 1893.
(6) [1918] 45 I. C. 654.

were correctly decided, I would be prepared to hold that the civil Courts would have jurisdiction to entertain such a suit whatever the ultimate fate of the suit might be.

I do not, however, think it necessary to discuss these two decisions as they were arrived at before Act 3 of 1912 was passed by which certain provisos were added to S. 77 (3) and it seems to me that the answer to the question referred depends to a very large extent on the interpretation to be placed on the first proviso then added.

Section 77 (3) runs as follows:

> The following suits shall be instituted in and heard and determined by revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted, and among the suits thus taken out of the jurisdiction of the civil Courts are "suits by a tenant to establish a claim to a right of occupancy"—sub-clause (d).

Inasmuch as the plaintiff in a suit instituted in the circumstances already described is not a "tenant" within the definition of that term, it may with some show of reason, be urged that such a suit not being by a "tenant" is not taken out of the jurisdiction of the civil Courts, and it seems to me that this was recognised by the legislature and it was in order to meet this very situation that in 1912, the following proviso was added:

> Provided that: (1) Where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a revenue Court, the civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil P. C., and return the plaint for presentation to the Collector.

Now it seems to me clear that the intention of the legislature, in enacting the proviso, was to depart from the general rule whereby the allegations in a plaint primarily determine jurisdiction and are to be looked to in order to ascertain the nature of the suit. The suit the proviso seeks to affect is one, that is prima facie within the jurisdiction of the civil Court in which it has been instituted, and therefore obviously refers to a suit which would ordinarily be triable by the civil Court and provides that if in the course of the trial of that suit it becomes necessary to decide any "matter" which can under this sub-section be heard and determined by a revenue Court alone, the civil Court shall decline to proceed further and deal with the suit (not the matter alone) in the manner laid down.

It seems to me that the word "matter" was designedly used in contradistinction to "suit" and it was intended that although the "suit" as laid was within the jurisdiction of the civil Court if the pleadings raised any matter involving an issue which it became necessary to decide and the decision of which would necessitate an encroachment on the jurisdiction of the revenue Courts, the whole suit and not just the "matter" was to be referred to the revenue Courts for decision.

This differentiation in the use of the words "matter" and "suit" appears to have been recognised by Martineau, J., in *Parman* v. *Lhassu* (3) when he says:

> The matter which has to be decided here is whether the plaintiff has a right of occupancy and a suit instituted by him in respect of the matter would not be one falling within sub-S. (3) as he is not now a tenant.

It was because the plaintiff had ceased to be a tenant that the suit was triable by a civil Court, but the matter to be decided in the suit was the existence of an occupancy tenancy. When *Parman* v. *Lhassu* (3) first came before Scott-Smith, J., he was of opinion that while the suit, as laid, was cognizable by the civil Courts this proviso applied and made it incumbent on those Courts to refer the suit to the revenue Courts. His judgment is to be found printed in 46 *I. C.* 811 and at page 812, column 2, occurs the following:

> A tenant after dispossession from his tenancy is no longer a tenant, and therefore, the present suit is not one by a tenant and is prima facie cognizable by a civil Court, but the question which has to be decided is whether plaintiff who at the time of his dispossession was a tenant had a right of occupancy.

From this it is clear that Scott-Smith, J., realized that the plaintiff at the time of suing was not a tenant, and with all respect, I find it difficult to follow him when later at page 123 of *Punjab Record* 1919 he says:

> I am now of opinion that I was mistaken in the view because I considered the plaintiff to be still a tenant after his dispossession.

It has been urged that even if the intention of the legislature was as stated above this intention has not been carried out as the language employed is unhappy. While admitting that the drafting of this proviso is not as happy as it might be, it seems to me, after careful consideration,

that the intention has been given effect to, and that in cases of this nature the proviso to S. 77 (3) is applicable and renders it necessary for the civil Court to act thereunder. But, inasmuch as this proviso seeks to take the jurisdiction of the ordinary Courts, it must be strictly construed and every word it contains examined and given effect to, and I consider that it is not the mere raising of a plea that would involve an issue on a 'matter' which requires to be heard and determined by a revenue Court alone that affects the jurisdiction of the civil Court, but that jurisdiction is only taken away when, and if it becomes necessary to decide such an issue in order to decide the suit.

Unless and until a decision of such a matter becomes necessary for the final disposal of the suit the civil Court's jurisdiction is maintained, and it is for that Court to decide all other questions that arise including the question whether the rule of res judicata bars any further enquiry into the matter pleaded.

My answer to the question referred is, therefore, that such a suit is within the jurisdiction of the Civil Courts and is not barred by S. 77 (3) (d), but that the civil Courts would have to deal with it in accordance with the procedure prescribed by the proviso to S. 77 (3) of the Tenancy Act as above indicated.

Fforde, J.—I have had the advantage of reading the judgment delivered by my brother Broadway, with which I find myself in agreement, and I have nothing to add.

Addison, J.—The question referred for decision is given in the judgment of my brother Broadway.

The Punjab Tenancy Act has enacted a complete set of provisions under which a tenant can contest his liability to be ejected by his landlord on the ground that he is an occupancy tenant etc., while the revenue Courts have been given exclusive jurisdiction to decide these suits. This is not disputed, but it has been for long a vexed question whether the tenant can sue in the civil Courts after he has availed himself of his remedies under the Punjab Tenancy Act or has failed to avail himself of them within the time fixed.

The plaintiffs were tenants of a certain area of land. Their landlord applied to the revenue Officer for service of a notice of ejectment upon them under the provisions of S. 43 of the Tenancy Act. The tenants instituted a suit in a revenue Court under S. 45 (6) of the Act to contest their liability to be ejected on the ground that they were occupancy tenants of the land. The tenants failed in their suit and their ejectment was therefore decreed by the revenue Court. This decree was executed on the 13th of June 1922. The tenants then instituted the present suit in the civil Courts for possession of the same land on the ground that they were the occupancy tenants thereof. The trial Court followed *Akbar Hussain* v. *Karam Dad* (2) and dismissed the suit holding that the civil Courts had no jurisdiction. The lower appellate Court followed *Parman* v. *Lhassu* (3) and held that the suit lay in the civil Courts. It was, therefore, remanded for decision on the merits. Against this order a miscellaneous appeal was presented in this Court and the Division Bench before which it came referred the question to a Full Bench for decision.

If the tenants had not availed themselves of their right under S. 45 (6) of the Act to institute a suit to contest their liability to be ejected on the ground that they were occupancy tenants before they actually were ejected, they would have been ejected under S. 45 (5) of the Act, not by a decree of a revenue Court but by order of a revenue Officer. They would then have had the right under S. 50 of the Tenancy Act to institute a suit in the revenue Courts for recovery of possession of their occupancy within one year. S. 50 runs as follows :

> In either of the following cases, namely (a) if a tenant has been dispossessed without his consent of his tenancy or any part thereof otherwise than in execution of a decree or than in pursuance of an order under S. 44 or S. 45 ; or (b) if a tenant who, not having instituted a suit under S. 45, has been ejected from his tenancy or any part thereof in pursuance of an order under that section denies his liability to be ejected the tenant may, within one year from the date of his dispossession or ejectment, institute a suit for recovery of possession of occupany, or for compensation or for both.

Sections 45 and 50 thus cover every possible case of the dispossession of a tenant and the two sections are complementary. If a tenant is wrongfully dispossessed he can under S. 50 (a) institute a suit within one year to recover possession. If a notice has been served upon him under S. 43 he can either institute a

suit under S. 45 (6) to be declared an occupancy tenant before he is ejected or if he does not do so he can within one year after ejectment institute a suit under S. 50 (b) to be restored to possession on the ground that he is an occupancy tenant. In the case before us the tenants instituted their suit in the revenue Courts under S. 45 (6), that is, before they were actually ejected.

The relevant part of S. 77 giving the revenue Courts exclusive jurisdiction to decide certain suits is as follows :

(3) The following suits shall be instituted in and heard and determined by revenue Courts and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted ; * * * provided that

(1) Where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can in this sub-section be heard and determined only by a revenue Court, the civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil Procedure Code and return the plaint for presentation to the Collector. * * * *

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(d) suits by a tenant to establish a claim to a right of occupancy or by a landlord to prove that a tenant has not such a right ; (e) suits by a landlord to eject a tenant ; (f) suits by a tenant under S. 45 to contest liability to ejectment when notice of ejectment has been served, (g) suits by a tenant under S. 50 for recovery of possession of occupancy or for compensation or for both.

(i) any other suit between landlord and tenant arising out of the lease or conditions on which a tenancy is held.

The first suit instituted by the present plaintiffs fell within S. 77 (3) (f) and was only cognizable by a revenue Court. They failed in that suit and were therefore ejected by decree of the revenue Court. The question is whether they can re-agitate the samo question in the civil Courts for possession of the land on the ground that they are occupancy tenants, it having been held by the revenue Court which decreed their ejectment that they were not.

The Full Bench judgment in *Akbar Hussain* v. *Karam Dad* (2) is important. The effect of that decision is that if a tenant is dispossessed in such circumstances that S. 50 of the Tenancy Act applies he can only sue in the revenue Courts for recovery of possession or for compensation within one year and on the expiry of that year cannot sue in the civil Courts. This decision overruled *Imam* v. *Feroz* (7) but only distinguished the previous Full Bench decision, *Joti* v. *Maya* (1). Though the last-named decision is not expressly overruled, the reasoning of the judgment in *Akbar Hussain* v. *Karam Dad* (2) is opposed to the reasoning in it. I have no doubt that *Akbar Hussain* v. *Karam Dad* (2) was correctly decided. S. 50 of the Tenancy Act provides the remedy for a tenant who has been dispossessed in either of two ways and S. 77 (3) (g) clearly provides that such suits shall be instituted in and heard and determined by a revenue Court alone. S. 50 also lays down that a tenant has only a year from the date of dispossession within which he can institute his suit. At the end of the year his status does not change in any way ; he still remains a tenant who has been dispossessed. No suit, therefore, can ever be instituted by such a tenant in the civil Courts, while he has only one year to sue in the revenue Courts. The same view has been taken in all similar cases decided since the date of the Full Bench decision in question e. g., in *A.I.R.* 1924 *Lah.* 539, *Nand Ram* v. *Ishar* (8) and *Piran Ditta* v. *Lal* (9). It follows that, if a tenant, who has been dispossessed of his tenancy in the circumstances mentioned in S. 50 of the Punjab Tenancy Act, allows the period of one year prescribed by that section to expire without bringing a suit in the revenue Courts, he, by the combined operation of Ss. 50 and 77 (3) (g), is debarred from bringing a suit for recovery of possession or for compensation or for both in a civil Court.

The Full Bench decision *Akbar Hussain* v. *Kuram Dad* (2), however, does not cover the case where a tenant has instituted his suit under S. 45 (6) of the Act prior to being ejected by decree of the revenue Court which dismissed his claim to occupancy rights. In a case of this kind, *Parman* v. *Lhassu* (3), it was held, following *Kharku* v. *Ditta* (5), that such a person after he has been unsuccessful in his suit in the revenue Court can sue for possession in the civil Courts on the ground that he has a right of occupancy. It was further held that S. 77 (3) (d) has no application to such a suit. The Full Bench decision *Akbar Hussain* v. *Karam Dad* (2) was distinguished and was distinguishable though some of the reasoning

(7) [1898] 64 P.R. 1898.

(8) A.I.R. 1926 Lah. 128.

(9) A.I.R. 1926 Lah. 613.

in it was not. It is clear, however, from the judgment of LeRossignol, J., in the Full Bench case that he considered that a suit such as the one now before us, was not cognizable by the civil Courts. S. 77 (3) (g) and (i) appeared to him to cover all conceivable causes of litigation between a landlord and his tenant qua tenant and his conclusion was that an ex-tenant in that capacity could look for no relief outside the revenue Courts and that civil Courts could hear his plaint only if he set forth a claim to relief in a capacity other than that of an occupancy tenant. The same Judge sitting in Chambers held in 1 *Lahore Cases* 269 that a suit like the present fell within S. 77 (3) (d) of the Act.

To return to S. 77. It seems to me clear that S. 77 (3) (d) legislates for suits by a tenant in possession to establish a claim to a right of occupancy. Such a suit can be brought by a tenant, who is not threatened with ejectment, on the ground that he satisfies the conditions of Ss. 5, 6 or 8 of the Tenancy Act. I do not think that there is any escape from the conclusion that this is the right interpretation. A tenant is defined in S. 4 (5) of the Act as a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that other person. That meaning which implies possession and liability to pay rent must be attached to the word "tenant" where it occurs in the Act unless the contrary is clearly indicated, as is the case in Ss. 50 and 77 (3) (g). It follows that the present suit is not one falling within S. 77 (3) (d) and to that extent *Parman* v. *Lhassu* (3) was correctly decided. Nor do I think that this is a suit falling within S. 77 (3) (d) as it is not a suit between a landlord and tenant arising out of the conditions on which a tenancy is held. Similarly, it is not a suit by a tenant under S. 45 to contest his liability to ejectment when notice of ejectment has been served and thus does not fall within S. 77 (3) (f). But the present plaintiffs have already instituted a suit under S. 77 (3) (f) and S. 45 (6) and have failed in that suit to establish their right of occupancy. The present suit therefore does not fall directly under the second group of sub-clauses in S. 77 (3) of the Act.

There is little doubt that the Punjab Tenancy Act intended that there should be no subsequent suit in a civil Court and in fact it gives the tenant a right to establish his claim to occupancy in the revenue Courts in all circumstances. Owing to the wording of S. 50 and S. 77 (3) (g) of the Act it is clear that a tenant or rather an ex-tenant, entitled to sue under those sections, cannot subsequently sue in the civil Courts. Though it was probably intended that such should be the case also when a suit had been decided under S. 45 (6) by a revenue Court with exclusive jurisdiction under S. 77(3) (f) and that there should be no further suit in a civil Court, the Act has failed to provide a specific provision to the effect that a subsequent suit cannot be brought in the civil Court. It follows that such a suit can be instituted in and entertained by a civil Court, but it still remains to be decided whether under proviso (1) to the section the civil Court is precluded from trying it.

In my opinion proviso (1) which was added by Act 3 of 1912, will apply and the civil Court will be precluded from proceeding with the trial of the suit, if it "becomes necessary" to decide the matter which is raised by the plaintiffs themselves, namely, whether they are in fact tenants and whether, as such, they have established a claim to a right of occupancy. That is their cause of action in their suit for possession. Thus though the suit does not fall within S. 77 (3) (d), because the plaintiffs are not in possession, the above-mentioned matter would, if it becomes necessary to decide it. In the present case, however, a plea of res judicata has been taken to the effect that the trial of the above matter is barred by reason of the previous decision of the revenue Court on the same point. It seems to me that, unless and until a decision of any matter "becomes necessary" for the final disposal of the suit, the civil Court's jurisdiction would be maintained and it would, therefore, be for the civil Court to decide whether the rule of res judicata bars any further inquiry into the matter indicated, and it would only proceed to take action under proviso (1) if it held that it was not res judicata. In the latter case the civil Court after endorsing upon the plaint the necessary particulars required by the proviso, should return the plaint for presentation to the Collector. That is my

reply to the question which has been referred to us.

Tek Chand, J.—I have read the judgments which my brothers Broadway and Addison propose to deliver, and have very little to add. I agree that the plaintiffs in the suit, out of which this reference has arisen, is not a "tenant" as defined in S. 4 (5) of the Punjab Tenancy Act, and therefore, the suit as instituted is not one by a tenant to establish a right of occupancy and the civil Court had jurisdiction to entertain it. I also agree that the plea of res judicata raised by the defendant must be decided by the civil Court before the action contemplated by the proviso of S. 77 can be taken. If the civil Court decides that the decision of the issue as to the status of the plaintiff is res judicata by virtue of the former decision of the revenue Court, it will dismiss the suit. But if for some reason it finds that the trial of the "matter" is not barred by the rule of res judicata it will then "become necessary" to try and adjudicate upon the claim of the plaintiff to establish a right of occupancy. This is a 'matter' the trial and decision of which is reserved by the legislature exclusively for the revenue Courts and the civil Court will, in that event, endorse the plaint as required by the proviso and send it to the revenue Court.

It will be seen that the decision of some of the issues that arise in the suit will be given by the civil Court and that of others by the revenue Court. This is obviously not a very satisfactory state of affairs. But there seems to be no escape from it, having regard to the peculiar nature of the proviso to S. 77 of the Tenancy Act and the well-established canons of interpretation of statutory provisions which trench upon the jurisdiction of ordinary Courts. There is no doubt that Act 3 of 1912 has succeeded in removing to a very small extent the serious anomalies in the law which were so ably and lucidly brought out by Sir Henry Rattigan and Sir Donald Johnstone in *Mahomed Bakhsh* v. *Bhagwan Das* (10), in consequence of which the provison to to S. 77 was enacted. Those anomalies still exist to a large extent and one cannot look with equanimity on the existing state of the law on the subject. What is substantially one dispute has to be tried and adjudicated upon piecemeal by Courts of different jurisdictions subject to different supreme authorities and the plaint has to be sent backwards and forwards before a final decision is reached. In such a state of things, the rights of the parties must, of necessity, remain in a state of uncertainty and suspense for an unnecessarily long time and there is the danger of conflicting and inconsistent orders being passed. The situation becomes still more complicated and embarrassing when one finds that appeals from the decision given by the civil Court on some issues arising in the same suit would lie to the District Judge and the High Court and that on others given by the revenue Court to the Collector, Commissioner and the Financial Commissioner.

The Courts, however, are powerless to remedy such a state of things. Their function is only to interpret the law as it stands on the Statute Book. The legislature alone can set matters right and it is a matter for serious consideration whether the time had not come when the whole question of the separate jurisdiction of revenue Courts, which was created for the first time in the Punjab in 1884, and which was extended and enlarged in 1887 and again in 1912, should not be re-examined and whether at least the law relating to appellate subordination of revenue Courts should not be brought into line with that which has worked so well in the other provinces.

Dalip Singh, J.—The first question to be decided in this reference is whether the civil Court has jurisdiction to entertain a suit of the present kind. It seems to me that the civil Court clearly has jurisdiction to entertain the suit because the only clause in the Tenancy Act under which this suit might be excluded from the cognizance of the civil Court is 77 (3) (d). Now, the relevant portion of Cl. 77 (3) (d) excludes from the cognizance of a civil Court "suits by a tenant to establish a claim to a right of occupancy." To my mind a suit for possession on the basis that the claimant is an occupancy tenant is not a suit by a tenant to establish a claim to a right of occupancy. It is true that the cause of action of such a suit is the claim by a person to be an occupancy tenant, but the suit itself is not a suit to establish a

10) [1909] 76 P.R. 1909=66 P.L.R. 1910=3 I C. 498=119 P.W.R. 1909 (F.B.).

claim to a right of occupancy but is a suit for possession on the basis of being an occupancy tenant. To give an example : a suit by a person for rent is a suit for money ; and, though the cause of action undoubtedly must be that the relationship of landlord and tenant exists between the parties, the suit cannot be said to be a suit to establish a claim to be a landlord or to establish the relationship of landlord and tenant. I would therefore consider that this clause refers only to declaratory suits. I am further strengthened in this position by considering the definition of the word " tenant " in this Act. "Tenant" is defined in S. 4 (5) as meaning a person who holds land under another person, and is or but for a special contract would be, liable to pay rent for that land to that other person. In the absence of any indication to the contrary this definition must be held to apply wherever the word " tenant " is used in the Act. A person, therefore, who is not holding land is not a tenant within the definition though the legal relationship of landlord and tenant may still be existing between himself and his landlord. In S. 77 (3) (d) a suit by a tenant is therefore a suit by a person who is still in possession of the land to establish a claim that he is an occupancy tenant ; in other words it is a suit wherein the tenancy exists in the sense that the person is actually in possession of the land as tenant, and the question is what is the nature of that tenancy. Such a suit would again be a declaratory suit and not a suit for possession. From both these points of view therefore it is clear to me that the civil Court has jurisdiction to entertain the suit.

The next question to be decided is whether the civil Court can try the suit and if so how far. For this question it is necessary to consider the meaning of the proviso to S. 77. In order to do this we must consider the state of the law before this proviso was introduced. Section 77 (3) reads as follows :

> The following suits shall be instituted in and heard and determined by revenue Courts, and no other Court shall take cognizance of any dispute or matter " with respect to which any such suit might be instituted.

This sub-section, as I understand it, shows that certain suits were to be instituted in and heard and determined by revenue Courts and no Court could take cognizance of any dispute with respect to which a suit of the nature specified might be instituted. It follows, therefore, that if a person was sued for damages for cutting trees and he pleaded that he was a person in possession of the land as occupancy tenant then the defence raised was a dispute with respect to which a suit might have been instituted by him because under S. 77 (3) (d), if he was a tenant, he might have asked for a declaration to a right of occupancy, and his defence was really equivalent to asking for such a declaration. This defence, was, however, excluded from the jurisdiction of the civil Court. The suit itself, however, was not excluded from the jurisdiction of the civil Court. The result was that sometimes the civil Court held that they were debarred from taking cognizance of the plea and proceeded to decide the case against the defendant, or they held that they were capable of entertaining the plea and proceeded to decide whether the person in possession was or was not an occupancy tenant, thus creating a double jurisdiction and practically nullifying the law that no Court except a revenue Court should take cognizance of such a dispute. This led to the enactment of the proviso. It is obvious that the defendant might raise other pleas besides the particular plea of occupancy tenancy, but the legislature considered that all such pleas, whether they fell within the definition of S. 77 (3) or not should be decided by the revenue Courts provided one of the pleas was such that a suit might have been instituted in the revenue Courts about it. This was the object of the proviso. The proviso, however, did not enlarge the matter in dispute which might be considered by a revenue Court because it expressly says that

> wherein a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a revenue Court. * * * *.

In order, therefore, to determine what the matter was we would have to refer back to sub-S. (3) and see whether the matter was such with respect to which a suit falling under those sub-sections could be instituted. Therefore, it seems to me that, except in the cases provided under S. 77 (3) (g), suits for possession by a person who was out of

possession on the ground that he claimed to be an occupancy tenant could still be tried by a civil Court. Different cases would, arise, e. g., where the alleged tenant was in possession, and the other in which the alleged tenant was not in possession ; and again where there had been a decision of the revenue Court on the point, or where there had been no such decision of a revenue Court. In cases where the alleged tenant was in possession the proviso would seem to show that the revenue Courts alone have jurisdiction to try the suit and the civil Courts would have to send all such suits, whether the matter arose on the frame of the suit or whether it arose on account of the defence, to the revenue Court for decision. If, however, the suit was cognizable as framed by a civil Court then, if the plea raised a question in respect of which a suit might be instituted in the revenue Court, then the civil Court would have to despatch the plaint to the revenue Court. If, however, the person was out of possession then, except in cases under S. 77 (3) (g) other cases could hardly arise and the civil Court would ordinarily have jurisdiction to proceed with the suit. If, however, the revenue Court had previously decided that the person was or was not an occupancy tenant, the matter would be res judicata ordinarily between the parties, and the civil Court would only be able to hold that the matter was res judicata unless it could come to the conclusion that for one reason or another the matter was not res judicata. If it came to such a conclusion which could only occur very rarely, then, in a case like the present, the civil Court would proceed to decide the suit because no suit could be instituted in the revenue Court about the matter. From this point of view the point becomes very academic, but this is the only solution which prevents great anomalies in procedure arising, and which also, as I consider, carries out the real intention of the legislature. I cannot believe that the legislature meant that the revenue Courts should have co-ordinate jurisdiction with the civil Court wherever any question of or, any right arising out of, land was concerned. I would, therefore, hold in the present case that the Court had jurisdiction to try the suit and decide the issue whether it was res judicata or not res judicata. Looking at the matter from another point of view the words used are "become necessary" and not "is necessary." Now, it is not necessary to decide whether the tenant in the present case is an occupancy tenant or not until it is first decided whether the matter is res judicata or not, and this question will be decided, therefore, by the civil Court first. Secondly, on general principles, where the question is whether a Court of special jurisdiction has acted within its jurisdiction or not, this question must always be decided by the Court of general jurisdiction, and the question whether the matter is res judicata or not is practically concluded by the decision that the Court of exclusive jurisdiction acted within its jurisdiction or not. I therefore, see no difficulty in interpreting the proviso from this point of view, whereas, after considering various alternative solutions, it seems to me that any other solution lands us in great difficulties.

G.B. *Reference Answered.*

A. I. R. 1927 Lahore 461

TEK CHAND, J.

Darba Mal and *another*—Defendants—Appellants.

v.

Asa Ram and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 2581 of 1926, Decided on 3rd March 1927, from the decree of the Dist. J., Ambala, D/- 10th July 1926.

(a) *Punjab Redemption of Mortgages Act* (1913), *S. 9 — Procedure as to making enquiry or dismissing petition is discretionary.*

In the event of the mortgagee joining issue with the mortgagor petitioner, it is not incumbent on the Collector to make an investigation into the dispute. He may, if he so likes, make a summary enquiry and give his finding as a result of it, or he may refuse to do so and dismiss the petition forthwith. No particular grounds are specified in the section on which alone he might adopt the latter course. His discretion in this matter is not limited in any way but is absolutely unfettered. He may stay his hands for the simple reason that difficult questions of fact and law are involved and on this ground alone, he might dismiss the petition. All that is necessary is that he should record his reasons for the course adopted. [P 463 C 1]

(b) *Punjab Redemption of Mortgages Act* (1913), *S.* 12—*Person failing to move Collector under S.* 12 *must sue within one year.*

Act 2 of 1913 is a miniature Code in itself. S. 12 governs all cases in which an order under certain sections (including S. 9) has been passed. The policy of the Legislature is that a person, who chooses to move the Collector under the Act, but fails, cannot be allowed to leave the matter in suspense for a period which may extend to another 60 years, but that the order is final, except that it is subject to the result of a suit, which he must (if at all) institute within one year of it: *A. I. R.* 1925 *Lah.* 385. *Foll* [P 463 C 2]

(c) *Punjab Redemption of Mortgages Act* (1913); *S.* 12—*Person asking for relief—Relief refused—He is person aggrieved.*

A person, who asks for a relief, which he is authoritzed to ask under the Act, but to which his application is refused, must be considered to have suffered a legal grievance and is a person aggrieved: *In re Reed Brown and Co*: (19 *Q. B. D.*.174, *Foll.* [P 464 C 2]

Har Gopal for *Kharak Singh*—for Appellants.

Shamair Chand—for Respondents.

Judgment.—This second appeal arises out of a suit for redemption, which was instituted by the plaintiff-respondent on 13th November 1924 on the allegations that his predecessors-in-interest had mortgaged the land in suit to one Goverdhan Dass in 1883, that Defendants 1 and 2 are the sons of Goverdhan Dass mortgagee, and that Defendants 3, 4 and 5 are transferees from them. The plaintiff claimed redemption on payment of Rs. 75 only.

The defendants pleaded that they were absolute owners and not mortgagees of the land in suit, that even if they were held to be mortgagees the mortgage charge on this and certain other land was Rs. 3,300 and not Rs. 75 as alleged by the plaintiff and that the suit for redemption was time barred as the plaintiff's application under the Redemption of Mortgages Act 2 of 1913 had been dismissed by the Collector on 13th August 1917 and the plaintiff had not instituted a suit in a civil Court within one year from that date, as required by Article 14 of the Indian Limitation Act.

The Subordinate Judge held that the defendants had failed to prove that they were the absolute owners of the land, that their real status was that of mortgagees, that the land had been mortgaged to them by the plaintiff's ancestors on the 7th December 1883, that the mortgage charge was Rs. 75 only, but that the plea of limitation had force and must prevail. He accordingly dismissed the suit. On appeal the learned District Judge agreed with the trial Court's finding on all points except limitation, and holding that the suit was within time he passed a decree for possession in plaintiff's favour on payment of Rs. 75 to the Defendants 1, 3, 4 and 5 in four equal shares.

The defendants have preferred a second appeal to this Court and the sole point for determination is whether the suit is barred by time. Both parties concede that if the order of the Collector was passed under any of the Ss. 6 to 11 of the Redemption of Mortgages Act, the present suit must be considered to have been brought under S. 12 of that Act and as it was not instituted within one year from the date of the Collector's order, it would be barred under Article 14 of the Limitation Act. The law on this point has been authoritatively laid down by the Letters Patent Bench in *Kaura* v. *Ramchand* (1) and neither counsel questions the correctness of that ruling.

Mr. Shamair Chand for the respondents, however, contends that as in the present case the Collector made no enquiry into the dispute between the parties and gave no adjudication thereon, his order cannot be said to have been passed under S. 9 of Act 2 of 1913, and that he not being "aggrieved" by that order, the rule laid down in *Kaura* v. *Ramchand* (1) is inapplicable.

In order to fully appreciate the point, it is necessary to describe in some detail the proceedings before the Collector. On the 26th March 1917, the present plaintiff presented to the Collector an application under S. 4 of Act 2 of 1913, applying for an order that the mortgage be redeemed on payment of Rs. 20 and that he be put in possession of the mortgagd property. Along with the petition he made a deposit of Rs. 20 with the Collector and a notice was in due course issued to the mortgagee to show cause against the petition. The defendants appeared and contended that they were not the mortgagees, but owners of the land and that the mortgage charge on this and other land was Rs. 3,300. After some adjournments the Collector passed the following order on the 13th August 1917:

(1) A. I. R. 1925 Lah. 335=6 Lah. 206.

The mortgagor has deposited Rs. 20. The mortgagee states that the mortgage charge on this land and some other land of the mortgagor is Rs. 3,300. He also pleads that the mortgage is more than 60 years old and cannot be redeemed. The mortgagor claims the mortgage to be within time. As dispute of this kind cannot be settled in summary proceedings, the Court orders that the mortgagor's petition be dismissed. The amount deposited be returned to the petitioner.

It is contended that this order does not fall under any section of the Redemption of Mortgages Act, but is really an order by the Collector refusing to exercise jurisdiction under that Act. After giving full consideration to this argument, I am of opinion that it is devoid of all force. As pointed out above the proceedings before the Collector commenced with an application by the mortgagor under S. 4, of the Act. The Collector took action under S. 5 and issued notice to the mortgagee to appear and show cause on a date specified therein. The mortgagee appeared on the date fixed and on the Collector making the necessary enquiry from him under S. 8, he denied the petitioner's right to redeem and stated that he was not willing to surrender possession of the land on receipt of the amount offered. It is contended that up to this stage the proceedings were in strict accordance with the Act. Now on the defendants' denial of the petitioner's right two courses were open to the Collector under S. 9. He could either (a) for reasons to be recorded, dismiss the petition or (b) make a summary enquiry regarding the objection raised and proceed under S. 10 or S. 11. It will thus be seen that in the event of the mortgagee joining issue with the petitioner, it is not incumbent on the Collector to make an investigation into the dispute. He may, if he so likes, make a summary enquiry and give his finding as a result of it, or he may refuse to do so and dismiss the petition forthwith. No particular grounds are specified in the section on which alone he might adopt the latter course. His discretion on this matter is not limited in in any way, but is absolutely unfettered. He may stay his hands for the simple reason that difficult questions of fact and law are involved and on this ground alone, he might dismiss the petition. All that is necessary is that he should record his reasons for the course adopted. This the Collector admittedly did in the present case. In my opinion therefore, the order in question was one contemplated by and actually passed under S. 9 of the Act.

It is next argued that as the Collector had given no adjudication on the plaintiff's right to redeem, his order was in no way against the plaintiff, and therefore, he was not a "party aggrieved" by it and need not have sued under S. 12 to establish his right in respect of the mortgage. It must, however, be borne in mind that the Collector's order was one dismissing the petition for redemption. As already shown, it is not the reasons for this order that are material, but what has to be seen is its final form and effect. By this order, the plaintiff's prayer to redeem the land was negatived and under S. 12 the order became conclusive against him, unless he got rid of it in appropriate proceedings under that section. As has been aptly stated by LeRossignol J. in *Kaura* v. *Ramchand* (1), Act 2 of 1913 is a miniature Code in itself. It is obvious that S. 12 governs all cases in which an order under certain sections (including S. 9) has been passed. The policy of the legistature is that a person, who chooses to move the Collector under the Act, but fails, cannot be allowed to leave the matter in supense for a period which may extend to another 60 years, but that the order is final expect that it is subject to the result of a suit, which he must (if at all) institute within one year of it. In this connexion, reference may, perhaps not inappropriately, be made to the provisions of O. 21, R. 63, Civil P. C., which makes it incumbent on a defeated claimant to property, attached in execution of a decree, to institute a declaratory suit to establish his right within one year. The terms of this section are analogous to those of section 12 of the Punjab Act under consideration, and the analogy has been made use of to interpret this section in several rulings of this Court and the Chief Court. See for instance, *Balwant Rai* v. *Cheru* (2), *Narinjan Singh* v. *Diwan Charn Das* (3), *Kaura* v. *Ramchand* (1). It has been held that the applicability of O. 21, R. 63, is not confined to cases in which

(2) [1917] 85 P. R. 1917=5 P. L. R. 1918=39 I. C. 451=157 P. W. R. 1917.
(3) A. I. R. 1922 Lah. 363=3 Lah. 239.

claim petitions had been rejected by the executing Court after investigation, but that it governs those cases also where the objections were dismissed without any enquiry, e. g., for default of appearance by the objector. See inter alia *Venkataratnam* v. *Ranganayakamma Zamindarini Garu* (4), *Nagendra Lal* v. *Fani Bhusan Das* (5), *Gulab* v. *Mutsaddi Lal* (6), and *Gopal Singh* v. *Ganpat Rai* (7).

Nor am I impressed by the argument that the plaintiff was not a "party aggrieved" within the meaning of S. 12 of the Act. In support of his contention Mr. Shamair Chand has referred to me to *Ishar Singh* v. *Ladha Ram* (8), and *Sakhawat Ali* v. *Radha Mohan* (9), but these are rulings under the Provincial Insolvency Act and lay down that an insolvent debtor or his creditors are not "persons aggrieved" for the purpose of filing appeals etc., under the provisions of that Act. Such cases are wholly distinguishable for under that Act, as soon as a Receiver is appointed, the property of the debtor vests in him and it is he alone who represents the estate and is entitled by law to move the Court on appeal and in certain other proceedings. There is no resemblance between proceedings under that Act, and those under the Redemption of Mortgages Act. Morever, I find that even these rulings have adopted the interpretation of the expression "aggrieved person" as given by James, L. J., *in re Ex parte Sidebotham* (10), as meaning

> A man who has suffered a legal grievance, a man against whom a decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something.

This definition was explained and amplified by Esher, M. R., and Lopes, L. J., *in re Reed Brown and Co.* (11), who held that a person who asks

> for a relief, which he is authorized to ask under the Act, but to which his application is refused, must be considered to have suffered a legal grievance.

This definition is, by no means exhaustive, but even according to it, it must be held that the plaintiff in this case was a 'party aggrieved' by the order of the Collector, and therefore, was bound to institute a suit under S. 12 to establish his right in connexion with the mortgage and having failed to do so, within one year, his claim must be held to have become barred under Art. 14 of the Limitation Act.

The learned District Judge has relied upon *Kristodass Kundoo* v. *Ramakant Roy* (12), which however, is a decision, under S. 7 of the Civil P. C. of 1859 and Art. 15 of the Limitation Act of 1871, the wording of both of which was quite different. This ruling must be considered to have become obsolete by virtue of the subsequent legislative alterations and amendments and is of no assistance in deciding a case like the present.

For the foregoing reasons I hold that the conclusion arrived at by the learned District Judge on the point of limitation cannot be sustained and that the suit is barred by time. I, therefore, accept the appeal; and, setting aside the decree of the District Judge, dismiss the plaintiff's suit with costs to the defendants in both the appellate Courts. The order of the Subordinate Judge as to costs in his Court will stand.

D.D. *Appeal accepted.*

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(4) [1918] 41 Mad. 935=35 M. L. J. 335=8 M. L. W. 292=48 I. C. 270=(1918) M. W.N. 599 (F. B.).
(5) [1918] 45 Cal. 785=44 I. C. 265=23 C. W. N. 375.
(6) [1919] 41 All. 623=50 I. C. 748=17 A. L. J. 674.
(7) [1916] 66 P. R. 1916=130 P. L. R. 1916=35 I. C. 321=117 P. W. R. 1916.
(8) A. I. R. 1921 Lah. 81.
(9) [1919] 41 All. 243=49 I. C. 816=17 A. L. J. 229.
(10) 14 Ch. D. 458.
(11) 19 Q. B. D. 174.
(12) [1881] 6 Cal. 142=7 C. L. R. 396.

A. I. R. 1927 Lahore 465

ADDISON, J.

Firm Harjas Rai-Arjan Das—Plaintiffs—Appellants.

v.

Tek Chand—Defendant—Respondent.

Misc. First Appeal No. 522 of 1926, Decided on 25th June 1926, from the order of the Sr. Sub-J., Sialkot, D/- 18th November 1925.

(a) *Civil P. C., Sch. 2, para. 18—Some of the partners of a partnership referring their dispute to arbitration—Suit by remaining partners for accounts—Award made pending the suit is not ultra vires.*

In order to apply the doctrine that an award made during the pendency of a suit is invalid, the person instituting the suit must be party to the agreement to refer; the party wishing to stay the suit must have the right to apply to the Court to stay it, and the subject-matter of the dispute must be the same before the arbitrator and before the Court. Where some of the partners of a partnership refer their dispute concerning the partnership as regards their rights inter se, and the remaining partners institute a suit for partnership accounts, an award made pending such a suit is not ultra vires. [P 468 C 1]

(b) *Contract Act, S. 23—Criminal prosecution pending under S. 406, Penal Code, against one partner at the instance of another partner—Parties referring the partnership dispute to arbitration—Prosecution dropped — Agreement is not void.*

Where the partners agree to refer their whole dispute concerning the partnership to arbitration, the agreement does not become void under S. 23, simply because a criminal prosecution under S. 406, Penal Code, is pending against one of the partners at the instance of the other partners, and in pursuance of such an agreement the prosecution is dropped. [P 468 C 2]

Tek Chand and *Mool Chand*—for Appellants.

Badri Das—for Respondent.

Judgment.—At Sialkot on the 30th July 1916, there was executed a deed of partnership between Harjas Rai-Arjan Das (share nine annas) and Tek Chand and Charanji Lal (share seven annas of which Tek Chand's share was four annas, six pies and Charanji Lal's share was two annas six pies). The capital was to be Rs. 11,000 of which Rs. 10,000 was to be subscribed by Harjas Rai-Arjan Das and Rs. 1,000 by Tek Chand and Charanji Lal. Capital was to bear interest at seven annas, six pies, per cent. per mensem and if additional sums were paid by any partner, they were to bear interest at the same rate. The business was to be that of commission agents in Jammu State. The business was started at Jammu on the 5th of August 1916, and later a branch was opened at Doru in Kashmir. The partnership continued up to the 5th January 1920, when it was dissolved because Tek Chand and Charanji Lal stopped working without giving over charge or accounting for the goods left. It has been established that Harjas Rai-Arjan Das contributed more than Rs. 10,000 as capital and that Charanji Lal contributed some Rs. 378 while Tek Chand appears to have contributed nothing towards capital.

On the 26th May 1921, Harjas Rai lodged a criminal complaint under S, 409 Indian Penal Code, against Tek Chand and his brother Mulk Raj, who is not a partner in the shop, for mis-appropriating three specific items. The whole of the partnership assets were not involved in this case but only three items. A charge was framed against Tek Chand in the Court of a First Class Magistrate under S. 406, Indian Penal Code, on the 7th of December 1921. Lala Devi Dayal had been appointed by the Magistrate a Commissioner to examine the accounts and to report on them. On the 5th of March 1922, an agreement was arrived at between Harjas Rai-Arjan Das on the one side and Tek Chand on the other to the effect that Lala Devi Dayal was appointed sole arbitrator to settle the disputes between them relating to the profits of this partnership and the contributions made by each towards it. It was further provided by this agreement that the arbitrator was to determine how much had been contributed by each towards capital or had been lent and also the interest thereon and that the two contracting parties fixed the total profit of the partnership at the liquidated sum of Rs. 23,000 of which Harjas Rai-Arjan Das would get 9-16ths in accordance with the share of that firm. If the profits amounted to more than that sum, Tek Chand was to get the whole excess, but if it was less than that sum, then Tek Chand had to make good the loss. Charanji Lal did not sign this agreement, though it is in evidence that he attended before the arbitrator and helped Tek Chand to make out the balance sheet.

In the agreement the criminal case was not referred to but five days later the parties appeared before the Magistrate on the 10th of March 1922, and

presented an application to the effect that as the whole of the dispute between the parties relating to the partnership had been referred to the arbitration of Devi Dayal they asked the Magistrate to consign the criminal case to the record room. The Magistrate did so.

The parties commenced to appear before the arbitrator at once and no objection was taken to the arbitration proceedings for a considerable time. Tek Chand put in a chitha before the arbitrator which showed that the net profits were over Rs. 40,000. Harjas Rai-Arjan Das did not admit this chitha and a Munim Sunder Das was ordered to prepare one after going through the accounts. The one prepared by him was not accepted by either and both parties applied to the arbitrator that an expert, namely, Ram Das of Sialkot, should be asked to prepare a chitha. He began to do so. He was helped by the parties. But before it was completed, a marriage took place in Harjas Rai's family and he had to leave. On his return Tek Chand stated that he wanted to go to Kashmir for a short time and he was allowed to go. He then kept putting off attending for several months, writing at the same time numerous letters. On the 7th of October 1922, the arbitrator sent a notice that the chitha would be prepared unless he appeared within a week. He did not reply and Ram Das completed the chitha. Then on the 24th November 1922, the arbitrator sent another registered letter to Tek Chand that the chitha was ready and that he should come and file any objections he desired as regards it before the 1st of December 1922, otherwise the arbitrator would make his award that day. Tek Chand sent through a pleader a reply dated the 28th November 1922, which the arbitrator received on the 29th November 1922, to the effect that he revoked the reference to arbitration as the agreement had been entered into to stifle the criminal prosecution and as the proceedings were not valid, Charanji Lal not being a party to them. He further added that Charanji Lal had on the 14th November 1922, instituted a regular suit for rendition of accounts of the partnership and hence the arbitration automatically came to an end.

The arbitrator announced his award on the 1st of December 1922, and on the 2nd of December 1922, Harjas Rai-Arjan Das applied in the Court of the Senior Sub-Judge, Sialkot, to have this award made a rule of the Court. The only defendant was Tek Chand. Charanji Lal was not made a party as he was not a party to the reference. On the 16th of December 1922, the arbitrator filed the award in Court. Tek Chand appeared and objected to the award on the ground that he had signed it under undue influence, that Charanji Lal was not a party to it, that Charanji Lal had filed a suit on the 14th November 1922, before it was made, that the award was given after too long a delay and that the arbitrator had misconducted himself during the proceedings. Later it was also pleaded that the agreement was void and against public policy as it was entered into to stifle the criminal prosecution.

It might be noted here that Charanji Lal valued his suit at Rs. 500 only, so that a very small Court-fee was paid. He obtained a preliminary decree on the 26th March 1924. It was held in Charanji Lal's suit that the shares were as given by me above in the beginning of this judgment and that the award of the arbitrator was no bar to his suit as he was no party to the agreement to refer to arbitration though he undoubtedly did appear before the arbitrator for a time along with Tek Chand. The Senior Sub-Judge ordered in Charanji Lal's suit that the award should be remitted to the arbitrator for further consideration and report after hearing the parties. Strictly speaking, what should have been ordered was that the arbitrator was appointed Commissioner in Charanji Lal's suit to report to the Court the result of the accounts but the words used were influenced by the fact that that Devi Dayal had already gone very fully into the accounts as arbitrator.

In the suit on the award filed by Harjas Rai-Arjan Das the decision was given by the Senior Sub-Judge on the 18th of November 1925. He held that Tek Chand was estopped from pleading undue influence as he appeared before the arbitrator for a long time and he could not now be allowed to repudiate the agreement on that score. He further held that Tek Chand was entitled to raise the question of illegality under S. 23 of the Indian Contract Act, i, e., that the

agreement had as its object the stifling of a criminal prosecution as, if that were proved the agreement would be void and the Court in no circumstances give effect to it. He further held as a fact that there was no undue influence. It was also held that the reference to arbitration was not illegal because Charanji Lal did not join it as it was open for two partners to adjust their disputes inter se without reference to the third, though the third partner would not be affected by the decision in that case. The Senior Sub-Judge also held that the agreement was to settle a dispute which existed apart from the criminal liability and it was not against public policy. He, however, was of opinion that as the arbitrator's award was made after the institution of a suit about the subject-matter referred to arbitration, the award was void in accordance with the principle laid down in *Firm Jai Narain-Babu Lal* v. *Firm Narain Das-Jaini Mal* (1). Finally, he found that there was no undue delay in making the award, and that no misconduct on the part of the arbitrator was proved. In fact Tek Chand produced no evidence on this point. All the issues were thus found in favour of the plaintiff Harjas Rai-Arjan Das, except one but on this last ground the suit was dismissed. Against this decision this appeal has been filed.

It was pointed out by the learned counsel for the appellant that the decision of the learned Judge below is contradictory, for on Issue No. 4 he held that it was not necessary for all the partners to refer a matter to arbitration while on the 8th Issue he held that the fact that Charanji Lal filed the suit automatically stopped the arbitration proceedings between the other two parties who had referred their dispute to arbitration without joining Charanji Lal.

The law is laid down in para. 18 of the second schedule of the Civil P. C. which runs :

> Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to stay to the Court the suit, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

Now, it is obvious that this paragraph does not apply to the present suit. Charanji Lal was not a party to the agreement to refer and it was he who instituted the suit. That by itself is sufficient to take away the operation of para. 18 of the second schedule. Similarly *Firm Jai Narain-Babu Lal* v. *Firm Narain Das-Jaini Mal* (1) is not an authority for the proposition laid down by the lower Court. In that case at p. 302 (*of* 3 *Lah.*) the learned Chief Justice after quoting certain remarks of Fletcher Moulton, L.J., in *Doleman* v. *Ossett Corporation* (2) went on to say that

> the law does not permit the same question to be decided by a Court of law as well as by an arbitrator, and it is only when the dispute before the two tribunals is identical that a decision given by the arbitrator must be treated as ultra vires. It is the identity of the disputes before the two authorities which is the ratio of the rule in *Doleman's* case (2), and it is necessary to emphasize this point because it appears that the passage quoted above, when divorced from its context, is liable to be misinterpreted as laying down the broad proposition that when an action has been brought in respect of contract containing an arbitration clause and has not been stayed, then an award made by an arbitrator upon a dispute coming within that clause is ultra vires, and that it is immaterial whether that dispute was or was not a matter in controversy in the action. I can see no reason in principle to extend the scope of the rule in the manner indicated above and fail to understand why the Court of law and the arbitrator should not go on simultaneously if the disputes before them, though relating to the same contract, are entirely distinct.

Then again at page 304 it is said that

> the doctrine that an award made during the pendency of action is invalid proceeds upon the principle that a Court of law seised of a dispute cannot allow an arbitrator to oust its jurisdiction in respect of that dispute, but there can be no ouster of jurisdiction if the dispute before the arbitrator is different from that before the Court.

Lastly, at page 306, it is said that

> the result of the above discussion is that the award in question dealt with matters which were not the subject-matter of the action, and it cannot be said that the arbitrators in taking cognizance of those disputes encroached upon the jurisdiction of the Court.

It follows from the above decision and from para. 18 of the Second Schedule to the Civil P. C.: (1) that the person

(1) A. I. R. 1922 Lah. 369=3 Lah. 296.

(2) [1912] 3 K. B. 257=81 L. J. K. B. 1092=10 L. G. R. 915=76 J. P. 457=107 L. T. 581.

instituting the suit must be party to the agreement to refer ; (2) that the party wishing to stay the suit has the right to apply to the Court to stay it. (In the present case Harjas Rai-Arjan Das had no right to apply to stay the suit of Charanji Lal as Charanji Lal was not a party to the agreement to refer) ; and (3) that the subject-matter of the dispute is the same before the arbitrator and before the Court. In the present case the cause of action before the Court was the original partnership agreement and undoubtedly Charanji Lal is entitled to accounts as against Harjas Rai-Arjan Das and Tek Chand without reference to any agreement which these two have made inter se. But the cause of action before the arbitrator was a new agreement entered into between Tek Chand and Harjas Rai-Arjan Das regulating their rights inter se. There is no reason that I know of to prevent two partners coming to such an agreement though, of course, the other partners would not be bound by it. No authority that two partners cannot settle their disputes inter se has been quoted before me. There also need be no conflict between the decision of the Court and the arbitrator. Charanji Lal is entitled, so far as the decree he obtains is concerned, to ignore the private agreement between the other two, but the decree given by the Court in that suit would have to recognize their private settlement. I, therefore, hold on the 8th issue that the fact that Charanji Lal instituted his suit on the 14th November 1922 did not render the award ultra vires.

The learned counsel for the respondent, however, sought to support the order of the Court below on the ground that it should have been held that the agreement to refer was opposed to public policy, in that it was entered into in order to stifle a criminal prosecution in a non-compoundable case. He relied on *Nujebar Rahman* v. *Muktashed Hossain* (3) and *Ghulam Mohi-ud-din* v. *Deoki Nand* (4). There is no doubt that if the agreement was entered into in order to stifle the criminal prosecution in question, it would be void. A case, much nearer the present, however, is *Dwijendra Nath Mullick* v. *Gopiram Govindram* (5) a decision of a Division Bench of the Calcutta High Court. In it Defendant No. 1 committed criminal breach of trust in respect of a large sum of money belonging to the plaintiff. The Police started investigation and the case was lodged in Court. Defendant No. 1 and his brother Defendant No. 2, executed a mortgage deed for a certain sum, which was less than the amount of the money which had been misappropriated by Defendant No. 1 in favour of the plaintiff and the plaintiff thereupon addressed an application to the Commissioner of Police stating all the facts of the case and asking that the case might be withdrawn. The Commissioner of Police stated on the application that he had no objection and the Magistrate dropped the proceedings. It was held that the contract between the parties was not opposed to public policy and could not be held to be void under S. 23 of the Contract Act. Where a bona fide debt exists and the transaction between the parties involves a civil liability as well as a criminal act, mortgage given by the debtor and a third party as security for the debt is not void. In the present case the plaintiff accused Tek Chand of misappropriating three items. He produced his evidence and the Magistrate framed a charge. Nothing was kept back from the Magistrate whereas in the Calcutta case no evidence had been led. The Magistrate was informed that the whole dispute relating to the partnership as between these two partners had been referred to the arbitration of the person whom the Magistrate himself had appointed to go into the accounts and the Magistrate with full knowledge of everything that had happened allowed the proceedings to drop. The agreement entered into was much larger than the charges framed by the Magistrate and it amounted to an agreement to refer to arbitration the whole partnership disputes as between these two parties. This case is a stronger case than the Calcutta case referred to and, in my opinion, it must be held in agreement with the lower Court that the agreement in question was not rendered void by reason of S. 23 of the Contract Act.

The parties could not have known that the Magistrate with all the evidence

(3) [1917] 40 Cal. 113=15 I. C. 259=16 C. W. N. 854.

(4) [1914] 39 P. R. 1914=54 P. L. R. 1914=22 I. C. 393=57 P. W. R. 1914.

(5) A. I. R. 1926 Cal. 59=53 Cal. 51.

before him would have let the matter drop. They entered into the agreement without that knowledge and the Magistrate in spite of that agreement, which nevertheless would have remained intact, could have gone on with the criminal case.

Another very similar case is a decision of this Court reported as *Ram Gopal* v. *Ganeshi Lall* (6). In that case the plaintiff had instituted criminal proceedings under S. 406, Indian Penal Code, against the defendant, alleging that he had disposed of certain pledged property. A warrant of arrest was issued by the Criminal Court and the case was fixed for hearing on the 25th May 1922. On the 29th May 1922, the defendant executed a bond of Rs. 400 on account of the balance of debt due and his brother became his surety. The Judge, Small Cause Court, dismissed the suit on the ground that the bond was executed in consideration of the withdrawal of the criminal proceedings under S. 406, Indian Penal Code, but on revision this Court held that where a bona fide debt exists and where the transactions between the parties involve a civil liability as well as a criminal act, a bond given by debtor as security for the debt constitutes a valid and enforceable agreement. In the case before me there was undoubtedly a dispute between the parties concerned which could be referred to arbitration and the agreement to refer cannot be held to be barred under S. 23 of the Contract Act: see also *Sukhdeo Dass* v. *Mangal Chand* (7) where it was said that .

> the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be carefully kept in view, and this care must be particularly exercised in a case where there is a civil liability already existing.

This subject is also discussed in *Jai Kumar* v. *Gauri Nath* (8), where the words of Cotton, L. J., are quoted, namely, that a threat to prosecute is not of itself illegal, and the doctrine contended for does not apply where a just and bona fide debt (in this case dispute) actually exists.

These where the only two points taken below which were argued before me, but the learned counsel for the respondent contended that the agreement to refer to arbitration was invalid because there was nothing to refer to arbitration the parties having fixed what the profits were to be. This is not correct. The arbitrator had further to see what the capital was and what interest had to be allowed on that capital. He had to see whether the profits were more than Rs. 23,000, in which case Tek Chand would have taken the excess or less, in which case he had to make good the deficit. It is not the case of Tek Chand that at the time he entered into the agreement he considered that the profits would be less than Rs. 23,000. In fact he stated before the arbitrator that the profits were Rs. 40,000. The arbitrator, however, has found that they only amount to Rs. 4,120 though he too has said that they would have been more than Rs. 23,000 except for the acts of Tek Chand and Charanji Lal, for example, he had to allow a large item of Rs. 8,000 as interest on capital invested in the partnership, and practically the whole of the sum would have disappeared had the capital contributed to the shop by Harjas Rai-Arjan Das been recovered immediately at the time of the retirement of the parties from the business. Similarly there was a large sum for irrecoverable outstandings due to the same cause. There was also some loss on two or three contracts which might have been avoided.

Another point taken by the counsel for the respondent, which was not taken in the Court below was that in the award the arbitrator states that Charanji Lal was asked to sign the deed, but he did not do so though he attended and helped Tek Chand in the proceedings which were going on before the arbitrator. This meant, it was argued, that it was intended that Charanji Lal should also be bound by the award. This does not follow. He clearly is not bound by the award and there was nothing to prevent the other two partners from referring their disputes, so far as the partnership was concerned, to arbitration.

For the reasons given above I accept the appeal, set aside the order of the

(6) A. I. R. 1925 Lah. 364.
(7) [1917] 2 P. L. J. 630=41 I. C. 812=2 P. L. W. 140.
(8) [1906] 28 All. 718=(1906) A. W. N. 212=3 A. L. J. 503.

lower Court, and order the award to be filed in Court and judgment to be pronounced according to the award. The appellant will have his costs in both Courts.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 470 (1)

SHADI LAL, C. J.

Bija—Petitioner.

v.

Emperor—Opposite Party.

Criminal Case No. 1507 of 1926, Decided on 10th December 1926, on report by the Dist. Mag., Ambala, on 17th August 1926.

Criminal P. C., S 110—Proceedings under S. 110—No right of further cross-examination exists under Criminal P. C., S. 256.

A person proceeded against under S. 110 has no right to further cross-examine the prosecution witnesses under S. 256: 1 *P. R.* 1916 *Cr.*; 35 *Cal.* 243, *Foll.* [P 470 C 1]

Gulla Ram—for Petitioner.

Jagan Nath Bhandari—for the Crown.

Order.—The rule laid down in *Ahmad Bakhsh* v. *Emperor* (1) is to the effect that a person proceeded against under S. 110, Criminal P. C., has no right to further cross-examine the prosecution witnesses under S. 256, Criminal P. C., and the same view has been taken by the Jalcutta High Court in *Chintamon Singh* v. *Emperor* (2). The Single Bench judgment of the Burma Chief Court in *Emperor* v. *Lunsha* (3) takes the contrary view, but does not contain any discussion on the subject. Following, therefore the rule enunciated in *Ahmad Bakhsh* v. *Emperor* (1), I set aside the order of the District Magistrate dated the 16th June 1926, and direct him to try the appeal on the merits.

R.D. *Order set aside.*

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(1) [1916] 1 P. R. 1916 Cr.=32 I. C. 676=58 P. W. R. 1915 Cr.

(2) [1908] 35 Cal. 243=7 C. L. J. 177=12 C. W. N. 299.

(3) [1911] 4 Bur. L. T. 24=9 I. C. 468=12 Cr. L. J. 89.

A. I. R. 1927 Lahore 470 (2)

ADDISON, J.

Fazl-ud-Din—Plaintiff—Appellant.

v.

Anjuman-i-Imdadia Bank, Nangal Khalan and *others*—Defendants—Respondents,

Second Appeal No. 1908 of 1925, Decided on 1st February 1927, from a decree of the Dist. J., Hoshiarpur, D/- 17th April 1926.

Custom (Punjab)—Grant of house site to a Kamin—Site reverts to proprietor when the Kamin leaves the village.

Grants of lands for purposes of residential houses for Kamins are made by the proprietary body and continue in force until the menials depart. When they leave the village, their site would revert to the proprietary body: 78 *P. W. R.* 1913 and 116 *P. L. R.* 1913, *Foll.* [P 471 C 1]

Anant Ram—for Appellant.

G. R. Khanna—for Respondents.

Judgment.—The co-operative Bank of Nangal Kalan obtained a decree against Babu, a Teli, and in execution thereof attached a house belonging to Babu and sold it. Fazal Din who is the nephew of Babu objected to this sale on the ground that he had half interest in the property. His objection was dismissed and he thereupon instituted a suit for a declaration to the effect that a one-half share of the house belonged to him. His suit was dismissed and the learned District Judge dismissed his appeal. Against his decision this second appeal has been admitted.

It would appear that the plaintiff's father died in another village and was not residing in the village at the time of the death. Later, plaintiff's mother married Babu, her deceased husband's brother. The District Judge has found that Babu alone has been in exclusive possession of the property since at least 1910. He has also found that Babu made the *kacha* house standing on the site into a pacca house in 1914 at his own expense. He has also held that Babu mortgaged the property as if it were his own in 1922. All that time the plaintiff had been doing nothing. In these circumstances he held that although the original house must have at one time, belonged jointly to Babu and the plaintiff's father as it was held by their father, that fact was of no avail to the plaintiff.

It is contended before me that the possession of Babu must be treated as the

possession of one co-sharer and, therefore not adverse to his nephew, the plaintiff, unless some overt act was proved. In the present case, however, it has been established that Babu has since 1910 at least been treating this property as his own, so much so that he converted the kacha house into a pacca at his own expense. It was not till the Bank proceeded to attach the house that the plaintiff ever thought of asserting any ownership over this house. For all these reasons the decision of the learned District Judge is correct. As pointed out also in *Narinjan Singh* v. *Natha Singh* (1), this is a case of Telis, i. e., village kamins and it is common knowledge that grants of lands for purposes of residential houses for them are made by the proprietary body and continue in force until the menial departs. The proprietary body get in return the services of the kamins. These considerations can be brought in, in so far as they affect the presumptions which are to be drawn from the conduct and position of the parties. In the present case it has been held that the plaintiff who is now about 30 years old has had nothing to do with the property since before 1910 while Babu has been treating this property as his own and converted the kacha house into a pacca house. They are kamins and when they leave the village their site would revert to the proprietary body. Even assuming, therefore, that the plaintiff's father may have once been a co-sharer before he left the village, it seems to me impossible to hold that the plaintiff is still a co-sharer.

Following, therefore, *Narinjan Singh* v. *Natha Singh* (1) I dismiss the appeal with costs.

G.B. *Appeal dismissed.*

(1) [1913] 116 P. L. R. 1913 = 18 I. C. 868 = 78 P. W. R. 1913.

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* A. I. R. 1927 Lahore 471

FFORDE AND CAMPBELL. JJ.

Haryana Cotton Mills Company, Ld., Bhiwani—Plaintiff—Appellant.

v.

B. B. and C. I. Ry. Co., Bombay—Respondent.

First Appeal No. 1525 of 1924, Decided on 25th February 1927.

* *Railways Act, S. 77 —Goods consigned for carriage—Railway refusing to deliver even after demand—S. 77 does not apply—Meaning of "loss" explained.*

Where goods were consigned for carriage to railway, but they were not delivered to the consignee even on demand and further there was refusal on the part of railway to give information as to the fate of the goods, a suit by consignee for damages is one for conversion and S. 77 does not apply. Cause of action for such a suit arises when the railway refused, after reasonable time, to deliver the goods : *A. I. R.* 1925 *Lah.* 255, *Ref.* ; *A. I. R.* 1921 *Lah.* 1 (*F.B.*), *Foll.*

[P 474 C 2, P 475 C 1]

N. C. Pandit and *Anant Ram Khosla* —for Appellant.

Bishan Narain and *Gauri Dayal*—for Respondent.

Fforde, J.—The plaintiffs, the Haryana Cotton Mills Company, brought the suit out of which this appeal has arisen against the B. B. and C. I. Railway Company for damages for the wrongful detention of certain goods of the plaintiffs which had been entrusted to the defendant company for conveyance from Bombay to Bhiwani. The measure of damage fixed by the plaintiffs is the price which he had to pay for those goods and interest upon that price calculated at Rs. 0/12/0 per cent per mensem up to the date of the institution of the suit, and the plaintiffs also claim interest from that date till realization.

In the first paragraph of the plaint it is pleaded that the plaintiffs had placed an order with Duncan Stratton & Co., of Bombay for supply of certain machinery for a cloth factory belonging to the plaintiffs then under construction at Bhiwani, and that Messrs. Duncan Stratton & Co., on the 20th of August 1921, made over this machinery to the defendant company at Bombay for despatch to Bhiwani and duly obtained a railway receipt on that date. This paragraph of the plaint is admitted by the defendants. In the second paragraph of their plaint the plaintiffs have pleaded that the defendants have " not delivered the said goods up to the present moment " and they have suffered a great deal of loss owing to delay in setting up the machinery of the factory. In the fourth paragraph of the plaint it is pleaded that the said goods ought to have reached Bhiwani within one month at the latest from the date of their despatch but that they have not reached their destination up to the time of the institu-

tion of the suit. In this paragraph it is also pleaded that the plaintiffs wrote several times to the defendants in respect of their failure to deliver them their goods, but that no heed was paid to these letters. The plaint concludes by praying that a decree for Rs. 5,973-3-3, principal and interest, with costs of the suit, be passed in their favour.

The defendants in their pleadings have stated that they do not deny the first paragraph of the plaint, but have traversed paragraphs 2, 3 and 4; and have pleaded in addition that the plaintiffs must strictly prove the value of the goods, that they are not entitled to any interest, that the case is one of loss or deterioration within the meaning of S. 77 of the Railways Act and that the consignment was upon risk-note form H at owner's risk. In their further pleas they have objected: (a) that the plaintiffs did not give a valid notice under Ss. 77 and 140 of the Railways Act and that their suit for this reason is liable to be dismissed; and (b) that

whatever consignment arrived at Bhiwani the plaintiffs can take delivery of that subject to all legal and valid charges and costs of the defendants.

The plaintiffs in their replication have pleaded that their claim is not with respect to any loss or shortage of the goods in question but with respect to its non-delivery. They do not admit the execution of the risk-note in question, and say that even if any risk-note be proved it has no effect in a case relating to non-delivery, but only to cases relating to loss, shortage and deterioration of the goods. They further plead that under the circumstances of the case no notice of any kind was required in law, and they conclude by saying that they are not prepared to take delivery of the goods alleged to have reached Bhiwani after the institution of the suit as they no longer require them.

The facts of the case are shortly these: On the 20th August 1921 Messrs. Duncan Stratton & Co., Bombay, consigned certain shafts and couplings ordered by the plaintiffs to be used in a cloth factory then under construction to the B. B. and C. I Railway for conveyance to the plaintiffs at Bhiwani. The goods in question were duly received by the defendant company on the 20th of August 1921. Nothing was heard of these goods for several months, and on the 31st March 1922 the plaintiffs wrote a letter addressed to the Traffic Superintendent, B. B. and C. I. Railway, Ajmer, asking what had happened to this consignment. To this letter there was no reply. On the 25th April 1922 the plaintiffs again wrote, this time addressing their letter to the Agent, B. B. and C. I. Railway, at Bombay, once more asking for information as to what had happened to their consignment and requesting an urgent enquiry into the matter. Again there was no reply. On the 29th April 1922 Messrs. Duncan Stratton & Co., wrote to the defendant company, addressing their letter to the Goods Agent, B. B. and C. I. Railway Carnac Bridge, Bombay, pointing out that the goods which had been consigned to the care of the railway were considerably overdue, that they were urgently required by their clients, the plaintiffs, at Bhiwani and they would be obliged if the Goods Agent would make enquiries into the matter and let them know the result. The railway company seems to have ignored this letter also. On the 15th of May 1922 the plaintiffs wrote another letter, addressed this time to the Goods Superintendent, B. B. and C. I. Railway, Bombay, giving the date of consignment and other necessary particulars and informing him that the progress of their mill was much hampered for want of the articles in question and requesting him to be good enough to make urgent enquiries into the matter. No reply was given to this letter. On the same date Messrs. Duncan Stratton & Co., wrote to the Goods Agent of the B. B. and C. I. Railway, Carnac Bridge, Bombay, informing the Goods Agent that the plaintiffs had been writing Messrs. Duncan Stratton & Co., strong letters holding them responsible for the loss which they had been put to every day owing to non-delivery of the goods, and asking the Goods Superintendent to supply them with information as to what had happened to those articles. On the same date the plaintiffs wrote a second letter, sent under registered cover, this time to the Agent of the B. B. and C. I. Railway at Bombay to the same effect as the previous correspondence pointing out that they had not as yet been favoured with any reply, and asking that the

matter be taken up with the least possible delay. On the 31st of May the plaintiffs once more wrote to the Agent of the defendant company referring to previous correspondence, and on the same date wrote a reminder to the Goods Superintendent at Bombay. On the 6th of June the plaintiffs once more wrote to the Goods Agent at Bombay. No communication was made either to Messrs. Duncan Stratton & Co., or to the plaintiffs by any railway official until the 9th of the June 1922 when a postcard with an illegible signature but purporting to be from the Traffic Superintendent, was received by the plaintiffs. This postcard is as follows :

No claim or any letter in connexion with the consignment in question was received from you till 31st March 1922, hence your claim was repudiated as timebarred. However, enquiries are being made as to how the consignment was disposed of and I shall advise you of the result later on.

Then on the 16th of June a letter was sent by the Goods Agent, Carnac Bridge, to the plaintiffs acknowledging the receipt of their letter of the 6th of June and stating that the matter was under enquiry. The plaintiffs wrote several more letters, some of them to the Goods Agent and some to the Traffic Manager of the defendant company. but received no reply. Ultimately on 28th of August 1922 the plaintiffs brought the present suit.

Throughout the whole of the correspondence and during the course of the trial in the Court below, the defendant company never once alleged that the goods had been lost, misdirected, misdelivered or gone astray in any way.

The learned trial Judge disposed of the suit on the objection in regard to notice. He held that a notice was required in accordance with the terms of S. 77 of the Railways Act, and as admittedly no such notice had been served, the suit was not maintainable. He also found that the risk-note alleged to have been signed by the plaintiffs was invalid. He also held that plaintiff had not paid the price of the goods, that the goods being consigned to self the plaintiffs had no right of action and that the railway receipt did not appear to be endorsed in plaintiffs' favour.

The main contention before us has been as to the effect of S. 77, of the Railways Act. A great deal of authority has been cited by Mr. Bishan Narain in support of his contention that a claim for damages for non-delivery is a claim for compensation for loss and is covered by the provisions of S. 77. In all those cases, however, the goods in dispute were not forthcoming. They had either disappeared altogether or they had been sent to the wrong person. No case has been cited to us in which S. 77 has been held to apply where a railway company admittedly in possession of a consignee's goods has failed to hand them over to the owner. That is the case here. A good deal of confusion seems to have arisen over the meaning of the word loss in that section. Mr. Bishan Narain has agued that S. 77 covers any claim for loss to the claimant and relies upon certain dicta of Scott-Smith J. in *Hill Sawyers and Co.* v. *Secy. of State* (1) (*I. L. R. 2 Lah.* 133). In that case the reference to the Full Bench was to determine whether loss in S. 80 of the Indian Railways Act included loss by misdelivery, and the Court held that misdelivery was 'loss' within the meaning of that section. But I am unable to accept Mr. Bishan Narain's contention that we are bound by Scott-Smith, J's definition of the term "loss" in Chapter 7 of the Indian. Railways Act in so far as it must be deemed to include parting with goods by delivering them to the wrong person. To that extent we are bound by the decision of the majority of the Full Bench. It is perfectly true, as observed by the learned Judge, that "loss" includes the "pecuniary loss or privation of an article to the owner" but there must be some pecuniary loss in every case in which an action for damages lies and S. 77 does not provide that notice shall be given in every action against a railway company. The present suit is undoubtedly a suit for damages for pecuniary loss sustained by the plaintiffs ; that is to say, the plaintiffs sue for the pecuniary loss or damages which they have sustained by reason of the defendants wrongfully detaining their goods In other words their suit is for damages for conversion. It is not a suit for damages by reason of the defendant company having lost the plaintiff's goods owing to the goods having gone astray or been distroyed or become deteriorated during the time when they were under the control of the defendants. It is not

(1) A. I. R. 1921 Lah. 1=2 Lah. 133 (F. B.).

doubt quite possible to hold that if a railway company loses dominion over the goods entrusted to them owing to their having been wrongly delivered to a person who is not entitled to them this is a "loss" of the goods in the sense contemplated by S. 77, as that word may reasonably be held to cover any misadventure befalling the goods while under the company's care which deprives them of the power to effect delivery. That is what has been held in *Hill Sawyers and Co.* v. *The Secretary of State* (1), where goods had been misdelivered. Such a suit is one, no doubt, for damages for conversion, but such conversion has resulted in the loss of the goods in the sense that the railway company has parted with its dominion over them. In the case just referred to, the reference to the Full Bench was made owing to the difference of opinion between Abdul Raoof and LeRossignol JJ. On reference to the Full Bench consisting of Scott-Smith, LeRossignol and Abdul Raoof, JJ., the two former Judges were in agreement, Abdul Raoof, J. dissenting. In his judgment in the Full Bench LeRossignol J. expressed the view that the word "loss" within the meaning of S. 80 of the Indian Railways Act is not used in the sense of loss to the Railway Company but loss to the passenger. With great respect to the learned Judge there seems to me to be a confusion of ideas in this reasoning. Loss of a passenger's goods is never loss to the railway company in the sense in which it is a loss to the owner of the goods. The railway company does not lose anything pecuniarily by allowing the goods to disappear or be destroyed or become deteriorated, whereas the owner necessarily loses the article or its value. Inthat case the plaintiff's cause of action does not arise merely because he has suffered a pecuniary loss but because he has suffered such pecuniary loss by reason of the fact that that railway company have permitted his goods to disappear or deteriorate. It is the loss of the goods by the railway company which entitled the plaintiff to sue for damages. LeRossignol J. says :

> Section 80 of Indian Railways Act itself furnishes clear evidence that the word "loss" is not used in the sense of "loss" to the railway company. For it provides inter alia for a suit for compensation for loss of life of a passenger. Can it be argued that the loss here is the loss to the railway and not to the unfortunate passenger ?

Of course loss in the sense used by the learned Judge is loss to the passenger and not the railway Company but the cause of action for the loss of the passenger's life arises from the negligence of the railway company. It is the company which has lost the passenger's life. If the passenger's death were due to natural causes in no way referable to the railway journey he would have lost his life but it would not be a case of loss by the railway company. This is a very striking instance of the confusion which has arisen from the failure to keep separate the two meanings of the word loss: the word in the sense used in Chap. 7 meaning a loss by the company, and in the other sense the damage or injury sustained by the plaintiff by reason of such loss. In the one sense the word denotes the state of fact of being lost, i. e. gone from the control of the person in charge, and in the other sense it means the deprivation or the pecuniary suffering which results to the owner from such loss. It seems to me that LeRossignol Judge's definition of the term ' loss ' in his first judgment is perfectly sound and one which can be adopted and applied to the construction of S. 77. The learned Judge at page 128 of the report expresses himself as follows :

> I interpret ' loss ' in its natural sense to mean any dealing with the goods which dispossess the railway of them so as to render impossible delivery to the consignee, whether that dealing is done with or without the consent and knowledge of the railway administration.

In the present case, however, the railway company has not lost the goods in that, or in any sense. There has been no dealing with the goods " which dispossessed the railway of them so as to render impossible delivery to the consignee". The answer of the railway company to the present suit is briefly: We do not deny that we received the goods; we do not allege or suggest that we ever parted with them; and they are, in fact, now available to the plaintiffs if they choose to accept them. In my judgment such a defence does not avail the railway company. Their conduct appears to me to be clear case of conversion by detention. Mere detention of course is not in itself a conversion, but where there has been, as in the present case, a detention coupled with neglect or refusal to deliver up the article detained after demand made, that refusal

or neglect is evidence of conversion. This is a simple case of bailee admitting that he has the goods but refusing to deliver them within a reasonable time after demand made, and refusing to give any information as to what has happened to them. The cause of action in the present case arose when the railway company refused after reasonable time had elapsed to carry out its duty to deliver the goods which had been entrusted to their care. In Leslie's Law of Transport by Railway the law is expressed as follows:

A mere failure by a carrier to deliver goods by reason of the fact that he has lost them does not amount to a conversion (*Owan* v. *Lewyn* (2); *Ross* v. *Johnson* (3), even though he denies that he has lost them, or asserts that he has delivered them *Anonymous* (4). *Severin* v. *Keppell* (5). If, however, he still has the goods a refusal to deliver them amounts to a conversion (*Anonymous, Supra*; *Attersol* v. *Briant* (6).

In *E. I. Ry. Co.* v. *Diana Mal, Gulab Singh* (7), Martineau and Moti Sagar, JJ. held that delay in delivery was "loss" within the meaning of Chap. 7 of the Railways Act and they declined to accept Scott-Smith Judge's definition of that term in *Hill Sawyers & Co.* v. *Secy. of State* (1). The present case, as I have shown goes beyond delay in delivery of the consignment. It is a refusal to deliver on demand or to give any information concerning the goods.

As to the defence that the defendants are protected by the terms of the risk-note, I may point out that that risk note has not been printed in this record. It is not before us and we have no means of considering whether or not it is in the prescribed form and duly executed. I would, therefore, accept the finding of the learned trial Judge the risk note is not a valid document.

As regards the finding of the learned trial Judge that the plaintiff has not paid the price, that finding is, in my opinion, entirely opposed to the evidence. Mr. S. N. Lala, Secretary of the Bhiwani Trading Company, in answer to interrogatories stated that Rs. 5,480, the price of the goods, was paid by the plaintiffs on the 22nd of March 1922. This statement has not been contradicted. Mr. Frank Harwood, partner of Duncan Stratton & Co., on being asked:

Has this sum of the price of the said goods, namely, Rs. 5,480 0 0, been paid to you by the plaintiffs,

replied "The matter is not still settled in full". The plaintiffs, however, even though the full price may not have been paid by them, are liable to Messrs. Duncan Stratton & Co., for whatever balance may be due, and in my judgment they are entitled to the full price of the goods as damages, but they are not entitled to the interest claimed on the value of the goods prior to the date of institution of the suit.

For the reasons I have given I would accept this appeal and enter judgment for the plaintiffs for Rs. 5,480 with interest at the rate of 6 per cent per annum on that sum from the date of institution of the suit till realization, and I would award them proportionate costs throughout.

Campbell, J.—I agree. It seems to me that the case of the relation of S. 77 of the Indian Railways Act to a suit for damages for non-delivery stands thus. A plaintiff who institutes such a suit without having preferred a claim in accordance with S. 77 takes a considerable risk. In nine cases out of ten the railway comes into Court and pleads that the goods have disappeared out of the railway's sight or control, that they are lost, and hence that the suit is barred by the provisions of S. 77. This seems to have been the situation in all the cases cited before us in which it has been held that failure to give notice of the claim under S. 77 bars a suit for compensation for non-delivery, and on the authority of those cases the plaintiff might very well fail in his action.

The present however is the tenth case, where the railway does not say either that the goods are lost or that they ever have been lost, even temporarily, where both parties are agreed that the goods have never been lost either by the railway or to the consignee and where neither has alleged any deterioration of the goods. In such circumstances I cannot see that the terms of S. 77 have any bearing upon the question whether the suit can lie or not.

D.D. *Appeal accepted.*

(2) [1672] 1 Vent. 223=86 E. R. 150.
(3) [1772] 5 Burr. 2825=98 E. R. 483.
(4) [1705] 2 Salk. 655=91 E. R. 557.
(5) [1802] 4 Esp. 156=170 E. R. 674.
(6) [1803] 1 Camp. 409=170 E. R. 1002.
(7) A. I. R. 1925 Lah. 255=5 Lah. 523.

A. I. R. 1927 Lahore 476 (1)

SHADI LAL, C. J., AND BROADWAY, J.

Noor Hussain Shah and *others* — Decree-holders—Appellants.

v.

Mt. Hussain Bibi—Judgment-debtor —Respondent.

Letters Patent Appeal No. 25 of 1926, Decided on 28th January 1927, from the judgment of Martineau, J., D/- 19th January 1926.

Decree—Execution—Decree ambiguous—Court can look to judgment and pleadings to ascertain its meaning.

Where a decree is in its terms ambiguous, it is competent to the Court executing it to refer to the judgment and the pleadings in the suit in which the decree was passed to ascertain its precise meaning : 18 *All.* 344, *Foll.*[P 476, C 1]

Mehr Chand Mahajan and *N. C. Mehra*—for Appellants.

Aziz Ahmad—for Respondent.

Shadi Lal, C. J. — This appeal arises out of proceedings in the execution of a decree, the interpretation of which is the bone of contention between the parties. The decree was passed by a Division Bench of this Court, and directs the removal of Mt. Hussain Bibi from "the waqf institution" of Takya Rasul Shahian ; and the question for determination is whether the judgment-debtor is, under the decree, liable to be removed, not only from the office of Gaddi Nashin, but also from the property appertaining to that office.

The expression "waqf institution" is an ambiguous phrase, and there can be no doubt that, where a decree is in its terms ambiguous, it is competent to the Court executing it to refer to the judgment and the pleadings in the suit in which the decree was passed to ascertain its precise meaning : vide *Lachhmi Narain* v. *Jawala Nath* (1). A perusal of the judgment, on which the decree was based, shows that the entire claim of the plaintiffs was allowed, and I find that the claim as laid in the plaint included not only the removal of the defendant from the office, but also her removal from the property attached to that office. It is to be observed that the Court did not disallow any portion of the claim, and I must, therefore, take it that the words "waqf institution" were intended to include the office as well as the property.

The learned counsel for the judgment-debtor, however, contends that the suit being under S. 14 of the Religious Endowments Act, a decree for the removal of the trustee from the trust property could not be passed. We are, however, not concerned with the correctness or otherwise of the decree, and the sole question before us is to find out the terms and the meaning of the decree.

I, therefore, hold that the judgment-debtor can be removed from the waqf property attached to the institution. The result is that I accept the appeal, and setting aside the judgment of Mr. Justice Martineau, restore that of the District Judge with costs throughout.

Broadway, J.—I concur.

G.B. *Appeal accepted.*

(1) [1896] 18 All. 344=(1896) A. W. N. 87.

A. I. R. 1927 Lahore 476 (2)

HARRISON, J.

Arjan Das—Accused—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 1038 of 1926, Decided on 12th November 1926, reported by the S. J., Jhelum, on 23rd June 1926.

Railways Act, S. 108—*Accused's account books thrown out of window while train in motion—Accused has sufficient and reasonable cause to pull alarm signal.*

A who had instituted a civil suit against B was travelling with the latter in the same compartment with his account books. While the train was in motion B seized the account books and threw them through the window. A pulled the alarm chain and stopped the train,

Held : that A had sufficient and reasonable cause for getting alarm signal and could not be convicted under S. 108. [P 477, C 1]

Facts—Arjan Das, applicant, instituted a suit against one Harnam Dass in a civil Court at Gujrat and after attending the hearing of that case on 8th October 1925 he started homewards. He had with him his account books containing the accounts of hundreds of debtors, including Harnam Dass. Changing into the 10 down Passenger Train at Lala Musa at about 4 p. m., he and Harnam Dass got into the same compartment. Shortly after the train had left Chelianwala Station, the attention of Arjan Das

being diverted elsewhere, Harnam Dass seized the applicant's Bahis and threw them out of the window. The train was at that time passing over the bridge on the Lower Jhelum canal, but, fortunately for the applicant, Harnam Dass did not succeed in throwing the Bahis into the canal. The applicant pulled the alarm signal and the train came to a standstill, thus enabling the Bahis to be recovered.

Arjan Das was prosecuted under S. 108 of the Railway Act and sentenced to a fine of Rs. 50.

Grounds.—Regard being had to the circumstances of the case I consider that the applicant had reasonable and sufficient cause for pulling the alarm signal, and that the learned Magistrate was wrong in convicting him. I have, therefore, the honour to forward these records to the High Court with the request that his sentence of fine may be set aside.

Harrison, J.—For the reasons given by the learned Sessions Judge I quash the conviction of Arjan Das under S. 108 of the Railways Act. The fine will be refunded.

G.B. *Revision accepted.*

A. I. R. 1927 Lahore 477

CAMPBELL AND TEK CHAND, JJ.

Jhanda Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Banto and *another*—Defendants—Respondents.

First Appeal No. 2718 of 1922, Decided on 4th March 1927, from a decree of the Sr. Sub-J., Amritsar, D/- 28th August 1922.

(a) *Custom—Punjab—Ancestral land—Pedigree prepared during Settlement is presumptive proof of relationship, but not of the nature of the property owned*

A genealogical tree prepared during the Settlement is useful merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is, no doubt, presumptive proof of their kinship but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village, which is found narrated in what is called *kaifiat dehi, kaifiat hasul-i-haqiat.*" [P 479 C 1]

If the pedigree table shows two persons to be descended from one common ancestor and in the foot-note or in the *kaifiat dehi* or other parts of the Settlement Record are found entries which indicate that the land held by one of them was acquired or was at one time held by the common ancestor, there might arise a presumption that it has descended from him and is ancestral. But in the absence of any such entries as to the acquisition of descent of the land no presumption arises as to the nature of the land held by any proprietor from the mere circumstance that the name of the common ancestor of himself and certain other persons is shown in the pedigree table : 41 *P.R.* 1914, *Expl.* and *Dist.*; *A.I.R.* 1924 *Lah.* 175 ; *A. I. R* 1924 *Lah.* 263, *Dist*; *A. I. R.* 1923 *Lah.* 355 and 9 *L. L. J.* 136, *Foll.* [P 479 C 1]

(b) *Custom—Punjab—Appointed heir dying sonless—Estate reverts to the appointer's collaterals only when it is ancestral of appointer.*

It is only where the land is ancestral of the appointer and the collaterals that the estate on the appointed heir dying sonless reverts to the appointer's collaterals. But the rule of reversion has no application where the property was self-acquired of the appointer and his power of disposal over it was absolute. [P 480 C 1]

Beni Parshad Khosla and *Jawahir Singh*—for Appellants.

Sardha Ram Kapur and *G. S. Salariya*—for Respondents.

Tek Chand, J.—One Jhanda Singh, a Kang Jat of Mauza Brewal in the Amritsar District, died sonless in December 1861. Before his death he had left instructions to his wife Mt. Jawali that if a son were born to their daughter Mt. Chandi, she, Mt. Jawali, should adopt him to Jhanda. Soon after Jhanda's death a son was born to Mt. Chandi and was named Lachhman Singh. Mt. Jawali adopted Lachhman Singh and executed a deed of adoption in his favour. The collaterals of Jhanda instituted a suit to contest this adoption, but their suit was dismissed in 1874 (Ex. P-15).

Lachhman Singh, the adoptee, died in 1910 leaving him surviving three widows and two daughters. The land of Jhanda, which had devolved on Lachhman Singh, was mutated in the names of his widows. One of the widows, Mt. Mahtab Kaur, died many years ago and we are not concerned with her in the present litigation.

On the 25th November 1915, the other two widows, Mt. Banto and Mt. Santi, executed a Will in favour of the two daughters, Mt. Guro and Mt. Santo, whereby, after their death, the property inherited by them from Lachhman Singh was to go to the daughters in equal half-shares. One of the widows, Mt. Santi, and one of the legatees, Mt. Santo, have

since died. On the 22nd October 1921, the plaintiffs, who are the collaterals of Jhanda in the sixth degree, instituted the present suit for a declaration that the Will above mentioned shall not affect their rights after the death of Mt. Banto. The suit has been dismissed by the trial Court and the plaintiffs have appealed. The first question to be decided is whether the land in suit is ancestral of the plaintiffs and Jhanda, to whom Lachhman Singh had been adopted. The learned counsel of the plaintiffs-appellants, at the commencement of the hearing, filed an application under O. 41, R. 27, Civil P. C., praying that he be allowed to produce fresh evidence to prove the ancestral nature of theproperty. After fully considering the matter we decided that no substantial cause had been shown for allowing this prayer. The plaintiffs were given full opportunity in the lower Court to produce evidence in support of their case. Indeed it appears that the lower Court allowed the plaintiffs to place on the record documents at a very late stage of the trial. No satisfactory explanation has been given for the failure of the plaintiffs to produce in the lower Courts the documents which are now sought to be tendered in evidence, nor have we been able to discover any inherent lacuna on the record which might justify the exercise of our powers under O. 41, R. 27. The case must therefore, be decided on such materials as exist on the record.

The learned counsel for the plaintiffs-appellants admits that the only piece of evidence to which he can refer in support of his contention, that the land in suit is ancestral of Jhanda and the plaintiffs, is the fact that the name of their common ancestor Dipa appears in the pedigree table prepared during the Settlement of 1861 (Ex. P 11). It is argued that this solitary fact is sufficient to raise a presumption that the land in suit was at one time owned by the common ancestor above mentioned and that the onus of proving the contrary lies on the defendants-respondents. In support of this contention reliance is placed on the following sentence in the judgment in *Jiwan Singh* v. *Har Kaur* (1) and printed at page 145 of the report:

> As regards the latter point (the ancestral nature of the property), we may say at once that the express mention of Sohan Singh in the pedigree table is presumptive proof that the land descended from him, and we see no reason therefore to differ from the finding of the Courts below.

After giving the matter careful consideration I am of opinion that this remark, though expressed in somewhat general terms, may be confined to the facts of that particular case and cannot be taken as laying down a proposition of general application. From the judgment as printed it is not possible to form an accurate idea of the materials that were on the record of that case relating to the history of the acquisition of the land then in dispute. Nor does it appear from the report whether to the pedigree-table exhibited in that case, there was not appended any foot-note (as is found in the pedigree tables of some villages) indicating the devolution of the land held by the founder of the family or the areas held by each member thereof. Moreover, a perusal of the judgment shows that the question of the ancestral nature of the property was a matter of very little importance for the decision of that further appeal, the real point of controversy before the Chief Court being whether, assuming the land to be ancestral, collaterals of the eleventh degree succeeded to a sonless proprietor in preference to his daughters. As the learned Judges were of opinion that collaterals of so remote a degree, would fail, even if the land was ancestral, they did not examine in any detail the materials relating to the ancestral nature of the property, especially when both the lower Courts had concurrently found this point in favour of the then appellants. They accordingly dismissed the respondents' objections on this score with the remarks quoted above. It is also noteworthy that the head-note of the report omits all reference to the rule supposed to have been laid down in this sentence. The remark, therefore, was, in my opinion, a mere *obiter dictum*and is of no value as a guide for any other case. In this connexion it will be apposite to bear in mind the following observations of Lord Halsbury in *Quinn* v. *Leathem* (2):

> Now before discussing the case.....and what was decided therein there are two observations

(1) [1914] 41 P. R. 1914=51 P. L. R. 1914=22 I. C. 415=31 P.W.R. 1914.

(2) [1901] A. C. 495=70 L. J. P. C. 76=50 W. R. 139=65 L. J. 708=17 T. L. R. 749=85 L. T. 289.

of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

If, however, the remarks in *Jiwan Singh* v. *Har Kaur* (1), above cited, was intended to lay down a general rule that the mere mention of the name of a person in the pedigree-table is presumptive proof of the fact that every piece of land held by his descendants (however low) was originally held by him and had descended from him in succession from generation to generation then I must respectfully dissent from it. A genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is, no doubt, presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village, which is found narrated in what is called *kafiat dehi*, *kaifiat hasul-i-haqiat*. These kaifiats are in some cases appended as foot-notes to the genealogical trees and in others they form separate parts of the Settlement record. If the pedigree-table shows two persons to be descended from one common ancestor and in the foot-note or in the *kaifiat dehi* or other parts of the Settlement record are found entries which indicate that the land now held by one of them was acquired or was at one time held by the common ancestor, there might arise a presumption that it has descended from him and is ancestral. But in the absence of any such entries as to the acquisition of descent of the land no presumption arises as to the nature of the land held by any proprietor from the mere circumstance that the name of the common ancestor of himself and certain other persons is shown in the pedigree-table.

It may also be mentioned that the remark in *Jiwan Singh* v. *Har Kaur* (1) has been recently dissented from by Scott-Smith and Moti Sagar, JJ., in *Kartar Singh* v. *Labh Singh* (3), and my learned brother Campbell, J., refused to follow it in *Dhiri Ram* v. *Nabi Bux*, Civil Appeal No. 259 of 1925, decided on 3rd March 1926. Another Division Bench (Zafar Ali and Jai Lal, JJ.), in *Jalal* v. *Bahawali* (4) refused to raise any presumption as to the ancestral nature of the property from the mere fact that the name of the common ancestor of the parties concerned was mentioned in the pedigree-table.

The learned counsel for the plaintiffs-appellants, however, has referred to *Maryam Bibi* v. *Ghulam Mahomed* (5) and *Maula Dad* v. *Ali* (6) in which, he says *Jiwan Singh* v. *Har Kaur* (1) was followed. I have carefully read both these rulings and find that in each of them, in addition to the fact that the name of the common ancestor was mentioned in the pedigree-table, there were other circumstances (e. g., both parties being proprietors in a joint khata and holding equal shares therein), which, taken together, were considered sufficient to justify the inference that the land was ancestral. In the present case, no other fact or circumstance admittedly exists. I must, therefore, hold that the land in dispute has not been proved to be ancestral of Jhanda and the present plaintiffs.

Mr. Khosla further contends that even if the land be not held to be ancestral of Jhanda and the present plaintiffs, they are still entitled to maintain the present suit as under the Riwaj-i-am of the Amritsar district prepared in 1913-14, the collaterals of a deceased sonless proprietor exclude the daughters from inheritance even with regard to the non-ancestral property. But assuming that such a custom prevails in the tribe of the parties, the plaintiffs in the present case, who are collaterals of Jhanda, the appointer, and not of Lachhman Singh, the appointee, have no locus standi to maintain the suit. If the land was non-ancestral of Jhanda and the plaintiffs the estate inherited by Jhanda's adopted son (or appointed heir) Lachhman Singh would,

(3) A. I. R. 1923 Lah. 355.
(4) [1926] 28 P. L. R. 241=9 L. L. J. 136.
(5) A. I. R. 1924 Lah. 175.
(6) A. I. R. 1924 Lah. 263.

on Lachhman Singh's death, pass to the latter's own natural heirs inasmuch as Jhanda had absolute powers of disposal over such property and Lachhman Singh had in turn become the owner thereof. It is only where the land is ancestral of the appointer and the collaterals that the estate, on the appointee dying sonless, reverts to the appointer's collaterals ; for in this latter case the appointer had only a limited power of disposal over the property and his collaterals had a residuary reversionary right in it. But the rule of reversion has no application where the property was self-acquired of the appointer and his power of disposal over it was absolute. Reference may be made in this connexion to para. 55 of Rattigan's Digest and the authorities collected therein.

For the foregoing reasons I hold that there is no force in this appeal and would dismiss it with costs.

Campbell, J.—I agree.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 480

HARRISON AND JAI LAL, JJ.

Bahal Singh—Plaintiff—Appellant.

v.

Surain Singh — Defendant—Respondent.

Second Appeal No. 1285 of 1923, Decided on 31st May 1927, from the decree of the Dist. J., Lahore, D/- 26th March 1923.

Civil P. C., S. 151—Trial badly conducted—New trial ordered.

Where the trial of suit was badly conducted by all concerned from commencement, in that, matters not pleaded were put in issue and decision was given by appellate Court on points not contained in grounds of appeal.

***Held* : that a trial de novo should be ordered.**

[P 480 C 2 ; P 481 C 1]

Harcharan Das Kumar—for Appellant.

Nand Lal—for Respondent.

Jai Lal, J.—The appellant Bahal Singh instituted a suit against Surain Singh for the recovery of Rs. 2,000 principal and interest alleged to be due on the basis of a balance struck and some cash advanced thereafter. The defendant pleaded inter alia that the debt had been discharged by payments made to the plaintiff's father who was a member of a joint Hindu family with the plaintiff. The trial Court held that the plaintiff was separate from his father and that the debt had not been discharged by means of the alleged payment to his father and decreed the suit with costs. On appeal the District Judge held that it had not been established that the plaintiff had separated from his father and consequently that the debt in suit was due if at all to the joint Hindu family consisting of the plaintiff and his father. The learned Judge declined to implead the latter on the ground (a) that no person may be added as a plaintiff without his consent and there was nothing on the record to suggest that the father had ever given any such consent and (b) that the defendant raised an objection as to the nonjoinder of parties from the beginning and the plaintiff deliberately and persistently asserted that he alone was competent to bring the suit.

In this connexion we may remark that no objection as to the nonjoinder of parties was raised by the defendant in the trial Court or in the ground of appeal to the District Judge and also that the finding of the trial Court that the plaintiff was separate from the father and that the amount in suit was due to him alone was not impugned in the grounds of appeal. Moreover the plaintiff's father was apparently present in the Court on his behalf in that Court as his recognized agent and consequently even if the prayer made to implead him did not amount to his consent to be impleaded the District Judge took no steps to ascertain if he consented to be made a plaintiff if such a course was necessary. The consequence is that the order of the learned District Judge declining to implead the plaintiff's father as a plaintiff cannot be sustained on the reasons given by him. In any case he could have been impleaded as a defendant.

A perusal of the record shows that the whole case has been badly conducted by all concerned from the very commencement. Matters have been put in issue which were not raised in the pleadings before the trial Court and decision has been given by the District Judge on questions which were not raised in the grounds of appeal. We consider that under the circumstances the best course

will be to set aside the decrees of both the trial Court and the District Judge and to remand the case to the trial Court under S. 151 of the Civil P. C., with direction to try the suit *de novo* after impleading the plaintiff's father as a plaintiff if he consents and otherwise as a defendant. We order accordingly. Costs incurred by the parties so far shall abide the result of the suit. The Court-fee paid by the appellant on the memorandum of appeal shall be refunded to the appellant.

D.D. *Case remanded.*

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* A. I. R 1927 Lahore 481

ABDUL RAOOF AND JAI LAL, JJ.

Firm Ganeshi Lal-Kundan Lal — Defendants—Appellants.

v.

Firm Debi Sahia-Gulzari Mal—Plaintiffs—Respondents.

First Appeal No. 2295 of 1921, Decided on 11th February 1925, from the decree of the Sr. Sub-J., Delhi, D/- 21st July 1921.

(a) *Contract — Construction — Contract in writing and print—Conditions in writing will be operative as against those in print.*

When a contract is both in writing and in print, the part which is in writing will be operative as against the part which is in print if there is an inconsistency between the two. [P 482, C 2]

* (b) *Contract—Contract for sale— Goods arriving late due to war conditions—Contract is not ipso facto cancelled on passing of due date of arrival—Reasons for late arrival are no defence to suit for damages for non-delivery though for late delivery.*

Where goods contracted to be sold arrive late due to circumstances arising from war, the contract is not cancelled ipso facto and the reason of the delay might with success be pleaded in defence of a claim for damages suffered owing to the delay in making delivery, but not in a suit for damages consequent on non-delivery of the goods. [P 483, C 2]

(c) *Contract— Construction — Due date of performance is date in contemplation of parties when contracting and not the date to which performance has to be postponed.*

The due date of the performance of a contract is the date which was in the contemplation of the parties at the time when the contract was entered into and not the date to which, owing to circumstances beyond the control of either party, the actual performance had necessarily to be postponed, but without any express agreement between the parties. [P 484, C 1]

(d) *Contract—Construction.*

When a contract for sale provided: "The terms of the contract shall be the same as those of R. J. Wood, the goods will be fresh. Patterns and invoices as received will be made over to you. We have purchased the goods from Sham Sunder Sham Lal."

Held: that the contract to supply the goods was not in any way contingent on their supply by Messrs. Sham Sunder Sham Lal. It was impossible to read this portion of the agreement to mean that the sellers would be absolved from their contract to supply if Sham Sunder Sham Lal did not deliver the goods to the sellers or that the sellers would be liable to supply only if Sham Sunder Sham Lal delivered the goods to them. [P 482 C 1, 2; P 483 C 1]

(e) *Evidence Act*, 101—*Contract—Party alleging that contract is conditional must prove the condition—Contract.*

The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence. [P 484 C 2; P 483 C 1]

Des Raj Sawhney and *Sagar Chand*—for Appellants.

Sardha Ram and *Jagan Nath Bhandari*—for Respondents.

Judgment.—This suit was instituted on the 25th April 1919 by the firm of Debi Sahai Guzari Mal against the firm of Ganeshi Lal Kundan Lal, both of Delhi, in the Court of the Additional Judge, Delhi, on the following allegations:

That on the 26th August 1917 the defendants sold to the plaintiffs 30 bales of D-1 white shirting of R. J. Wood's office of May to November or December shipments; that in spite of the arrival of the goods and in spite of the demands the defendants did not deliver them to the plaintiffs. The plaintiffs, therefore, claimed Rs. 15,606-4-0 as damages on account of this breach of contract by the defendants.

The defendants contested the suit on two main grounds and those are the only grounds which have been argued before us. The first ground was that the performance of the contract of delivery of goods by the defendants to the plaintiffs was contingent on supply of the goods to the defendants by the firm of Sham Sunder Sham Dass of Delhi from whom the defendants had purchased the goods sold and that the defendants had not received the goods from that firm. The second ground was that the goods arrived late owing to the war and, therefore, the contract was cancelled or must be deemed to have

been cancelled, and in any case, the delay was excusable and no damages were consequently claimable by the plaintiffs. In the alternative it was contended that the damages should be calculated as on the due date of delivery which, according to the defendants, was the normal date on which the goods were expected to be delivered in Delhi. The plaintiffs had claimed damages as on the date when the goods actually arrived in Delhi.

The Court below held that the contract was not a contingent one as alleged and that the damages were to be calculated according to the market rates prevailing on the normal date of delivery and consequently awarded a decree for Rs. 6,952-3-0 with costs against the defendants. The defendants have appealed from the decree passed against them and the plaintiffs have filed cross-objections in respect of the damages disallowed by the Senior Subordinate Judge.

The terms of contract in suit are to be found printed in the form supplied by the Delhi Hindustani Mercantile Association. After the printed matter the following conditions were added in manuscript :

Compliments from Ganeshi Lal Kundan Lal to Debi Sehai Gulzari Mal.

Thirty (30) bales of D-1 of white shirting of the office of R. J. Wood at 20 sh. 2d. (twenty shillings and two pence) which we have purchased in the bazar have been sold to you, will recieve net profit at the rate of Rs. 2-8-0 (rupees two annas eight) per piece, all expenses in connexion therewith shall be borne by you. We will inform you about the arrival of the goods. You shall have to take delivery of the goods on payment in the bank or the (importing) office. You shall be liable for interest on the draft from its due date as also for the godown charges from the date of the arrival of the goods. The terms of the contract shall be the same as those of R J. Wood. The goods shall be fresh. Patterns and invoices as received will be made over to you. We have purchased the goods from Sham Sunder Sham Lal.

It was urged by the learned counsel for the respondents that the printed matter was not intended to be operative at all in this case, but that the parties had agreed to the terms of R. J. Wood and that there was no evidence on the record to show what those terms were. His further argument was that even if the terms in print were the terms of R. J. Wood, they were inoperative in so far as they were inconsistent with the manuscript part of the agreement. With the second part of the contention we are in full accord. It is a well-recognized principle of construction of documents that when a contract is both in writing and in print, the part which is in writing will be operative as against the part which is in print if there is an inconsistency between the two. We hold, therefore, that if the printed part of the document before us was intended to be acted upon, it is operative only in so far as it has not been superseded by the manuscript part of it.

As regards the first contention of the learned counsel we note that the learned Senior Subordinate Judge and both the parties assumed during the trial of the suit in the Court below that the printed terms were the terms of R. J. Wood. The learned counsel for the appellants strenuously contends that those were the terms of R. J. Wood. In our opinion the contention of the learned counsel has force. If the terms of R. J. Wood had been different from the terms of the printed form, the parties naturally would have given evidence as to what they were, and the learned Senior Subordinate Judge who had dealt with a number of cases arising under similar contracts would not have accepted the printed terms as the terms of R. J. Wood. Most of the terms that are printed are, however, inapplicable to the circumstances of the case. They mostly apply to delay in shipment as opposed to arrival of the goods in India. The goods in this case were shipped on due dates, but were admittedly received in Delhi on various dates which are mentioned in the judgment of the lower Court, and it is clear from the evidence of Mr. Gray, dated the 21st February 1921, that the delay in their arrival in Delhi was occasioned by the war. Mr. Gray, has further stated that usually goods arrived from England in Delhi during 1917 and 1918 in about two months. Mr. Gray, we might mention is the manager of R. J. Wood and Co. of Delhi.

Now, taking the first ground on which the decree of the learned Senior Subordinate Judge was attacked, we are of opinion that the contract to supply the bales was not in any way contingent on their supply to the defendants by Messrs. Sham Sundar Sham Lal. The party who alleged that a contract is conditional on the happening of a certain contingency

must prove the existence of such a condition by clear and unequivocal evidence. There is no oral evidence on this point except the vague and unsatisfactory statement of the defendants themselves. So far as the written or printed portion of the contract is concerned there is no expression used from which such a condition can be inferred. The only portion from which we were asked to infer such a condition was the second postscriptum which runs as follows: "Patterns and invoices as received shall be made over to you. We have purchased the goods from Sham Sundar Sham Lal". In our opinion this expression was used to describe the goods that were intended to be sold and to show that it was a bona fide transaction of sale and purchase and not a mere gamble. It is impossible to read this portion of the agreement to mean that the sellers would be absolved from their contract to supply if Sham Sundar Sham Lal did not deliver the goods to them or that the sellers would be liable to supply only if Sham Sundar Sham Lal delivered the goods to them. In our opinion the matter is so clear that no further comment is necessary. We might also mention that there is no reliable evidence to show that Sham Sundar Sham Lal did not deliver the goods to the defendants. The only statement on this point is that of Joti Parshad, defendant, who was examined as his own witness. His answers to the questions asked in cross-examination show a deliberate attempt at concealment and prevarication, and we have no hesitation in rejecting this statement as unreliable. From the above it is clear that the defendants have failed to fulfil their part of the contract to deliver the goods. The plaintiffs demanded the goods by means of notices in writing on the 9th January 1918 and 27th April 1918, still the defendants declined to deliver the goods.

Having found that the defendants-appellants broke their contract to supply the goods to the plaintiffs-appellants in spite of the demands in writing by them, the next question that we have to determine is whether the appellants are exonerated from liability to pay damages to the respondents owing to the delay in the arrival of the goods being admittedly due to the circumstances arising from the war. It is in evidence that the goods actually arrived in Delhi. It might have been in the power of the respondents to cancel the contract when they found that the goods did not arrive on the due date, but there is no evidence that they did so. On the other hand their conduct clearly proves an intention to keep the contract alive in spite of the delay. We do not find any ground in support of the contention of the learned counsel for the appellants that the contract must be deemed to have been ipso facto cancelled on the non-arrival of the goods on the due date. There is no such condition in the agreement before us and no authority has been quoted in support of the proposition. The goods have actually arrived in Delhi and the contract not having been cancelled the appellants were bound to deliver the goods. The reason of the delay might with success have been pleaded in defence of a claim for damages suffered owing to the delay in making delivery, but not in a suit for damages consequent on non-delivery of the goods which actually arrived. In our opinion therefore the respondents were entitled to damages on account of the appellants' breach of the contract.

The next question is as to the date on which the damages should be calculated. It is common ground that the damages should be calculated on the basis of difference between the agreed rates and the market rates on the due dates of delivery. The learned Senior Subordinate Judge has held that this date should be the date on which the goods were normally due in Delhi and has given the respondents a decree accordingly. The respondents, however, are not satisfied and in the cross-objections claim that the damages should be assessed as on the respective dates on which the consignments actually arrived in Delhi. This is because the market rates of the goods had gone up in the meantime.

It was contended by the learned counsel for the respondents that in the case before us the due date of delivery was not the normal date when the goods were expected in Delhi, but that such date was left undetermined owing to the war and that the delivery was intended by the parties to be made whenever the goods actually arrived; in other words, that it was anticipated that the goods would arrive late and, therefore, the

normal date of arrival was not in the contemplation of the parties and that it was expressly agreed that the delivery could be made when the goods actually arrived irrespective of the time that may have elapsed between the date of the contract and actual arrival. We do not think that the contract before us is capable of this construction. The ordinary date of arrival of goods from England to Delhi is much less than two months, but Mr. Gray deposed at the trial of the Court that the normal date of arrival during 1917 and 1918 was about two months owing to the war, and it is not denied before us that in those days two months after the date of shipment was ordinarily accepted as the date of arrival of goods. In our opinion the parties contemplated, when they entered into the agreement, that the goods would arrive in Delhi in about two months time from their shipment in England and that was the date of delivery of each month's shipment as agreed to by the parties. The delay that actually happened was not in the contemplation of the parties and could not, therefore, be taken in fixing the due date of delivery for the purpose of assessing damages owing to non-delivery. The due date of the performance of a contract is the date which was in the contemplation of the parties at the time when the contract was entered into and not the date to which, owing to circumstances beyond the control of either party, the actual performance had necessarily to be postponed but without any express agreement between the parties. In our opinion there is no force in the cross-objections.

We observe that in the plaint the 30 bales agreed to be sold have been split up into monthly instalments. This has not been disputed by the appellants, and it appears that by custom among the traders of Delhi the manufacturers of the goods in such cases are allowed to apportion their consignments between the various purchasers and this appears to have been done in the case before us also. There was no question before us as to any mistake in the assessment of damages. The only question argued was whether the normal date of arrival of each consignment should be taken as the due date or the actual date of arrival. We have already expressed our views on this matter.

The result is that both the appeal and the cross-objections are dismissed with costs.

G.B. *Appeal and cross-objections dismissed.*

A. I. R. 1927 Lahore 484

TEK CHAND, J.

Lekh Raj-Bhoja Ram Chamba Ram-Lekh Raj—Plaintiff—Petitioner.

v.

Shafi Muhammad—Defendant — Respondent.

Civil Revision Petition No. 664 of 1926, Decided on 9th March 1927, from the order of the 2nd Cl. Sub-J., Multan, D/- 29th June 1926.

Civil P. C., O. 17, R. 3—Plaintiff present on date of hearing but not present on date fixed for return of summons—R. 3 does not apply and dismissal of suit is illegal.

A suit was instituted on the 28th May 1926. On the 31st May 1926, the Court admitted the plaint and directed that summonses for final disposal should issue to the defendant for the 29th June 1926. It was also ordered that the 10th June 1926 was fixed for the purpose of return of the summonses. On the 10th June neither party was present, nor had the summonses been served upon the defendant. It was ordered that the case should come up on the date fixed.

On the 29th June 1926, the plaintiff was present but the Court dismissed the suit under O. 17, R. 3, as he was not present on 10th June.

Held; that O. 17, R. 3 did not apply and the Court acted illegally and with material irregularity in dismissing the suit under O. 17, R. 3.

[P 484, C 2; P 485, C 1, 2]

Gulzari Lal for *Sain Das*—for Petitioner.

Judgment.—The suit out of which this revision petition arises was instituted on the 28th May 1926 in the Court of the Subordinate Judge, Multan, exercising Small Cause powers. On the 31st May 1926, the Court admitted the plaint and directed that summonses for final disposal should issue to the defendant for the 29th June 1926. It was also ordered that the 10th June 1926 was fixed for the purpose of return of the summonses.

On the 10th June neither party was present, nor had the summonses been served upon the defendant. It was ordered that the case should come up on the date fixed.

On the 29th June 1926 the Court passed the following order:

The plaintiff is present. The plaintiff did not appear on the date fixed for examination of service of summons though there was an order to this effect. It is accordingly ordered that under O. 17, R. 3 of the Civil Procedure Code the plaintiff's suit be dismissed and consigned to the record room.

The plaintiff has preferred a revision petition to this Court against this order and after an examination of the record I am of opinion that this petition must succeed. It is obvious that O. 17 R. 3 has no application to a case of this kind. That rule is as follows:

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

The first date of hearing of the case was the 29th June and on that date the plaintiff was present. The 10th June was fixed merely for the return of summonses with a view to issue fresh summonses in case service was not effected. It was not a date to which the hearing had been adjourned nor can it be said that "time had been granted" to the plaintiff to perform any act for the further progress of the suit. In *Harjas Rai* v. *Narain Singh* (1) a Division Bench of the Chief Court held that:

the stringent provisions of O. 17, R. 3 of the Code of Civil Procedure cannot be invoked unless time had been granted to a party specifically for the performance of any of the acts mentioned therein and that party has committed a default in performance thereof.

This ruling has been followed by the High Court in *Lila Ram-Ladha Ram* v. *Ramzan* (2) and *Karam Chand* v. *Jinda Ram* (3) where it was held that the rule is inapplicable where the adjournment has been given in the ordinary course and not at the special request of a party. In *Balmakund Marwari* v. *Lachmi Narain Marwari* (4) the Patna Court held that:

Rules 2 and 3 of O. 17 of the Civil Procedure Code apply only to cases where the actual hearing of the suit has been adjourned, and by the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. But in cases where it was clearly never intended that there should be a hearing of the suit in the ordinary sense of the word but merely some interlocutory matter decided between the parties as to the future conduct of the suit, the provisions of these rules have no application.

Further it is to be noted that this rule is not applicable where the Court has no materials to dispose of the case. See *Sher Ali* v. *Mangu* (5). I hold that the Subordinate Judge acted illegally and with material irregularity in dismissing the suit under O. 17 R. 3.

I, therefore, set aside the judgment of the lower Court and accepting the petition for revision remand the case for disposal in accordance with law. There will be no order as to costs in this Court.

D.D. *Case remanded.*

(1) [1915] 51 P. R. 1915=29 I. C. 938=98 P. L. R. 1916.
(2) A. I. R. 1924 Lah. 272.
(3) A. I. R. 1924 Lah. 404,
(4) [1920] 2 U. P. L. R. (Pat.) 197=57 I. C. 748.
(5) [1919] 150 P. R. 1919=52 I. C. 292.

A. I. R. 1927 Lahore 485

BROADWAY AND ZAFAR ALI, JJ.

Harchand Singh—Plaintiff—Appellant.

v.

Gurdip Singh and *another*—Defendants—Respondents.

First Appeal No. 2152 of 1924, Decided on 25th November 1926, from the decree of the Sr. Sub-J., Lyallpur, D/- 4th August 1924.

Contract Act, S. 253—Plaintiff alleging one proportion of shares—Defendants alleging another—Case should be decided on evidence.

In a suit for accounts of a partnership, where plaintiff alleges a certain proportion of shares, while defendant, while admitting partnership alleges different proportion, it is incumbent on the Courts to weigh carefully the evidence led by both sides and to give a decision as far as possible according to the weight of that evidence. [P 489, C 2]

Moti Sagar, Tek Chand, Devi Ditta Mal, Sant Singh and *Sheo Narain*—for Appellant.

Muhammad Shafi, Muhammad Rafi and *Badri Das*—for Respondents.

Broadway, J—On the 10th December 1919 a partnership was entered into between Sardar Harchand Singh, Sardar Gurdip Singh, and Sardar Dalip Singh by which they agreed to open a Commission Agent's shop at Lyallpur under the name of "Khalsa Dokan." The busi-

ness of this partnership came to an end on the 23rd January 1922, and it is an admitted fact that the business of this partnership resulted in very heavy losses. On the 25th May 1923 Harchand Singh instituted a suit against Gurdip Singh and Dalip Singh, in which he sued for dissolution of partnership and rendition of accounts of the business of the firm. He valued the suit at Rs. 1,000 undertaking to pay Court-fee on any sum that might be decreed in excess of that. In his plaint he stated that the partnership had been entered into verbally, that is, there was no documentary evidence or any deed by which the partnership had been drawn up. He alleged that his share was 1/5th, Gurdip Singh's 2/5ths and Dalip Singh's 2/5ths, and that the partners had agreed to subscribe the capital in that proportion; but that while he had contributed the sum of Rs. 150 towards the capital neither of the partners had contributed anything. He also stated that Dalip Singh, Defendant No. 2, was to be appointed as the manager and the agent of the firm and to receive remuneration at the rate of Rs. 80 per mensem, while he and Gurdip Singh were to act as advisers and supervisors without any remuneration and prayed for a decree to the following effect:

(a) The partnership may be dissolved, date of dissolution fixed, and the shares of ths parties declared.

(b) The rights in respect of the debts due to the parties and the liabilities in respect of the debts due from them may be determined and the amount due to or from each partner may be fixed or the account of the firm may be adjusted in some other way and the rights and liabilities of the parties may be declared.

(c) A decree for Rs. 5,250 or for the addditional amount that may be found due may be passed in favour of the plaintiff conditional on payment of the additional Court fee.

(d) The costs of the suit may also be awarded.

The defendants contested the suit and filed separate written statements. They both admitted that the partnership had been entered into between them and the plaintiff, but denied that the shares had been correctly stated in the plaint. According to them the share of the plaintiff Harchand Singh was 13/16ths, of Gurdip Singh 2/16ths and of Dalip Singh 1/16th. Gurdip Singh claimed merely to be a 'sleeping partner' while Dalip Singh stated that he had managed the business of the partnership, the remuneration fixed being Rs. 150 per mensem. Various pleas were also raised and the following issues were settled:

1. Has dissolution of partnership already taken place?
2. How long (the period for which the account can be rendered) did the partnership last?
3. What are the shares of the parties in this partnership?
4. Is Sardar Gurdip Singh liable to render account?
5. What was the scope of partnership?

Parties led evidence and then, on the 19th March 1924, their counsel made a certain statement which disposed of all but two issues. This statement is to be found at page 319 of the paper-book and is to the following effect:

We, both the parties, agree to the following points:

1. The account of the partnership business from the 10th December 1919 up to the 23rd January 1922 may be caused to be rendered;
2. If any fresh business was made after that date the partnership shop would not be responsible for the loss incurred therein and;
3. If any outstandings were realized after that date or if any previous loan raised on the liability of the partnership business was paid off, the same shall be taken into consideration in the rendition of accounts and for this purpose a reasonable pay of the munim shall be allowed.

Upon this the Senior Subordinate Judge recorded an order pointing out that only Issues Nos. 3 and 5 remained to be considered, and after hearing arguments he found that Issue No. 5 could only be decided satisfactorily after the accounts had been checked. The parties agreed to the appointment of Lala Sohan Lal as local commissioner and Lala Sohan Lal then went into the accounts, recorded statements, and furnished a report. To this report the plaintiff and the defendants filed objections. After hearing counsel the case was decided on the 4th August 1924. The learned Subordinate Judge passed a preliminary decree declaring that the shares of the parties were as follows:

Plaintiff ... 13 annas in a rupee,
Gurdip Singh ... 2 annas in a rupee, and
Dalip Singh ... 1 anna in a rupee.

The partnership was declared dissolved as from the 22nd January 1922, and Lala Sohan Lal was appointed receiver of the partnership property and directed to make out the list of outstanding debts, etc.

In connexion with the fifth issue the learned Senior Subordinate Judge also issued certain directions to the receiver as to the method of calculating the capital, etc., of the partnership.

Against this preliminary decree the plaintiff has preferred an appeal to this Court and on his behalf we have heard Mr. Moti Sagar, while Sir Muhammad Shafi has addressed us on behalf of Gurdip Singh and Mr. Badri Das for Dalip Singh.

On behalf of the appellant it has been contended that the Senior Subordinate Judge has erred in: (1) fixing the shares of the partnership as he has fixed them; and (2) his directions to the receiver in connexion with the capital and interest, etc., of the partnership. As to the second point, counsel for the defendants-respondents have agreed that the directions should be expunged and that the capital and interest should be left to be decided in the proceedings that must be taken before passing the final decree. His directions are to be found in his judgment at page 362 of the paper-book and from the words "The counsel (line 1) . . . to the word "third person" on page 363, (lines 4 to 14), are set aside.

The question raised in the first contention relates to Issue No. 3 in deciding which the learned Senior Subordinate Judge having rejected the evidence led by the plaintiff-appellant followed certain principles enunciated in *Fazal Khan* v. *Mt. Karam Begam* (1) and declared the shares of the partners to be as set out by the defendants-respondents.

Mr. Moti Sagar contended that in partnership suits of this nature all the parties are in the position of a plaintiff and that therefore it is incumbent on each of them to prove the allegations he makes. Applying this principle to the present case he urged that the defendants-respondents having alleged that certain specific shares had been fixed, the onus of proving the correctness of their allegations was on them, which onus they have failed to discharge.

In these circumstances, he argued, when the Court finds it impossible to accept the evidence of either party, the proper course was to fall back on S. 253 of the Indian Contract Act and give effect to its provisions. The principles enunciated in *Fazal Khan* v. *Mt. Karam Begam* (1) being inapplicable to cases of this nature, we have been taken through the evidence on the record and I have no hesitation in agreeing with the learned Senior Subordinate Judge's estimate of that led by the plaintiff-appellant. Sardar Harchand Singh himself says that when the shares were fixed, the only persons present were the partners concerned. Jiwan Singh's statement that he was present at the time is therefore clearly incredible. The only other witness produced by Sardar Harchand Singh on this point was Sardar Janmeja Singh who says that he had dealings with "the Khalsa Dokan" and, before starting these dealings, had questioned the two defendants-respondents, who had told him that they each owned two shares and Harchand Singh one share in the business. He says: "I had a mind to join with them as a partner," but he did not do so. Neither Harchand Singh nor any other witness has hinted even that it was ever contemplated to take in any one as a partner and this witness' statement is to my mind of no weight. It must, therefore, be held that the plaintiff-appellant has failed to prove that the shares of the partners were fixed as set out in the plaint.

Sir Muhammad Shafi contended that the plaintiff-appellant having failed to prove the correctness of his allegation as to the shares fixed the learned Senior Judge was right in applying the principles laid down in *Fazal Khan* v. *Mt. Karam Begum* (1), and that he had no jurisdiction to resort to S. 253 of the Contract Act. In support of his latter contention he referred to *Eshen Chunder Singh* v. *Shamchurn Bhuttoo* (2), *Ramasami Nadan* v. *Ulaganatha* (3), *Lakhshmi Venkayyamma* v. *Venkatadri Appa Rao* (4), *Pushavali Alakh Naraya* v. *Secy. of State* (5), *Tika Ram* v. *The Deputy Commissioner of Bara Banki* (6), *Nabi Bakhsh* v. *Sajid Ali* (7), *Ram Rattan* v. *Labhu Ram* (8), *Ram Diwaya Ram* v. *Milkhi Ram* (9) *Badar-ud-Din Biswas* v. *Harajtulla Joordar* (10), *Radhe Mandar*

(1) [1914] 105 P. R. 1914=27 I. C. 113=241 P. L. R. 1915.

(2) [1866] 11 M. I. A. 7=6 W. R. P. C. 57 (P. C.).
(3) [1899] 22 Mad. 49=8 M. L. J. 312 (F. B.).
(4) A. I. R. 1921 P. C. 27.
(5) A. I. R. 1925 P. C. 18=49 Mad. 249=53 I. A. 64 (P. C.).
(6) [1899] 26 Cal. 707=26 I. A. 97=3 C. W. N. 573=7 Sar. 520 (P. C.).
(7) [1919] 50 I. C. 160.
(8) [1919] 50 I. C. 366.
(9) [1913] 229 P. W. R. 1913=18 I. C. 553=8 P. L. R. 1913.
(10) [1920] 54 I. C. 797.

v. *Fakir Mandar* (11), *Wong Mun Khee* v *Teong Shain* (12), *Bakhtawar Begam* v.. *Hussaini Khanum* (13) and *Dwijendara Narain Rao* v. *Jogesh Chandra Dey* (14), I have examined these authorities and am of course bound by the pronouncement of their Lordships of the Judicial Committee. I am also in full agreement with the authorities of the various High Courts that have been cited, but I do not consider it necessary to discuss these authorities; for it seems to me that they deal with their own set of facts. As pointed out in *Quinn* v. *Leithem* (15) (also cited by Sir Muhammad Shafi):

> every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

None of these authorities deal with a partnership suit, and, *Edulji Muncharji Wacha* v. *Vullebhoy Khanbhoy* (16) is an authority for the proposition propounded by Mr. Moti Sagar that the position of parties in partnership suits is in some particulars different from that of the position of parties in an ordinary suit—say for money. In that case the plaintiff had filed a suit for rendition of accounts, etc., against 21 defendants. Some of the defendants had filed written statements. The plaintiff then applied for leave to withdraw the suit or that the suit might be dismissed. Two of the defendants objected and applied to be made plaintiffs, at the same time praying that the plaintiffs should be made a defendant in the suit. The prayer was granted and West, J., is reported to have said as follows:

> Each of the parties to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant, and in both capacities comes before the Court for the adjudication of his rights relatively to the other partners, which the Court endeavours to determine by its decree (page 168.).

It was urged by Sir Muhammad Shafi that that was a decision under the old Code and that the corresponding provisions to be found in O. 1, R. 10, Civil P. C., had rendered that authority obsolete. It appears however, that this authority was considered in *Brojendra Kumar Das* v. *Gobind Mohan Das* (17), and it was held that certain provisions which existed in S. 32 of the old Code had been omitted in O. 1, R. 10 (2) as they had been considered to be redundant. The decision of West, J., was approved.

Section 253 of the Indian Contract Act lays down that in the absence of any contract to the contrary all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership. It has been urged by Mr. Moti Sagar that if it be held that the plaintiff had failed to make out his allegations as to what shares had been fixed, the allegations made by the defendants, unless substantially proved by them, should be disregarded and the partners should be held to have had equal shares. He referred to *Robinson* v. *Anderson* (18), and *Ram Charan* v. *Bulaqi* (19), in support of his contention. The facts in the latter authority are not on all fours with the case now under consideration. In *Robinson* v. *Anderson* (18) the plaintiff had brought an action claiming to be entitled as a partner holding an equal share. The defendant alleged that the shares agreed upon were unequal. The Master of the Rolls after examining the evidence led by the defendants says at page 365:

> It appears to me to be impossible to say, that there was that which Mr. Anderson is bound to establish, namely, any agreement or any contract between the parties, that each party should carry on his own business separately, and be paid for the business which he himself conducted, totally irrespective of the plaintiff. I think not only that the contrary is proved, but that, in the absence of any evidence the presumption of law would have been in favour of an opposite conclusion, upon the mere fact of a joint employment.

This view was upheld by Lord Justice Knight Bruce and Lord Justice Turner on appeal. It will be seen, however, that in that case the plaintiff had claimed that the agreement between him and the defendant was that they should share equally that is to say he alleged as a fact what the law would presume in the absence of evidence of an agreement to the contrary. In the present

(11) [1920] 56 I. C. 970.
(12) [1916] 10 Bur. L. T. 119=36 I. C. 464.
(13) [1914] 36 All. 195=23 I. C, 355=41 I. A. 84 (P. C.).
(14) A. I. R. 1924 Cal. 600.
(15) [1901] A. C. 495=85 L. T. 289=70 L. J. P. C. 76=50 W. R. 139=65 J. P. 708=17 T. L. R. 749.
(16) [1883] 7 Bom. 167.
(17) [1916] 20 C. W. N. 752=34 I. C. 186.
(18) [1885] 109 P. R. 362.
(19) A. I. R. 1924 All. 854=46 All. 858.

case the plaintiff does not allege the shares which would be presumed to have been agreed on in the absence of an agreement or contract to the contrary, but has set up a case showing that the shares agreed upon were unequal. Having failed to establish his allegations he asks that the presumption raised by law should be given effect to despite the fact that the defendants-respondents have, while admitting that there had been a contract making the shares unequal, set up a different allotment of shares. In considering this point the learned Senior Subordinate Judge came to the conclusion that he should act in accordance with what is laid down in *Fazl Khan* v. *Mt. Karam Begam* (1). In that case Mt. Karam Begam as plaintiff, had sued Fazl Khan, as defendant, for recovery of her prompt dower, alleging in her plaint that her dower had been fixed at the time of her marriage at Rs. 10,000 and 100 gold mohars of the value of Rs. 25 each and that one-half of this amount was the prompt dower. She accordingly claimed the sum of Rs. 6,250. Fazal Khan while admitting that the dower had been fixed at the time of the marriage, alleged that it had been fixed at Rs. 100 and one gold mohur of the value of Rs. 18 and that, therefore, all that the plaintiff was entitled to was Rs. 59. The trial Court rejected the evidence led by Mt. Karam Begam as unworthy of credence and after enquiry as to the amount of Mehr-ul-misl or customary dower, fixed it at Rs. 3,000 and granted a decree for Rs. 1,500. Their Lordships of the Chief Court held that it was not justifiable to hold any enquiry into what was the customary dower and that the plaintiff having failed to prove the allegations made by her the utmost that could be decreed in her favour would be the amount admitted by the defendant namely Rs. 59 and that was the amount decreed.

Now it seems to me obvious that the principle laid down in that case cannot be universally applied, because there the decree was given on the admission of the defendant. The difficulty of applying the principle there laid down would be apparent at once if in the present case Gurdip Singh and Dalip Singh had set up a different inequality of shares. It seems to me that in suits of the nature now under consideration, it is incumbent on the Courts to weigh carefully the evidence led by both sides and to give a decision as far as possible according to the weight of that evidence. Indeed in the present case it seems to me that this is really what the learned Senior Subordinate Judge has done, for while criticising the evidence led by the defendants and coming to the conclusion that 'much' reliance could not be placed on some of the witnesses, he says at page 360 line 41 :

> the shares alleged by the plaintiff are moreover improbable, while the probabilities are on the side of the defendants and hence their evidence can be given credence to.

Turning to this evidence it will be found that both the defendants have been put into the witness-box and have sworn that the shares were as set out in their written statements. In support of their statements they produced Kidar Nath, Mul Raj Datar Singh and Mewa Singh. (The judgment here discussed the evidence, led by defendants and proceeded.) These facts to my mind render it highly probable that the plaintiff-appellant's share in the partnership was much larger than he is now prepared to admit owing to the fact that the business of this "Khalsa Dokan" has suffered very heavy losses. After taking all the facts into consideration and giving all possible consideration to the evidence led by the parties in my judgment the evidence of the defendants-respondents must be held to carry weight and the conclusion arrived at by the learned Senior Subordinate Judge on the question of shares must be accepted.

I would, therefore, dismiss this appeal with costs.

Zafar Ali, J.—I agree.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 489

ADDISON, J.

Bissu Mal—Defendant—Appellant.

v.

Ram Kishan and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1940 of 1926, Decided on 12th February 1927, from a decree of the Addl. Dist. J., Amritsar, D/- 1st May 1926.

Registration Act, S. 49—Unregistered lease given effect to—Transaction can be set aside.

The rule that where a compulsorily registrable but unregistered document has been given effect to, the transaction should not be set aside, does not apply to the case of a lease as it can never be said that it comes to an end and that the transaction is completed. 42 *Cal.* 80 (*P. C.*) *Dist.* [P 490 C 2, P 491 C 1]

Badri Das—for Appellant.

Dev Raj Sawhney—for Respondents.

Judgment. — The plaintiff is the mahant of the temple of Sri Rugnathji in Amritser City. The property in suit is 17 kanals. 5 marlas of land with some houses thereon and it admittedly is waqf, belonging to the temple in question. The plaintiff sued to eject the defendants from the suit land on the allegation that they were his tenants on an annual rental of Rs. 125 by virtue of an unregistered deed, dated the 17th of April 1917. It was alleged that the defendant had not paid rent for the last three years and had committed various acts of misfeasance in the temple property. One defendant confessed judgment and admitted the plaintiff's claim. The other defendants admitted that the property was waqf and that the mahant gave it to them by means of the agreement referred to. They denied, however, that they got it on a lease though they admitted that they agreed to pay to the plaintiff, the sum of Rs. 125 annually, which sum was to be spent on the worship of the idol. They further pleaded that they were not liable to ejectment and that they had built substantial constructions on the property by means of public subscriptions though they admitted that they also had become waqf, i. e., temple property, under the agreement.

The lower appellate Court has held that the agreement in question was a lease or in any case created a right and interest in this immovable property, the value of which was admittedly far in excess of the sum of Rs. 100, and that for both reasons the document was inadmissible in evidence, as it was not registered, except to the extent that it could be looked at in order to see the nature of the possession. The nature of the possession disclosed being that of landlord and tenant and the rent not having been paid for the last three years, it was held that the suit was properly decreed. It was further found proved that the defendants did not allow the plaintiff to make a free use of the waqf property for religious purposes and that the procession of the idol was not allowed to be conducted there, while other acts were permitted which were against the religious character of the property.

One defendant has come here on second appeal. The ground dealing with the contention that the defendants were prejudiced by the trial of the case by a Sub-Judge with Third Class powers was not pressed before me and obviously there was no prejudice. The principal argument advanced on behalf of the appellant was that the document in question was not a lease and also did not convey any interest in property of the value of more than Rs. 100 and that it was not therefore, compulsorily registrable. It was said that the appellant was simply created a manager of the property in question.

I have gone carefully through the document and there is no doubt that it is a lease of immovable property in perpetuity, subject to the right of the defendants to give up possession when they liked, the annual rent reserved being Rs. 125 a year. Full possession is given by the deed and the document is a lease within the meaning of S. 105 of the Transfer of Property Act. That being the case, it can only be looked at to see the nature of the possession. When that has been done, it is obvious that the possession was in the capacity of tenants.

Another point argued was that the plaintiff was not entitled to possession without paying for the buildings which had been built by public subscription. It was admitted, however, that the whole of the property, including the buildings in question, was waqf and the plaintiff the mahant of the temple in question was entitled to eject the tenants from the property in question without paying compensation.

Lasty, it was contended that, as the document had been given effect to, the transaction should not be set aside. This argument was founded on a decision of the Privy Council : *Mahomed Musa* v. *Aghore Kumar Ganguli* (1). In that case, however, there was a complete compromise and the compromise was fully carried out. In the case of a lease it can

(1) [1915] 42 Cal. 801=28 I. C. 930=42 I. A. 1 (P. C.).

never be said that it comes to an end and that the transaction is completed. This argument also must, therefore, fail.

For the reasons given I dismiss the appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 491

SHADI LAL, C. J., AND ZAFAR ALI, J.

Mrs. M. V. O'Donnell—Petitioner—Appellant.

v.

C. E. O'Donnell and *another*—Defendants—Respondents.

First Appeal No. 1795 of 1925, Decided on 23rd May 1927, from the decree of the Dist. J., Ambala, D/- 31st March 1925.

* *Divorce Act, S. 13—Husband admitting adultery alleged by wife—Admission is sufficient proof even in absence of other evidence—Evidence Act, S. 31.*

An admission of adultery unsupported by corroborative proof should no doubt be received with caution, but if the Court, after scrutinizing it carefully believes it to be true, it can grant divorce on the strength of that admission alone although there might be a total absence of other evidence to corroborate it: *Robinson* v. *Robinson* (29 *L. J. N. S.* 178 *Foll.*) [P 492 C 1]

Jagan Nath Aggarwal and *Balwant Rai*—for Appellant.

Shadi Lal, C. J.—In this case Mrs. O'Donnell of Simla seeks the dissolution of her marriage with the principal respondent on the ground of adultery and cruelty. The District Judge finds that cruelty has been proved; but on the issue of adultery he has recorded his opinion against the petitioner and has consequently dismissed her petition for divorce.

Now the charges against the husband as mentioned in the petition, were to the effect that he had committed adultery with Miss Nash, a schoolmistress, and also with one Mrs. Simpson. The District Judge holds that neither of these charges has been established, and as Miss Nash has not been impleaded as a respondent in this appeal, the learned counsel for the appellant has confined his arguments to the charge of adultery with Mrs. Simpson.

The adultery complained of is sought to be proved by the admissions made by the husband in two letters, which he wrote to his wife in the summer of 1924. The first letter which is dated the 14th of July 1924, is in the following terms:

I am writing to you perhaps for the last time to tell you that it is my intention never to live with you again for the simple reason that there has come into my life a Mrs. Simpson with whom I lived as man and wife at Delhi last year from the 31st July to 7th August. This lady is now in Calcutta. and as soon as you divorce me, it is my intention to marry her. We were unsuited for one another due no doubt to a great extent to me and, I trust that your next venture, if any will be more successful than ours has been. Look after the boy who I hope turns out well.

It appears that the husband did not receive any reply from his wife, and after waiting about a fortnight he wrote to her another letter on the 29th of July 1924. In this letter he makes the following inquiry:

Mrs. Simpson writes From No 2 Park Mansions Park Street, Calcutta, enquiring whether you are taking out proceedings against me for divorce as we intended as soon as the decree has been made absolute to get married.

Now, it is beyond dispute that the respondent has a made a definite and clear admission of his guilt, and the question is whether there is any valid reason for supposing that it does not represent the truth. When examined by the District Judge before the settlement of issues he attempted to explain away his admission by saying that the statements contained in the letters were false and that he had written the first letter in anger "at being brought into Court by my wife in Simla for breach of the peace." This explanation appears to me to be false. There can be no doubt that he was at Delhi during the week referred to in his first letter, and he admits that he met Mrs. Simpson at Delhi though only once. He further admits that he knew the lady and that he wrote to her about twice a month while she was living at 2, Park Mansions, Park Street, Calcutta. He, however, repudiates the charge of having committed adultery with her.

I entirely repel the suggestion that the principal respondent deliberately invented a false story attributing immorality to himself and to a lady said to be a mere acquaintance of his for the purpose of merely teasing his wife. Nor do I see any reason for suspecting collusion between the husband and the wife. The plain fact is that as stated in his own letters, he had contracted a liaison with Mrs. Simpson and was anxious to marry her. It is common ground that he was

on good terms with his wife, and he accordingly informed her of his having committed adultery so that she might take proceedings for divorce and set him free to marry Mrs. Simpson.

It may be conceded that apart from the admission, there is little or no evidence to prove the charge of adultery though the circumstantial evidence renders it probable that the admission is a true representation of facts. An admission of adultery unsupported by corroborative proof, should no doubt be received with caution; but if the Court after scrutinizing it carefully believes it to be true, it can grant divorce on the strength of that admission alone although there might be a total absence of other evidence to corroborate it. The leading case on the subject, is *Robinson* v. *Robinson* (1) in which Cockburn, C.J., delivering the judgment of the Court made the following observation:

> if there is evidence, not open to exception of admission of adultery by the principal respondent, it would be the duty of the Court to act on such admission although there might be a total absence of all other evidence to support them. * * * The admission of a party charged with a criminal wrongful act has at all times and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed we see no reason why such a confession should not as against the party making it have full effect given to it in cases like the present.

This exposition of law has been endorsed in several judgments by the High Courts in India.

I am, therefore, of opinion that there is sufficient proof of the adultery complained of and that the charge of cruelty also has been established. I would accordingly accept the appeal with costs and grant the petitioner a decree nisi for dissolution of her marriage with the principal respondent.

D.D. *Appeal accepted.*

(1) 29 L. J. N. S. 178.

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* A. I. R. 1927 Lahore 492

ZAFAR ALI, J.

Karam Ilahi and *another*—Plaintiffs—Appellants.

v.

Ghulam Mustafa — Defendant — Respondent.

Second Appeal No. 2594 of 1926, Decided on 21st March 1927.

* (a) *Easements Act, S. 43—Dominant owner increasing height of waterspout dropping water on servient tenement by 4 feet—Easement is not destroyed.*

There was a parnala or a waterspout on the roof of the defendant's house to discharge water on to plaintiff's land. The defendant raised the height of the roof and along with it that of the waterspout by about 2½ or 4 feet.

Held: that no additional burden was thrown on the servient tenement and the easement was not destroyed: *Harvey* v. *Walters*, (1873), 8 *C. P.* 162, *Appl.* [P 492 C 2]

(b) *Easement Act, S. 1—Act does not apply to Punjab—Principles of English law apply to cases on easements.*

The Easement Act (5 of 1882), is not in force in the Punjab and cases relating to easements are decided by general principles of English Law. [P 493 C 1]

Mohammad Alam—for Appellants.

Mohammad Monier—for Respondent.

Judgment.—There was a parnala or a waterspout on the roof of the defendant's house to discharge water on to a land which belongs to the plaintiffs. Recently the defendant raised the height of the roof and along with it that of the waterspout. The question of law involved in this second appeal is whether by raising the height of the spout the defendant has placed an appreciable additional burden on the plaintiffs' land. The original height was 7½ feet which, according to the plaintiffs, was increased by 4 or 4½ feet. But one of the plaintiffs' witnesses, who is a Mistri, stated that the increase was to the extent of 2½ feet. The lower appellate Court held that

> a fall from 10 to 12 feet is surely a heavier burden than a fall from 7½ feet, the admittedly original height of the parnala; but this increase can be easily remedied by covering up the parnala with tin or bricks so that the water may fall exactly on the place where it used to fall and the additional height may not in any way increase the burden of the servient tenement. This would be the most equitable course to adopt in this case so that the defendant may continue to enjoy his easement without extra burden on the plaintiff.

Counsel for the appellants contends that having found that the burden was increased, the District Judge was not competent to suggest a remedy for it, but that he must have decreed the plaintiffs' suit. In support of this contention he cites *Damodar Das* v. *Tilok Chand* (1) and *Chaudhri Keshri Sahay Singh* v. *Hit Narain Singh* (2). Both these cases appear to be distinguishable. In the

(1) [1915] 13 A. L. J. 791=30 I. C. 941.
(2) [1920] 58 I. C. 967.

former, a single-storeyed house with a thatched roof, from a portion of which the rain-water was discharged on to the plaintiffs' land, was converted into a three-storeyed pucka house with five spouts. It was held that there was a considerable increase of burden within the meaning of S. 23 of the Easement Act. In *Chaudhry Keshri Sahay Singh* v. *Hit Narain Singh* (2) the owner of a dominant tenement had the right to let the rain-water from the roof of his house down from the eaves on to the roof of the servient tenement from a distance of seven feet but he subsequently raised the height of his roof to about 21 feet from the roof of the servient tenement and, instead of allowing the water to drop from the eaves, he poured it down through pipes. It was held that the burden on the servient tenement had increased and that, therefore, the easement was extinguished.

As already stated, the increase in the height of the spout in the present case is only 2½ or 4 feet, and the learned District Judge appears to have held that the additional burden thrown on the plaintiffs' land was so slight that it could be remedied by covering up the groove of the parnala by means of bricks or tin. It may further be observed that the Easements Act (5 of 1882) is not in force in this Province and cases like the present are decided by general principles of English Law. These principles were enunciated in *Harvey* v. *Walters* (3), and *Thomas* v. *Thomas* (4), which cases are cited in *Suresh Chandra Biswas* v. *Jogindra Nath Sen* (5). In *Harvey* v. *Walters* (3), the house in respect of which an easement was enjoyed was pulled down and was replaced by a new house three feet higher than the original one. The Court held that, in these circumstances, as there was no addition to the burden, the easement remained unaffected. The plaintiff there was the owner of certain premises the eaves of which projected over adjoining land of the defendants and had become entitled by length of user to have the rain-water drop from such eaves on to the defendants' land. The plaintiff in rebuilding his premises carried the wall abutting on defendant's land to a slightly greater height than before, and raised the height of the eaves from the ground to the same extent. As there was no evidence that a greater burden was thrown on the servient tenement by the alteration, it was ruled that the easement was not thereby destroyed, and the plaintiff was entitled to the right of eaves drop from the premises as altered. This decision followed the earlier case of *Thomas* v. *Thomas* (4).

What has occurred in the present case is similar to what took place in *Harvey* v. *Walters* (3) and the principle laid down therein applies to it. The decision of the learned District Judge is therefore in accordance with the above ruling and appears to be equitable and just.

The defendant has filed cross-objections as against that order of the District Judge which requires him to remove the roof from over the staircase which has recently been roofed by him and from over which the rain-water is discharged on to the plaintiffs' land. The objection is based on the ground that the plaintiffs did not specifically ask for the removal of that staircase in their plaint. This objection is not tenable because the plaintiffs' case on the whole was that the burden had been increased and should be removed.

I, therefore, dismiss the appeal as well as the cross objections. The parties will bear their own costs in this Court.

D.D. *Appeal dismissed.*

(3) [1873] 8 C. P. 162=42 L. J. C. P. 105=28 L. T. 343.
(4) [1835] 2 C. M. & R. 34=4 L. J. Ex. 179=5 Tyr. 804=1 Gale. 61.
(5) [1920] 24 C. W. N. 896=58 I. C. 854=32 C. L. J. 27.

A. I. R. 1927 Lahore 493

ADDISON AND JOHNSTONE, JJ.

Firm Roop Ram-Bhagwan Das—Plaintiffs—Respondents.

v.

Firm Nanak Ram-Chhaju Ram—Defendants—Respondents.

Appeal No. 2785 of 1923, Decided on 6th June 1927, from the order of the Dist. J., Delhi, D/- 21st August 1923.

Contract Act, S. 189—Purchase contract by agent for principal—Principal not remitting money in time, nor instructing agent—Agent has authority to settle at market rate.

The plaintiffs as commission agents, bought on behalf of the defendants certain goods to be delivered on a certain date. Before the date of

delivery, plaintiffs telegraphed to the defendants to remit the purchase price within 24 hours, otherwise they would be compelled to sell at the market rate at the risk of defendants. Defendants took no action and, on due date, plaintiffs settled with the person from whom they purchased at the market rate and sued the defendants for loss.

Held: that when defendants failed to remit the purchase money, the plaintiffs, as their agents had implied authority to settle at the market rate and the defendants were liable for the loss. [P 494, C 1]

Shamair Chand—for Appellants.

Addison, J.—The plaintiffs who are commission agents, bought on behalf of the defendants on the 26th November 1919,25 bales of gunny bags at Rs. 56-12-6, to be delivered on the 2nd May 1920. On the 30th April 1920 plaintiffs telegraphed to the defendants to remit the purchase price within 24 hours, otherwise they would be compelled to sell at the market rate at the risk of defendants. Defendants took no action and, on the due date, plaintiffs settled with the persons from whom they purchased at the market rate, which was Rs. 48-10-6. The loss was Rs. 676-5-9, and in a suit brought by the plaintiffs against the defendants for this and other sums, this sum was disallowed on the ground that the plaintiffs should have themselves paid their sellers for the goods in spite of defendants not remitting the money, taken delivery of the goods and then sued the defendants for the whole price.

I have no hesitation in holding that when defendants failed to remit the purchase money, the plaintiffs, as their agents had implied authority to settle at the market rate, that is, on the possible terms. This follows from the defendants' conduct in not replying to the telegram sent to them. The plaintiffs became responsible to the persons they purchased from and, seeing that the market price had fallen very much, they were entitled to settle and thus avoid the risk of further loss. The agents were diligent in communicating with the principals before the due date and received no money and no instructions, though they said that they would be compelled to sell, if the money was not sent by the due date. In these circumstances the plaintiffs must succeed and I would accept this appeal ex parte and order that the decretal amount be increased by the sum of Rs. 676-5-9 with costs on that sum throughout, in addition to the proportionate costs already allowed in the Court of first instance on the sum decreed by it.

Johnstone, J.—I concur.

G.B. *Appeal accepted*

✲ A. I R 1927 Lahore 494

ADDISON, J.

Agya Singh—Defendant — Petitioner.

v.

Sundar Singh—Plaintiff—Respondent.

Civil Petition No. 65 of 1927, and Appeal No. 2811 of 1926, Decided on 7th March 1927, for stay of execution proceedings in Suit No. 87 of 1925.

✲ (*a*) *Civil P. C., O. 41, R. 5—Order appealable under S. 104 (f), Civil P. C.,—R. 5 does not apply.*

No power is given to an appellate Court to stay execution of a decree when an appeal is preferred from an order under S. 104(f). 31 *Cal.* 1031, *Rel. on.* [P 495, C 1]

(*b*) *Civil P. C., O. 41, R. 5—Applicability.*

An interim order of stay cannot be made absolute as regards the money already paid to decree-holder under the decree. [P 495, C 1]

Sardha Ram—for Petitioner.

Kishen Dayal—for Respondent.

Order. — Under the provisions of para. 21 of the second schedule of the Civil Procedure Code the Senior Subordinate Judge, Delhi, ordered an award made without the intervention of the Court to be filed and pronounced judgment in accordance therewith. From this order a first appeal under S. 104 (f) of the Civil Procedure Code has been admitted. The appellant applied to this Court for stay of execution of the decree, which followed the order appealed from under the provisions of para. 21 (2) of the second schedule of the Civil Procedure Code. An ad interim order of stay was made to the effect that the money payable under the decree should not be paid to the decree-holder except upon security being given for its refund to the satisfaction of the executing Court, while the execution of documents transferring property from the judgment-debtor to the decree-holder was completely stayed. The decree-holder has now appeared to show cause against this order.

The application is under O. 41, R. 5 Civil Procedure Code. It is, however, clear that this rule only applies if there is an appeal from a decree. This follows from the wording of the section and it was also the view taken in *Bhagwat Rajkoer* v. *Sheo Golam Sahu* (1). Under the provisions of O. 41, R. 8, Civil Procedure Code, R. 5 of the same order can be applied if there is an appeal against an order made in execution of a decree. Neither of these two rules however apply to the present case as here there is only an appeal under S. 104 (f), Civil Procedure Code, against an order filing an award in an arbitration without the intervention of the Court. There is no appeal from a decree, nor is such an appeal competent except in so far as the decree is in excess of, or not in accordance with, the award. It may be the case that if the appeal is accepted the decree will ipso facto also be set aside. But that does not alter the fact that there is no appeal from the decree. I must therefore hold that no power is given to an appellate Court to stay execution of a decree when an appeal is preferred from an order appealable under S. 104 (f) of the Civil Procedure Code.

I might mention that most of the money payable under the decree had already been given to the decree-holder before the ad interim order of stay was passed. In any case therefore the order could not have been made absolute as regards the money already paid: see Mulla's Code of Civil Procedure, 8th Edition, at the top of page 922.

For the reasons given I discharge the ad interim order of stay of execution, dated the 26th January 1927.

D.D. *Order discharged.*

(1) [1904] 31 Cal. 1081=9 C. W. N. 123.

A. I. R. 1927 Lahore 495

FFORDE AND ADDISON, JJ.

Emperor—Appellant.

v.

Bhola—Accused—Respondent.

Criminal Appeal No. 875 of 1926, Decided on 15th February 1927, from the order of the S. J., Karnal, D/- 8th May 1926.

Penal Code, Ss. 447, 441 and 40—"Offence" in S. 441 includes offence under S. 24, Cattle Trespass Act—Penal Code, Ss. 441 and 40.

Entering the cattle pound with intent to commit an offence under S. 24, Cattle Trespass Act amounts to criminal trespass within the meaning of S. 447 and entering the pound with intent to intimidate the person in charge of the pound amounts to an offence under S. 447. [P 496 C 1]

Carden-Noad—for Appellant.

Raj Krishen Bal—for Respondent.

Fforde, J.—The respondent was tried under S. 458 of the Indian Penal Code by a Magistrate invested with first class powers for having committed lurking house-trespass or house-breaking by night after having made preparations for causing hurt, and was convicted and sentenced to six months' rigorous imprisonment with a fine of Rs. 50, and, in default of payment of the fine to further rigorous imprisonment for three months. On appeal to the Sessions Judge this conviction and sentence were set aside. The learned Sessions Judge held that no offence had been established under the provisions of S. 458 of the Indian Penal Code, and further held that the only penal provision under which the accused could be proceeded against was S. 24 of the Cattle Trespass Act. He also expressed his opinion that proceedings under S. 24 would not lie as the prosecution had not shown that the cattle seized had caused any damage within the meaning of that Act. The learned Sessions Judge upon these findings accepted the appeal of the accused and acquitted him. The Crown have now appealed to this Court against that judgment of acquittal.

The learned Government Advocate has quite rightly conceded at once, that S. 458 of the Indian Penal Code could not apply to the facts of this case. The facts found by the trial Magistrate are that on the night of the 23rd, or early morning of the 24th of January 1926, one Nihala seized a cow belonging to the accused which he found grazing in his wheat crop and had it impounded in the cattle-pound of Mokhra, obtaining a receipt from the keeper of the pound. On the same night or early morning the accused proceeded to the cattle-pound, opened the lock, entered and drove off his cow, after slightly injuring the chaukidar who attempted to prevent him. The learned Government Advocate con

tends that this act of the accused amounted to the offence of criminal trespass within the meaning of S. 447 of the Indian Penal Code, read with the definition given in S. 441. He says that the accused's act amounted to an entry upon property in the possession of another person with intent (1) to commit an offence and (2) so intimidate the person who was lawfully in charge of those premises. S. 40 provides that in Chap. IV and certain specified sections, the word " offence " denotes an offence punishable under the Indian Penal Code or under any special or local law as in S. 40 defined ; and, further, that under certain other sections, including S. 441 the word " offence " has the above meaning when the thing punishable under the special or local law is punishable under such law with a penalty amounting to six months' imprisonment or upwards, whether with or without fine. The Government Advocate contends that an offence within the meaning of the latter part of S. 40 has been committed under the provisions of S. 24 of the Cattle Trespass Act, and that, accordingly, as the accused entered upon property in possession of another with intent to commit an act which is made an offence by the Cattle Trespass Act, he is guilty of criminal trespass within the meaning of S. 447. The Government Advocate also contends that the accused in entering the pound did so with intent to intimidate the person in charge of the pound, did in fact intimidate him and thereby committed an offence under S. 447.

I think that upon the facts of this case both the learned Government Advocate's contentions are sound. There is no doubt that the accused did enter the pound, that he did it to intimidate the chaukidar in charge of that pound, and that he also did it for the purpose of removing his cow which had been properly seized within the meaning of the provisions of the Cattle Trespass Act. I have not the slightest doubt that the accused's cow was grazing in the wheat crop of Nihala, and, therefore, Nihala was authorized under S. 10 of the Cattle Trespass Act to impound it. For these reasons I am of opinion that the accused should have been convicted under S. 447 of the Indian Penal Code, but not under S. 458. I would accordingly accept this appeal, set aside the order of acquittal of the learned Sessions Judge and would convict him under S. 447 of the Indian Penal Code and sentence him to a fine of Rs. 50 with one month's rigorous imprisonment in default of payment, in substitution for the conviction under S. 458 had by the trial Magistrate and for the punishment awarded by him.

Addison, J.—I concur.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 496

HARRISON, J.

Mrs. Peter and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Reference No. 1679 of 1926, Decided on 25th March 1927, made by the S. J., Karnal, on the 4th November 1926.

Penal Code, S. 363—Guardians and Wards Act, S. 17 (4)—Christian woman becoming Hindu and taking her children by Christian husband with her—She is not guilty under S. 363.

One P. who was formerly a Christian changed her religion and became a convert to Hindusim. She left the house in which she was living during the absence of her husband who had gone to another place. When the latter came back he demanded his children, but they were not handed over to him.

Held : that on these facts there is no question of an offence under S. 363 : 41 *Cal.* 714, *Foll.*

[P 496 C 2 ; P 497 C 1]

Facts.—Applicants Mrs. Peter and Brahma Sarup have been charged by Munshi Gulnawaz Khan, Magistrate, 1st class, Karnal, on 24th August 1926, under Ss. 363 and 380 and abetment of those offences respectively, and they have filed an application for revision of the charge.

It appears that Mrs. Peter who was formerly a Christian changed her religion and became a convert to Hindusim in March 1926. She left the house in which she was living during the absence of her husband who had gone to Delhi. When the latter came back he demanded his children, but they were not handed over to him. Hence this prosecution.

Grounds.—The chief contention of the applicant's counsel before me is that there is no law under which among Christians a father has a preferential right to the custody of his children than

the mother and that, therefore, the removal of her children by Mrs. Peter to another house does not amount to an offence under S. 361, Indian P. C. This contention appears to be right. S. 41 of the Indian Divorce Act of 1869 lays down that in a suit for obtaining a judicial separation the Court may make such order about custody of the children as it thinks fit. Cl. 4 of S. 17 of the Guardians and Wards Act lays down that as between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right: see also para. 3660 of Gour's Penal Law, 3rd Edition, Volume 2nd and *Anne Elizabeth Barthwick* v. *Herbert Charles Barthwick* (1). The last was a case where the Court had awarded a custody of a child to the husband who had obtained a decree nisi for divorce. The wife had removed the child, whereupon she was prosecuted for kidnapping under S. 361. The High Court quashed the proceedings holding that the wife had committed no offence so long as the decree nisi against her had not been made absolute. The learned Public Prosecutor has been able to cite no authority to the contrary except S. 60 of the Indian Succession Act 1925, which lays down that a father may by a will appoint a guardian of his child during minority. That does not mean that he has got a preferential right to the mother. All that that section lays down is that he may appoint a guardian by a will. The provisions of S. 17 of the Guardians and Wards Act referred to above are much more clear on the point which is in dispute. Apart, therefore, from the question whether the children were really under the gurdianship of the father or the mother, which seems to be doubtful on the evidence on the record, I think a charge under S. 363 or its abetment should not have been framed against the applicants in this case. The record is, therefore, submitted to the High Court with recommendation that the charge under S. 363 and S. 363/109 be quashed.

Order.—The facts of this case are explained in his order of reference by the learned Sessions Judge. It has been laid down in *Anne Elizabeth Barthwick* v. *Herbert Charles Barthwick* (1), that on these facts there is no question of an offence under S. 363 and the law has been clearly explained in that ruling. The charge under S. 380 is I think clearly unwarranted. I quash both charges. This has the effect of an acquittal of Mrs. Peter and Brahma Sarup and I order accordingly.

D.D. *Accused acquitted.*

(1) [1914] 41 Cal. 714=22 I. C. 424=18 C. W. N. 484.

A. I. R. 1927 Lahore 497

DALIP SINGH, J.

Gulab Khan—Plaintiff—Appellant.

v.

Gulab and *others*—Defendants—Respondents.

Second Appeal No. 1050 of 1926, Decided on 15th January 1927, from the decree of the Dist. J., Attock, D/- 19th January 1926.

Registration Act, S. 17—Agreement not to sell or mortgage a house built on site belonging to another—Site owner not to eject house-owner House worth more than Rs. 100—Agreement is compulsorily registrable.

A built a house on site belonging to *B*, a Sardar, and executed an agreement as follows: "The house which I have built at my own expense I am not entitled to sell or mortgage. I will pay the Sardar annas eight every six months. The Sardar will not be entitled to eject me." The house was worth more than Rs. 100.

Held: that the document is either a kabuliyat and would require registration as it creates a perpetual tenancy, or at best it was a document declaring rights in property of more than Rs. 100 and it would need registration even if it were not a lease. [P 498 C 1, 2]

Nanak Chand Chopra—for Appellant.

Sheo Narain ior *Bishan Narain*—for Respondents.

Dalip Singh, J.—In this case Defendant No. 1 mortgaged the house in suit to Defendant No. 4 for Rs. 99 on the 26th May 1922. On the 15th July 1922 he also mortgaged it by two mortgage deeds of 80 each to Defendants Nos. 5 and 6. Defendant No. 4 obtained a decree on his mortgage deed and in execution applied for sale of the house. The plaintiff alleges that by reason of a special agreement with him Defendants Nos. 1 and 2 had no power to mortgage this house and therefore the house cannot be sold in execution. He alleged that Dulla, father of Defendants Nos. 1 and 2, had built a house by permission

of the plaintiff on the site which was in possession of and belonged to the plaintiff and that in consideration of his being allowed to do so he had executed the agreement relied on, the relevant words of which are as follows :

> The house which I have built at my own expense I am not entitled to sell or mortgage. I will pay the Sardar eight annas every six months The Sardar will not be entitled to eject me.

The plaintiff produced two witnesses: one, his son, who is also his Mukhtar and the other the scribe of the deed. The deed is unregistered. The scribe deposes that the site of the house in dispute belonged to and was in possession of the plaintiff, that Dulla had built this house on it and that Dulla executed this agreement which was duly read to him and thumb-marked by him. This evidence is supported also by the son of the plaintiff as witness.

The trial Court dismissed the suit holding that the document was a perpetual lease and its registration was compulsory and it therefore could not be admitted in evidence; that apart from the document the custom of the village was that non-proprietors could alienate their houses and that the condition in the deed that the executant should have no power to alienate the house could not override the customary rights of alienation because no consideration was proved for Dulla's giving up those rights. It also held that it was not proved that the agreement related to this present house in dispute. In appeal the learned District Judge held that the document was not a lease relying on *Beni* v. *Puran Dass* (1), but he held that the document did not prove anything as it was not shown that eight annas was paid as rent, that no consideration was proved for Dulla's giving up the rights to mortgage or sell the house and that the evidence for the plaintiff did not prove the circumstances under which the document was written. He therefore held that it was not proved that the plaintiff was proprietor of the site in suit or that the document was binding on Dulla's heirs.

In second appeal it is contended by counsel for the appellant that there is evidence to show that the document referred to the house in dispute and that the only possible inference is that in consideration of being allowed to build on the site owned by the plaintiff the defendants' father Dulla agreed not to sell or mortgage the house to pay eight annas every six months in consideration, and that Dulla could not be ejected therefrom. Counsel for the respondent contends that the document is either a lease and therefore needs registration or is an agreement affecting the rights in land and immovable property of more than Rs. 100 in value and therefore needs registration. There is force in both of these contentions. In the case reported in *Beni* v. *Puran Das* (1), the document was not addressed to anyone. In this case the document is addressed to the plaintiff and as it was produced by the plaintiff's son it was presumably accepted by him. This document would therefore be a kabuliyat and would therefore require registration as it creates a perpetual tenancy.

Secondly, if I am wrong on this point, the fact that in 1922 the house was mortgaged for Rs. 99 plus Rs. 160 altogether, that is to say, for Rs. 259, and the fact that the plaintiff's son stated that he would not accept Rs. 500 as the price of the house, show that the value of the house is at least somewhere near Rs. 400 to Rs. 500. Allowing for the fact that prices have risen since 1906 the price of the house in 1906 would be over Rs. 100. As the document declares rights in this property of more than Rs. 100 it would need registration even if it were not a lease. I would therefore hold that the document is inadmissible in evidence. I also agree with the learned District Judge that it is not shown in what circumstances this document came to be executed nor what the consideration was for Dulla's agreeing not to alienate the house. It may be that the explanation given by counsel for the appellant is the most plausible one, but even assuming that this is so it was open to the learned District Judge to draw or not to draw the inference of fact from the statements contained in the document. He did not so draw the inference and I cannot hold that he was wrong or perverse in that view. I therefore hold that the appeal fails and is dismissed, but in the circumstances I make no order as to costs of this appeal.

D.D. *Appeal dismissed.*

(1) [1904] 27 All. 190=(1904) A. W. N. 212.

* A. I. R. 1927 Lahore 499

FFORDE AND CAMPBELL, JJ.

Hakim Rai and *another*—Plaintiffs—Appellants.

v.

Firm Ishar Das-Gorkh Rai and *others*—Defendants—Respondents.

First Appeal No. 2849 of 1925, Decided on 3rd February 1927, from the order of the Senior Sub-J., Gujranwala, D/- 5th October 1925.

* (a) *Court Fees Act, S. 7 (4) (c)—Suit to set aside decree on the ground of fraud—Ad valorem fee must be paid.*

A suit to set aside a decree on the ground of fraud is not a mere declaratory one but it is one in which consequential relief is prayed. In such cases the substance and not the language of the plaint is to be looked to: 38 *Mad.* 922 (*F. B.*) and 39 *Cal.* 704, *Foll.* [P 500 C 2]

(b) *Civil P. C., O. 6, R. 17—Suit framed as mere declaratory but falling under Court Fees Act, S. 7 (4) (c)—Opportunity to amend was not given.*

Where a suit as framed was a mere declaratory one but it was found in appeal that it was one coming under S. 7 (iv) (c), Court Fees Act, and there was no allegation that a fresh suit if brought under O. 7, R. 13, would be barred, an opportunity to amend so as to include a prayer of consequential relief was not given. [P 500 C 2]

Mukand Lal Puri—for Appellants.

Moti Sagar and *Raj Keshore*—for Respondents.

Campbell, J.—The appellants presented a plaint in the Court of the Senior Subordinate Judge, Gujranwala, in which the prayer was as follows: That a decree be passed in favour of the plaintiffs against Defendants Nos. 1 and 2 declaring that the decree dated the 6th March 1924 for Rs. 29,101-15-9 obtained by them against the plaintiffs from the Bombay Court is based on fraud and deception and is not enforceable.

On this plaint the plaintiffs paid a Court-fee stamp of Rs. 10-0-0 as provided for in Art. 17 (iii) of the Court Fees Act, which prescribes that fee for a suit to obtain a declaratory decree where no consequential relief is prayed. The Court, on objection being taken to the Court-fee, ruled that the suit was not a mere declaratory suit but a declaratory suit with consequential relief which should be stamped in accordance with S. 7 (4) (c) of the Act ad valorem on the amount at which the plaintiffs valued the relief sought. The Court further held that since the plaintiffs had valued the suit for purposes of jurisdiction at Rs. 29,101-15-9, they could not declare a different valuation for purposes of Court-fee. The Court gave the plaintiffs time from 27th August 1925 till the 5th October 1925 to make up the deficiency in Court-fee. On the 5th October no additional Court-fee was paid and the plaint was rejected. The plaintiffs have appealed to this Court.

The question for our decision is whether the suit falls under S. 7 (iv) (c) or under Art. 17 (iii) of the Court Fees Act. The appellants rely upon *Sagajirao Khanderav* v. *Smith* (1), where it was held that when the only prayer in the suit is to have a decree set aside as null and void it is a suit for a declaratory decree without consequential relief and that Art. 17 (iii) is applicable. The view of the Judges was apparently, that the Court must take what the plaint says and must not go beyond it and that it is not concerned with the question whether a mere declaration that a decree is void will have any practical effect. This decision was followed in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2) where it was observed that the safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success.

A different view altogether has been adopted by a Full Bench of the Madras High Court in *Arunachalam Chetty* v. *Rangaswamy Pillai* (3). The question referred was whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only, or whether it is a suit with consequential relief falling under S. 7 (iv) (c) of the Court Fees Act. The Court held that the substance and not the language of the plaint is to be looked to and that a suit of the nature described in the reference which merely asks for a declaration is none the less a suit for a declaratory decree with consequential relief within the meaning of S. 7 (iv) (c). This conclusion was arrived at after considering a number of previous

(1) [1896] 20 Bom. 736.
(2) [1903] 30 Cal. 788.
(3) [1915] 38 Mad. 922=28 M. L. J. 118=28 I. C. 79=(1915) M. W. N. 118 (F. B.).

authorities which are set forth in the judgment.

In a later case *Deokali Koer* v. *Kedar Nath* (4), the Calcutta Court appears to have taken a view which is inconsistent with that taken in the former Calcutta case, *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2). The report shows that that case was cited at the Bar but it is not mentioned in the judgment. The suit was for a declaration that a registered deed was invalid and that the decree passed on the basis of it was also invalid and the lower Court had dismissed it on the ground that a Court-fee of Rs. 10-0-0 paid on the plaint was insufficient. A preliminary objection was raised that the same fee paid on the memorandum of appeal was also insufficient. The preliminary objection was sustained in a judgment in which it seems to me that the Judges endorsed the finding of the Madras Full Bench that the substance and not the language of the plaint is to be looked to. It was noticed that although a mere declaration was sought, the case was not one which came within the scope of S. 42 of the Specific Relief Act under which alone a plaintiff is entitled to sue for a declaration without consequential relief. Sir Lawrence Jenkins who delivered the judgment observed :

> It is a common fashion to attempt an evasion of the Court-fees by casting the prayers of the plaint into a declaratory shape..... .....but the device does not merit encouragement or favour.

Later on he remarked that the Courts must be guided by the provisions of S. 42 of the Specific Relief Act as they are expressed and should be astute to see that the plaints presented conform to the terms of that section.

The last of the cases cited before us is a decision of this Court, *Bua Ditta* v. *Ladha Mal* (5). *Deokali Koer* v. *Kedar Nath* (4) was not apparently cited before the Bench, but *Sagajirao Khanderav* v. *Smith* (1) and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2) were, and also the Madras Full Bench decision, *Arunachalam Chetty* v. *Rangasawmy Pillai* (3), as well as a later Madras case, *Ramanadhan Chettiar* v. *Annamalai Chetty* (6) which followed the Full Bench and held that a suit to declare that a decree is fraudulent and void would not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing his decree. The suit out of which *Bua Ditta* v. *Ladha Mal* (5) arose was one for a declaration that an arbitrator's award and the decree passed in accordance therewith were based upon fraud and were ineffectual and inoperative against the plaintiff, a prayer being added for any other relief, etc. The Judges held that the Madras rule should be applied, but what they actually did was to direct the Court below to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief and to value this relief and to pay Court-fee on his valuation.

In my opinion the correct view of such cases as the present is that taken in *Arunachalam Chetty* v. *Rangasawmy Pillai* (3), and *Deokali Koer* v. *Kedar Nath* (4), and they must be held to be declaratory suits in which consequential relief is prayed. The lower Court, therefore, was right in regarding the suit as one falling under S. 7 (iv) (c) of the Court-fees Act.

There is no allegation that a fresh suit, such as the plaintiffs are entitled to bring under O. 7, R. 13, would be barred by limitation, and hence I see no reason for adopting the course taken in *Bua Ditta* v. *Ladha Mal* (5). I would simply dismiss this appeal with costs.

Fforde, J.—I agree.

D.D. *Appeal dismissed.*

(4) [1912] 39 Cal. 704=15 I. C. 427=16 C. W. N. 838.
(5) [1920] 2 U. P. L. R. (Lah.) 37=54 I. C. 838.
(6) [1915] 29 I. C. 132.

A. I. R. 1927 Lahore 500

BROADWAY, J.

Godha—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1192 of 1926, Decided on 6th December 1926, from the order of the S. J., Jullundur, D/- 7th July 1926.

(a) *Penal Code, S.* 215—*Scope.*

Section 215 does not apply to the actual offender : *A. I. R.* 1925 *Lah.* 563, *Foll.* [P 501, C 1]

(b) *Criminal trial—Evidence.*

A Court is not bound by the opinion of its predecessor about the evidence in a connected case. It should weigh the evidence before it and form its own opinion, [P 501, C 1]

Shambhu Lal Puri—for Petitioner.

Broadway, J — The petitioner in this case, one Godha, son of Abdulla, has been found guilty of an offence under S. 215, Indian Penal Code, and sentenced to undergo rigorous imprisonment for a term of one year and to pay a fine of Rs. 50, or in default to undergo a further term of rigorous imprisonment for one month.

It appears that two persons were accused of having stolen certain bullocks and then of having obtained a sum of Rs. 220 for their recovery. Of these two persons, Ismail was arrested and proceeded against. He was convicted of an offence under S. 411, but on appeal the learned Sessions Judge, Colonel Roe, found it impossible to believe the evidence of certain witnesses and Ismail was acquitted. The present petitioner Godha absconded while these proceedings were going on. He was subsequently arrested, sent up for trial and the Magistrate found him guilty under S. 215 of the Indian Penal Code and sentenced him as stated above. On appeal, the learned Sessions Judge clearly gave it as his opinion that the conviction of this petitioner should have been under S. 411, Indian Penal Code. He goes on to say:

But inasmuch as my learned predecessor in the previous case found that the evidence of the complainant's son who has been examined again in this case was not believable, I have to bow before his decision.

The learned Sessions Judge, Lala Dwarka Nath, is wrong in that view. It was for him to weigh the evidence on this record and not to accept the opinion of another Judge on evidence that was not before that Judge. Be that as it may, it is perfectly clear that, in the opinion of the learned Sessions Judge, the present petitioner was the thief. Following *Queen-Empress* v. *Muhammad Ali* (1), and Criminal Revision No. 6 of 1925, decided by Sir Henry Scott-Smith J., *Kehr Singh* v. *Emperor* (2), I must hold that the conviction in this case under S. 215 cannot stand. I, therefore, accept this petition, set aside the conviction and sentence and direct that Godha be released forthwith.

Appeal accepted.

G.B.

(1) [1900] 23 All. 81=(1900) A, W. N. 205.
(2) A. I. R. 1925 Lah. 563.

* A. I. R. 1927 Lahore 501

JAI LAL AND DALIP SINGH, JJ.

Jhangi Ram and *others*—Plaintiffs—Appellants.

v.

Mt. Rupan Bai and *others*—Defendants—Respondents.

Second Appeal No. 1629 of 1922, Decided on 20th December 1926, from the decree of the Dist. J., Multan, D/- 8th April 1922.

* (a) *Civil P. C., O. 22, R. 2—Purchase of deceased respondent's interest by surviving respondent after institution of suit—O. 22, R. 2, applies* (Jai Lal, J., Contra; Dalip Singh, J.)

Per Jai Lal, J.—If the right to sue survives against the surviving respondents even by reason of any cause which arises after the institution of the suit or the appeal, e. g., the purchase of the interest of the deceased by them during pendency of the appeal, the case would fall within the purview of O. 22, R. 2: *A. I. R.* 1926 *Lah.* 607 and 11 *C. W. N.* 186, *Foll.* [P 503 C 2]

(b) *Civil P. C., O. 22, R. 10—Purchase of deceased respondents share by surviving respondent—Appeal can continue against surviving respondent with Court's leave.*

Where, owing to an arrangement in the form of a sale or partition the interest of the deceased respondent vests in the surviving respondent, the appeal may, by leave of Court, continue against the surviving respondent: *A. I. R.* 1924 *Cal.* 90, *Foll.* [P 503 C 2]

Per Dalip Singh, J.—The rights of any person to possess or own any property by virtue of a sale are not necessarily the same as his rights to possess and own that property as against a certain person who has brought a suit for possession of that property against whom a decree has been given by the Court. Therefore, where although the interest of the deceased respondent in the suit property is purchased by the surviving respondent before the suit is dismissed in his favour with costs, the appeal abates as against the deceased respondent if his legal representatives are not brought on record: *A. I. R.* 1926 *Lah.* 37 and 607, *Dist.* [P 505 C 1]

(c) *Pre-emption—Waiver—Person waiving his right to pre-empt cannot even defend a suit for pre-emption by another person on the ground of his right.*

There can never be a conditional waiver. A person who has once waived his right to pre-empt is incompetent not only to sue for pre-emption but also to defend a suit for pre-emption on the ground of his right: *A. I. R.* 1925 *Lah.* 359 (*F.B.*), *Foll.* [P 504 C 1, 2]

Hargopal—for Appellants.

G. C. Narang—for Respondents.

Jai Lal, J.—This second appeal arises out of a suit for pre-emption originally instituted by the appellant Chatta Ram against Mt. Rupan Bai and Loku Ram to pre-empt a sale, dated the 7th December 1918, of an alleged house and a

haveli in Navan Shahr. The plaint was subsequently amended and one Chaudhri Mangla Mal was impleaded as a defendant on the ground that he had originally waived his superior right of pre-emption by means of an agreement dated the 5th December 1919, but when the plaintiffs' intention to bring a suit for pre-emption became known to him and the original vendee, the latter executed a fictitious sale-deed in favour of the former. It was asserted that the waiver of a right of pre-emption could not be revived. The defendants pleaded that one of the properties mentioned in the sale deed was a shop and was not, therefore, the subject of pre-emption. The other property was admitted to be a house, but it was asserted that Mangla Mal had purchased the entire property in exercise of his superior right of pre-emption and, therefore, the plaintiff could not pre-empt the original sale.

The trial Court dismissed the suit on the grounds that there had been no waiver of his right of pre-emption by the defendant Mangla Mal whose right to pre-empt was superior to that of the plaintiff and that one of the properties in suit was a shop. The District Judge on appeal concurred with the view of the trial Court and dismissed the appeal. He held that one of the properties in suit was a shop and that though Mangla Mal had waived his right of pre-emption by executing the agreement on the 5th December 1919, such waiver had the effect only of precluding him from enforcing his right of pre-emption as a plaintiff and that it did not prevent him from contesting the plaintiff's right by virtue of the sale in his favour. In support of his conclusion the learned Judge relied upon *Bola* v. *Bhikha* (1). The decree of the learned District Judge is attacked by the plaintiff on the ground that his view on the question of waiver is erroneous. But a preliminary objection is taken on behalf of the respondent that the appeal has abated.

It appears that Mangla Mal died when the suit was pending in the trial Court and his three sons, Lachhman Das, Murli Dhar and Balmukand were made parties in his place. The appeal to this Court was presented on the 19th June 1923, and Balmukand died on the 26th or 27th June 1923. An application was made by Chhatta Ram, appellant, on the 12th July 1924, impleading Nathu Ram, son of Balmukand, as a respondent in his place. This was granted subject to all just exceptions on the 10th October 1924. In his application by Chhatta Ram it was alleged that he was not aware of the death of Balmukand. Chhatta Ram died on the 27th November 1925, and his sons Jhangi Ram and others were substituted in his place as appellants. Jhangi Ram has filed an affidavit in which it was alleged that his father was not aware of the death of Balmukand. It was further alleged that by virtue of a private partition between the sons of Mangla Mal the property in dispute had fallen to the share of Murli Dhar, respondent, alone and that Balmukand and his sons had no interest therein. A counter-affidavit has been filed by Murli Dhar in which it is asserted that Chhatta Ram had a full knowledge of the death of Balmukand and that Nathu Ram is not a son of Balmukand, but that the name of his son is Ram Sarup.

With regard to the alleged partition between the sons of Mangla Mal it is stated that on the death ofChaudhri Mangla Mal the house in dispute became the joint property of his sons Murli Dhar, Lachhman Das and Balmukand, by inheritance, and that later Lachhman Das and Balmukand sold their shares in the house to Murli Dhar who then became its sole owner; a private partition is, therefore, denied. We may mention here that we are not satisfied that Chhatta Ram had any good ground for not making an application for making the legal representatives of Balmukand party to the appeal within the ordinary period of limitation, and that if such an application is necessary under O. 22, R. 4 then the appeal has abated so far as Balmukand is concerned. But it is contended by counsel for the appellant that as the share of Balmukand in the property in dispute vests in Murli Bhar either by virtue of a sale as admitted by him or by virtue of a partition, as alleged by Jhangi Ram, and as Murli Dhar is already on the record, therefore, no application to cause the legal representatives of Balmukand to be made a party to the appeal is necessary. The case, it is alleged, falls under O. 22, R. 2, Civil Procedure Code. In the alternative it is contended that in any case O. 22, R. 10

(1) [1919] 8 P. R. 1919=49 I. C. 147.

applies and that the appeal can by leave of the Court be continued against Murli Dhar alone and in the absence of Balmukand.

A further argument was addressed to us by the learned counsel that the suit out of which this appeal has arisen was to pre-empt a sale to which Mangla Mal was no party and that Mangla Mal was impleaded only as a pro-forma defendant and, therefore, his absence or the absence of any of his legal representatives does not affect the appellant's rights to prosecute the appeal. The learned counsel, in support of his first contention relies upon *Gopal Das* v. *Mul Chand* (2) in which it was held that on the death of a Hindu minor, a plaintiff-respondent in the case, the right to obtain relief survived against his brothers who were co-plaintiffs and respondents with him and were, therefore, his legal representatives and, therefore, O. 22, R. 2 applied and it was not necessary to make an application under R. 4. The learned counselfor the repondent has strenuously contended before us that the judgment cited was wrongly decided and is opposed to the view takenin the majority of previous cases in this Court. All such cases are discussed in the judgment and I do not think it necessary to review them here. The judgment relied upon by counsel for the appellant fully applies to this case. It may be possible to hold a different view, and such a view has been held by some Judges of this Court and elsewhere, but, speaking for myself, I entirely agree with the opinion expressed in *Gopal Das* v. *Mul Chand* (2).

This opinion is further supported by a judgment of a Division Bench of the Calcutta High Court in *Shyamanand Das* v. *Raj Narain Das* (3). In that case the plaintiffs were members of a joint Hindu family and during the pendency of a defendant's appeal one of them died and the rights and liabilities of the deceased plaintiff vested by survivorship in the remaining plaintiffs-respondents. It was held that an application by the appellants to have the surviving plaintiffs-respondents noted as the legal representatives of the deceased came within S. 362, Civil P. C. which is the same as O. 22, R. 2 of the present Code of Civil Procedure and that S. 362 was not limited in its application to cases where the rights to sue or appeal survived against the surviving defendants or respondents not as the legal representatives of the deceased, but by reason of a right vested in them antecedent to the suit. The following remarks appear at page 188 of the report (11 *C. W. N.*)

> If the language used in S. 363 (O. 22, R. 4 of the present Code) be contrasted with that of S. 362, it would be obvious that a broad distinction is made between a case in which upon the death of one defendant, the right to sue survives against the other defendants who are already on the record and the case in which the right to sue survives against persons, some of whom are already on the record and others who are strangers to the suit; in the former case S. 362, while in the latter S. 363, is applicable. Indeed S. 363 seems to contemplate that in the second case. the legal representative referred to is a person different from the surviving plaintiff. In our opinion, the limited construction which the respondents seek to place upon S. 362 is not justified by the language of the Code and is not supported by any intelligible principle.

The respondents' contention was that S. 362 applied only to cases in which the right to sue or the right to appeal survived against the surviving defendants or respondents by reason of a right vested in them antecedent to the suit. It thus appears that if the right to sue survives against the surviving respondents even by reason of any cause which arose after the institution of the suit or the appeal, e. g., the purchase of the interest of the deceased by them during pendency of the appeal, the case would according to the opinion expressed by the learned Judges of the Calcutta High Court fall within the purview of O. 22, R. 2. Applying this test to the facts of this case, in my opinion the right to sue the sons of Mangla Mal survived on the death of Balmukand against Murli Dhar by virtue of a sale that admittedly took place in his favour before the institution of this appeal. I hold, therefore, that the present case is fully covered by O. 22, R. 2 and that no application under O. 22, R. 4 is necessary in this case and that the appeal can proceed againt Murli Dhar in the absence of the heirs of Balmukand.

I am also of opinion that O. 22, R. 10 applies to this case because owing to an arrangement in the form of a sale or partition the property in dispute now vests in Murli Dhar alone. Order 22, R. 10 provides that in the case of an assignment, creation or devolution of any

(2) A. I. R. 1926 Lah. 607=7 Lah. 399.
(3) [1906] 4 C. L. J. 568=11 C. W. N. 186.

interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. By virtue of O. 22, R. 11, the provision of R. 10 applies to appeals also and, therefore, there has been an assignment or devolution of the interest of Balmukand in favour of Murli Dhar, and consequently the appeal can by the leave of this Court be continued against Murli Dhar. No cause whatsoever has been shown why such leave should not be granted ,and I would consequently grant it. That O. 22, R. 10 applies to the facts of this case is supported by a judgment of the Calcutta High Court in *Rajani Kanta Roy* v. *Jyoti Prosad Singh Deo* (4). In that case also an application for the substitution of the heirs of a deceased defendant was made about a year after his death but it transpired that the interest of the deceased defendant in the property in suit had been sold in execution of a decree and was purchased from the auction-purchaser by the heirs of the defendant after his death. An application made for the substitution of the heirs of the deceased defendant was treated as one under O. 22, R. 10 on the ground that on the purchase of his interest by his heirs there was devolution of the interest of the deceased defendant and, therefore, the case fell under O. 22, R. 10 and that it was immaterial that the original application was not under that rule but for substitution of the heirs of the deceased.

Following that authority I would allow the application of 12th July 1924, to be treated as one under O. 22, R. 10. As Murli Dhar is already on the record there is no need to make a fresh order adding him as a respondent in place of Balmukand. I would, therefore, hold that the appeal has not abated as against Balmukand and it survives against Murli Dhar, and that in any case there has been a devolution of the interest of Balmukand in favour of Murli Dhar against whom the appeal can proceed. The preliminary objection, therefore, must be disallowed.

On the merits the case is concluded by a decision of a Full Bench of this Court, that is, *Arjmand Khan* v. *Shankar Lal* (5) in which it was held that there can never be a conditional waiver and that a person who has once waived his right to pre-empt was incompetent not only to sue for pre-emption but also to defend a suit for pre-emption. Mangla Mal, it has been found, had waived his right of pre-emption on the 5th December 1919. He is, therefore, not entitled to re-assert that right as a defendant in this case. The District Judge has found that out of the two properties the plaintiff could pre-empt the sale of the house alone, the other being a shop. As he has given no findings as to the market value of the house the case must be remanded to him for further enquiry into the matter.

The result is that this appeal is accepted and the case remanded to the District Judge for decision of the plaintiffs' suit so far as it relates to the house sold by virtue of the sale-deed of the 7th December 1918 by Mt. Rupan Bai in favour of Loku Ram. The District Judge may, if he thinks such a course necessary for the decision of the other points involved in the suit, record further evidence himself or send the case to the trial Court for recording such evidence. The Court-fee paid on the memorandum of the appeal in this Court will be refunded to the appellant and the other costs will abide the result.

Dalip Singh, J.—The facts of this case are given in the judgment of my learned brother (which I have had the advantage of reading) and I do not propose to repeat them. It should be borne in mind, however, that the transfer of Balmukand's interests took place before the decision of the learned District Judge was given in the case. The appeal of the plaintiff-appellant was dismissed with costs. The suit had also been dismissed with costs. I agree with my learned brother in holding that no good ground has been made out for Chhatta Ram, the original plaintiff-appellant, not having made an application for bringing the legal representatives of Balmukand on to the record within the ordinary period of limitation. I do not wish to express any opinion as to which of the conflicting rulings of this Court, namely *Gopal Das* v. *Mul Chand* (2), and *Gurditta Mal* v. *Muhammad Khan* (6), is correct. In this particular case the facts are distinguishable from either case. Balmukand transferred his share

(4) A. I. R. 1924 Cal. 90.
(5) A. I. R. 1925 Lah. 359=6 Lah. 243 (F.B.).
(6) A. I. R. 1926 Lah. 37.

in the pre-empted property to Murli Dhar. He did not transfer his rights in the decree, nor was it so contended. The facts of the case, therefore, are distinguishable from those of *Gopal Das* v. *Mul Chand* (2) and *Gurditta Mal* v. *Muhammad Khan* (6). It seems to me that the rights of any person to possess or own any property by virtue of a sale are not necessarily the same as his rights to possess and own that property as against a certain person who has brought a suit for possession of that property and against whom a decree has been given by the Court. In this case, e. g., what becomes of the costs of the suit and the appeal which were decreed jointly in favour of Balmukand and others against the plaintiff-appellant. I do not think that it is possible to hold that those were also transferred by the sale of the property to Murli Dhar, and I would therefore, hold that the appeal abates so far as Balmukand is concerned.

I have next to consider whether the appeal can proceed as against Murli Dhar alone. Under the new Code it is distinctly provided that the appeal shall abate as against the deceased defendant. It is a question to be decided in each case whether as a result of an abatement the appeal can or cannot proceed against the surviving respondents. I would consider on the facts of this case that as it is admitted on both sides that a devolution of interest qua the property has taken place in favour of Murli Dhar the Court should allow the appeal to proceed as against Murli Dhar and leave it to be decided whether the result of the decree if favourable to the appellants, does or does not confer any right to the property on him. It may be that the heirs of Balmukand would be able to show that the transfer by their father was not good for various reasons. If so, the fact that the plaintiff-appellant obtained a decree against Murli Dhar entitling him to possession of the property as against Murli Dhar would be quite infructuous. Without having the heirs of Balmukand on the record it is quite impossible to hold that the appeal has not abated as against Balmukand. We have nothing but the word of the plaintiff-appellant and of Murli Dhar that any such transfer has taken place. At the same time it is quite possible that the heirs of Balmukand will not be able to raise any such objection or if there is any objection by them, it may be found against them. In that event the decree obtained by the plaintiff-appellant against Murli Dhar will enable him to get possession of the property. At the same time the heirs of Balmukand may be able to execute their decree for costs if they can otherwise do so against the present plaintiff-appellant. I would, therefore, hold that in the circumstances of this case the Court should allow the appeal to proceed against Murli Dhar under O. 22, R. 10 of the Civil P. C.

On the pleadings of the defendant the factum of waiver was admitted. Counsel for the respondents has urged that this waiver was only conditional. The condition, however, was duly fulfilled and, therefore, the waiver even if conditional became complete. The fact that subsequently both parties agreed to resile from the positions that they had taken up would not affect the question that waiver had once taken place. It follows, therefore, that the plaintiff-appellant must succeed in view of the ruling reported as *Arjmand Khan* v. *Shankar Lal* (5). I agree, therefore, that the appeal should be accepted and the case remanded to the District Judge for the decision of the other points in the suit. The Court-fee paid should be refunded and the other costs should abide the result.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 505

SHADI LAL, C. J., AND BROADWAY, J.

Abid-ud-Din and *another*—Defendants —Appellants.

v.

Bisharat Ali and *others*—Plaintiffs and Defendants—Respondents.

Letters Patent Appeal No. 93 of 1925, Decided on 21st January 1927, from the judgment of Harrison, J., D/- 20th January 1925.

Civil P. C., S. 11 — *Former suit against the same defendants as trespassers dismissed on the finding that they were co-sharers—Second suit to prevent defendants from obstructing joint user is not barred.*

Where a former suit by plaintiffs against the defendants, on the ground that the latter were trespassers, was dismissed on the finding that both the parties were co-sharers in the property,

a second suit by plaintiffs recognizing the defendants to be co-sharers but contending that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers is not barred inasmuch as, although, the matter forming the ground of attack in the second suit might have been made a ground of attack in the former, the plaintiffs were not bound to do so. [P 506 C 1]

Shamair Chand—for Appellants.

Jagan Nath Aggarwal and *Hargopal*—for Respondents.

Shadi Lal, C. J.—After hearing arguments on both sides we are of opinion that the suit brought by the plaintiffs is not barred by the rule of res judicata. A perusal of the plaint in the former suit leaves no doubt that that suit was brought by the plaintiffs against the defendants on the ground that the latter were trespassers, but the Court holding that both the parties were co-sharers in the property dismissed the suit. In the present suit the plaintiffs, recognizing the defendants to be co-sharers, contend that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers. The matter which forms the ground of attack in the present suit might have been made a ground of attack in the former suit, but the plaintiffs were not bound to do so. The learned Judge was, therefore, justified in rejecting the plea of res judicata.

Our attention has, however, been invited to a mistake in the decree of the District Judge which directs the defendants to "vacate the site in question." As pointed out above, the defendants are co-sharers and they are entitled to remain in possession of the property along with the other co-sharers; and there is no reason why they should be evicted.

I would, therefore, accept the appeal so far as to direct that the plaintiffs shall obtain joint possession of the site in question with the defendants. In all other respects the appeal is dismissed with costs.

Broadway, J.—I concur.

G.B. *Appeal partly accepted.*

A. I. R. 1927 Lahore 506

TEK CHAND, J.

Amar Singh—Plaintiff—Appellant.

v.

Rala Singh and *others*—Defendants—Respondents.

Second Appeal No. 2260 of 1926, Decided on 23rd February 1927, from the decree of the Dist. J., Ludhiana, D/- 25th May 1926.

(a) *Punjab Pre-emption Act* (1913), *S.* 20—*Omission of prayer to issue notice is immaterial.*

The mere fact that there is no specific prayer in an application under S. 20 to issue notice to the vendor is a wholly immaterial omission. [P 507 C 2]

(b) *Punjab Pre-emption Act* (1913), *S.* 20—*Written notice.*

S. 20 does not lay down that a written notice should be served on the vendor. [P 508 C 1]

(c) *Evidence Act, S.* 114 — *Presumption is that a Court is satisfied as to a service of notice.*

When there is nothing to indicate that the Court had not satisfied itself of the service of notice it must be presumed that the Court was so satisfied: *A. I. R.* 1923 *Patna* 406, *Rel. on.* [P 508 C 2]

Jagan Nath Aggarwal—for Appellant.

G. S. Salariya—for Respondents.

Judgment.—On the 20th December 1923, one Nand Singh sold the land in dispute to Rala Singh and Amar Singh, sons of Jiwa Singh, defendants, for Rs. 4,000. On the 19th July 1924, Amar Singh son of Dhir Singh instituted a suit for pre-emption claiming superior right to pre-empt on the ground of relationship with the vendor and alleging that the price mentioned in the sale-deed had not been fixed in good faith or paid, that, as a matter of fact, only Rs. 1,800 had passed and that the market value of the land sold was also the same. The defendants-vendees admitted that the plaintiff had a superior right to pre-empt but pleaded that the price mentioned in the deed had been paid in full, that the market-value of the land was over Rs. 4,000 and that the plaintiff's right of pre-emption had been extinguished by his failure to comply with the provisions of S. 20 of the Punjab Pre-emption Act.

The trial Court found in favour of the plaintiff on all these points and holding that the plaintiff had complied with the provisions of S. 20, that Rs. 1,990 only had been actually paid to the vendor and that sum also represented the

approximate market value of the land, passed a decree in favour of the plaintiff for possession on payment of Rs. 1,990.

Against this decree both the plaintiff and the defendants-vendees appealed. The learned District Judge was doubtful whether the full price for which the sale purported to have taken place had actually been paid, but he held that the market value of the land was Rs. 4,000. On the question of 'waiver' he disagreed with the finding of the trial Court and held that Amar Singh plaintiff, had not, complied with the provisions of S. 20. He accordingly accepted the defendants' appeal and dismissed the plaintiff's suit with costs in both Courts.

The plaintiff pre-emptor has come up to this Court on second appeal and his learned counsel has attacked the findings of the learned District Judge on both the points. The question relating to the market-value of the land in suit being Rs. 4,000 is, however, one of fact arrived at after a careful examination of the evidence and cannot be questioned in second appeal. No valid reasons have been urged before me justifying interference with this finding, and I uphold it.

In order to decide the other question, it is necessary to set forth the facts relating thereto in some detail. On the 24th July 1923, Nand Singh (vendor) presented to the Court of the Senior Subordinate Judge an application under S. 19 of the Punjab Pre-emption Act stating he was heavily indebted and that he wanted to sell the land for Rs. 4,000, and praying that under that section notices be issued to his collaterals (including Amar Singh, plaintiff), that if they (or any of them) wished to exercise the right of pre-emption, they might do so within three months. Notices in terms of this application and fixing the next date of hearing for the 30th August 1923, were accordingly sent to all the collaterals and duly served on them, including Amar Singh, plaintiff. On the 30th August 1923, Nand Singh, vendor, and Amar Singh, plaintiff, and certain other collaterals, appeared before the Court and the following order was recorded on Nand Singh's application :

> Nand Singh, petitioner, and Narain Singh, Kishan Singh, Bishan Singh, and Amar Singh of the opposite party are present. Proclamation has been duly published and notices served. The proceedings may be filed.

There is on the record an application under S. 20, dated the same day, by Amar Singh, plaintiff, and Krishna, another collateral, purporting to be filed in reply to the vendor's aforesaid application under S. 19, in which it is stated that the vendor had no necessity to sell the land, that his alleged indebtedness was fictitious, that the market-value of the land did not exceed Rs. 1,800, that the applicants were willing to purchase it for that sum, and that if the vendor did not agree to accept that price, they would institute a suit for pre-emption. The order passed by the Court on this application was simply that it be placed on the file (shamil misl howe). The learned District Judge has held that the filing of this application was not sufficient compliance with the provisions of S. 20 inasmuch as there is no prayer contained in it for issue of a notice to the vendor as contemplated by that section, nor is there anything on the record to show that the contents of this application were brought to the notice of the vendor. He had, accordingly, held that the plaintiff's right of pre-emption had been extinguished.

The first question to be considered is whether the plaintiff's application of the 30th August fulfils the requirements of S. 20. As already stated this application was filed within three months of the date on which notice under S. 19 had been served on the plaintiff, and it clearly expressed the plaintiff's intention to enforce his right of pre-emption on payment of Rs. 1,800. It seems to me that the requirements of the first paragraph of S. 20 were duly complied with. No particular form of notice is prescribed in that section. All that is necessary is that the person having a right of pre-emption should duly notify to the Court his intention to enforce that right and should also state whether he accepts the price specified by the intending vendor in his application under S. 19, and if not, what sum he is willing to pay; and on receipt of this information the Court is to take steps to communicate it to the vendor. The mere fact that there is no specific prayer in the application asking the Court to issue a notice in these terms to the vendor is, in my opinion, a wholly immaterial omission. As both parties had been directed to appear in Court on the 30th August—and they did

in fact so appear—it was not necessary for the intending pre-emptor to specifically ask the Court to issue a notice to the vendor. I have already shown that the plaintiff in his application had mentioned the necessary facts and notified them to the Court and this is all that he was legally required to do.

Again it is not laid down in that section that any written notice is to be served on the vendor. What is necessary is that the pre-emptor's intentions are to be made known to the vendor and in each case it is for the Court to take whatever steps it thinks proper to have this done. We have, therefore, to see whether the contents of the plaintiff's application under S. 20 were made known to the vendor. It is no doubt true that there is nothing in writing on the record to show that this was done, but we have the fact that Amar Singh filed his application under S. 20 on the 30th August 1923, and on the same day the Court, after recording the presence of both Nand Singh, vendor, and Amar Singh, plaintiff, as also a number of other collaterals, and stating that notices had been duly served ordered that "the proceedings be filed." On that date the application of the plaintiff under S. 20 had been filed and was before the Court. Both the parties were present face to face in Court and in their presence the Court directed that "the proceedings be filed." Under such circumstances, and having regard to the last para. of S. 20 of the Pre-emption Act, and S. 114 of the Evidence Act, it must, in my opinion, be held that the contents of the plaintiff's application were duly make known to the defendant (vendor). Under S. 20 the proceedings are to be filed *when the Court is satisfied that the notice under* S. 20 *had been duly served* on the vendor and under S. 114, Illustration (e) of the Evidence Act, it is to be presumed that all "judicial and official acts have been regularly performed," i. e., performed with due regard to procedure.

The maxim *omnia præsumuntur rite esse acta* fully applies to a case like this, and until the contrary is proved, the presumption is that all the formalities required by the law had been followed. A ruling in point (though not under the Pre-emption Act) will be fouud in *Harnarain Panday* v. *Nandkeswar Pandey* (1), where it was held that when there is nothing to indicate that the Court had not satisfied itself of the service of summonses, it must be presumed that the Court was so satisfied. In the circumstances above indicated, it must be held that the Court did make known to the defendant (vendor) the intention of theplaintiff to enforce his right of pre-emption on payment of Rs. 1,800.

The learned District Judge has relied on *Jesa Ram* v. *Mehr Chand* (2), but after a careful consideration of that case I am of opinion that it is in no way against the plaintiff-appellant. With regard to the service of notice under S. 19 it was definitely held there that all that is necessary is a substantial compliance with the provisions of that section and that if the Court is satisfied that the opposite party knew of the contents of the application the requirements of the section are satisfied. As regards the notice under S. 20 all the parties concerned were not present in Court in that case and, therefore, on those facts, the learned Judge held that there was not sufficient proof of compliance with the provisions of that section. But the facts of the present case are wholly dissimilar.

For the foregoing reasons, I accept the appeal, and, setting aside the decree of the lower appellate Court, pass a decree in favour of the plaintiff for possession of the land in dispute by pre-emption on payment of Rs. 4,000 within two months from this date. As the plaintiff did not admit the market value of the land to be Rs. 4,000, I order that the parties shall bear their own costs throughout. In case the plaintiff-appellant fails to deposit the amount within the period above mentioned his suit shall stand dismissed with costs throughout.

D.D. *Appeal accepted.*

(1) A. I. R. 1923 Patna 406.
(2) [1918] 104 P. W. R. 1918=45 I. C. 935.

A. I. R. 1927 Lahore 508

BROADWAY AND ZAFAR ALI, JJ.

Bhagwan Singh and *others* — Plaintiffs—Appellants.

v.

Nihal Singh and *others* — Defendants—Respondents.

Second Appeal No. 2819 of 1922, Decided on 23rd November 1926.

Custom—Punjab—Jagirdar Jats of Garangan, Tahsil Kharar—Succession—Rule of chundawand applies.

The family of Jagirdar Jats of village Garangan in the Kharar tahsil of the district of Ambala is governed by the rule of chundawand in matters of succession. [P 510 C 1]

T. D. Khanna and *Man Singh*—for Appellants.

Kishan Lal—for Respondents.

Broadway, J.—This second appeal has arisen out of a suit instituted by Bhagwan Singh and others, against Nihal Singh and others claiming a declaration that they and Mt. Chand Kaur, Defendant No. 5, were the joint owners of the land in suit, and that the other defendants could not claim partition of the same. The parties are all descendants of one Gurmukh Singh and are Jagirdar Jats of village Garangan in the Kharar tahsil of the district of Ambala. The land in suit belonged to one Jiwan Singh and on his death passed to Mt. Partap Kaur, his widow. Mt. Partap Kaur having died, the plaintiffs claimed to be entitled to succeed to this estate, whereas the defendants claimed to be entitled to a share thereof on the ground that they are also descended from Gurmukh Singh. Now Gurmukh Singh died in Sambat 1801, leaving him surviving two widows, Mt. Bhagan and Mt. Daya Kaur. Each of these widows had three sons. In 1852, during the settlement, the wajib-ul-arz was prepared of the village of Garangan, in which it was stated that the rule of succession among the Jat proprietors of this village was pagwand. Some of the descendants of Gurmukh Singh, by both his wives, attested this wajib-ul-arz.

In 1853 also, during the settlement that was then in progress, a pedigree-table or shajra-nasb relating to this particular family was prepared. The pedigree-table was attested by the then existing descendants of Gurmukh Singh by both his wives. There is a note attached to this pedigree-table to the effect that the family were Jat Sikhs of Hit Got, *riwaj taksim chundawund*. The property of Gurmukh Singh was accordingly divided into two shares, the descendants of the other wife taking the other share.

In 1854 Mt. Ramon, the widow of Suba Singh, died without issue. The descendants of Gurmukh Singh by his wife Mt. Bhagan claimed to be entitled to a share in the estate, succession to which opened out on the death of Mt. Ramon. The descendants of Gurmukh Singh by his wife Mt. Daya Kaur objected to this and filed an application before the Revenue Authorities definitely referring to the pedigree-table and the note thereon, and stating that their family was governed in matters of succession by the rule of chundawand. Their claim was given effect to and the estate in question was made over to them, the descendants of Gurmukh Singh by his wife Mt. Bhagan obtaining no share whatever. In 1887 a jamabandi was prepared of a certain portion of the estate left by Gurmukh Singh which had not been divided up. That jamabandi shows that the property had been divided into two shares and that the descendants of each of the two wives held one share between them.

In December 1919 Mt. Partap Kaur, the widow of Jiwan Singh, died. The descendants of Gurmukh Singh by Mt. Daya Kaur preferred a claim to a share in the estate, succession to which had then opened out. (Incidentally it may be mentioned that the estate amounted to ⅓rd of the half of Gurmukh Singh's estate, which was exactly the case when Mt. Ramon died.) The plaintiffs who are Gurmukh Singh's descendants by Mt. Bhagan, thereupon instituted this suit, claiming that their family was governed in matters of succession by the rule of chundawand and that, therefore, they alone were entitled to succeed to the estate now in question, and that the defendants who are descendants of Gurmukh Singh by Mt. Daya Kaur had no right or title to the same. The Courts below examined this question of custom and came to the conclusion that the plaintiffs had failed to prove that their family were governed by the rule of chundawand and dismissed their suit accordingly. At the same time the learned District Judge granted the plaintiffs a certificate under S. 41 (3) of the Punjab Courts Act. Armed with this certificate the plaintiffs have come up to this Court in second appeal.

It has been contended that the documentary evidence on the record clearly establishes that this family is governed by the rule of chundawand. On the other hand it has been urged that having regard to the conditions on which the

jagir was sanctioned and to the other evidence on the record the view taken by the Courts below is correct. The learned District Judge has been influenced by the fact that subsequent to the death of Gurmukh Singh none of his descendants appears to have more than one wife There has, therefore, been no occasion for distribution according to any particular rule of custom. It appears to me, however, that the Courts below have not given due weight to the fact that on the one and only occasion when the question of succession arose, it was the defendants-respondents themselves or their ancestors who set up the existence of this custom as to chundawand and succeeded in obtaining the decision in their favour in the Courts that then existed. The learned District Judge also appears to have lost sight of the fact that in 1887 a jamabandi was prepared showing that property which was held jointly was held by all the descendants of Gurmukh Singh according to shares showing that the distribution on Gurmukh Singh's death had been according to the rule of chundawand. The learned District Judge has also expressed his doubt as to whether the note on the pedigree-table had been read out to the persons who signed it and had assented to it.

In this connexion, however, it seems to me that the making of that note was due to the fact that this family was departing from the custom that was prevalent in this village. Some of the descendants of Gurmukh Singh by both his wives had, as already stated, attested the wajib-ul-arz of their village. This wajib-ul-arz deals with other matters as well as those of succession and no doubt this family would be governed by the wajib-ul-arz in these other matters. As, however, they followed another rule as to succession it was considered advisable to note that fact when the pedigree-table of their particular family was drawn up.

Having regard to these facts, I am of opinion that the plaintiffs had succeeded in making out their case and that on the evidence on the record it should be held that the rule of succession in this family is that of chundawand. I would further point out that having regard to the fact that it was the defendants' ancestors who clearly set up this custom in 1854, it scarcely lies in their mouths to deny the existence of that custom now that it affects them adversely.

I would, therefore, accept this appeal and grant the plaintiffs a decree as prayed for in their plaint. The plaintiffs will also be entitled to their costs throughout.

Zafar Ali, J.—I agree.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 510

HARRISON AND DALIP SINGH, JJ.

Nizam-ud-din — Defendant — Appellant.

v.

Muhammad Bashir Khan—Plaintiff—Respondent.

First Appeal No. 278 of 1923, Decided on 14th February 1927, from a decree of the Sr. Sub-J., Gurgaon, D/- 12th December 1922.

Custom — Punjab — Sheikhs Qureshis of Gurgaon—Predeceased daughter's son excludes collaterals.

Amongst the Sheikhs Qureshis of the Gurgaon District and more especially at Palwal town, there exists a custom by which a son of a predeceased daughter excludes a collateral. Such a custom is not opposed to general custom. : 84 *P. R.* 1917, *Dist.* [P 512 C 1]

Muhammad Shafi, J. N. Bhandari, Khurshaid Zaman and *Nawal Kishore*—for Appellant.

Abdul Qadir and *M. Sleem*—for Respondent.

Judgment.—Plaintiff brought this suit for the possession of the property left : (a) by his grandfather Shamas-ud-in ; and (b) by his great-uncle Ibrahim Bakhsh. The defendant is a collateral, who is in possession. Ibrahim Bakhsh was the first of the two brothers to die and he left no children but a widow Mt. Saghir-unnisa who succeeded to his land and made a gift in favour of her brother-in-law, Shamas-ud-din of portion of that land. Mt. Sakina Begam the mother of the plaintiff and the daughter of Shamas-ud-din, died before him ; and on his death the widow of Ibrahim Bakhsh took the whole of the property for her life. On her death which occurred 10½ years before the suit was instituted the collaterals obtained possession.

The plaintiff's suit is based on a custom alleged to exist amongst the Sheikns Qureshis of the Gurgaon District and more especially at Palwal town by which a son of a predeceased daughter excludes a collateral. The finding is that the custom has been established and from this finding the collateral has appealed.

There is admittedly an entry in favour of the plaintiff's case in the Rewaj-i-am. In this and throughout this Rewaj-i-am, as also throughout the Codes of Tribal Customs of the Gurgaon District, Sayeds and Sheikhs are treated as one group having the same customs and as different from other tribes. This view has also been taken in *Muzaffar Ali* v. *Zainab* (1) and the reason for it is obvious and simple, namely that these two tribes stand apart as foreigners of Arab descent. In accordance with this entry in the Rewaj-i-am the Subordinate Judge has decreed the plaintiff's claim.

The entry is attacked before us on various grounds. It is contended that it is unsupported by instances in the Rewaj-i-am itself and that the instances adduced by the plaintiff by means of oral evidence are worthless, that there is a distinction between Shiah and Sunni Sheikhs and Shiah and Sunni Sayeds and that the answer given should be treated as referring only to Shiah Sheikhs. It is further contended that in the absence of any instances in support of the alleged custom there is a lacuna in the Customary Law which must be filled by going to the Mahomedan Law which is the personal law of the parties. For this main proposition the counsel relies more especially on *Wazira* v. *Maryan* (2) and various other rulings which have followed it, such as *Budha* v. *Fatima Bibi* (3), the proposition being that a mere entry in the Rewaj-i-am unsupported by instances and opposed to general custom, is not sufficient to establish a rule of inheritance. It is not necessary for us to discuss the question of how far, if at all, *Wazira* v. *Maryan* (2) qualifies or distinguishes *Beg* v. *Allah Ditta* (4) a Privy Council ruling. If we accept the dictum and the test laid down in *Wazira* v. *Maryan* (2) in its entirety we have to see whether the custom in this case is unsupported by instances and is opposed to general custom. We have been taken through the rewaj-i-am and find that there are instances of sons of daughters succeeding their mothers who in their turns had succeeded their fathers and no distinction has been drawn between ancestral and self-acquired property but so far as the present custom is concerned it is not supported by instances in this rewaj-i-am.

We find, however, that good and reliable instances have been established by the oral evidence more especially that of Risaldar Abdul Majid (P. W. No. 5). He succeeded his maternal grandfather and though it is true that he says that there were no collaterals he is obviously using the word in the sense of cousins, for in the next breath he says that his grandfather's real brother was alive.

There is also a case quoted by Iqbal Hussain, one quoted by Abdul Ghafur and instances of Sayeds which are relevant, given by Manzur Abas (P.W. No. 1). There are, therefore, instances in support of the custom. In the second place we are of opinion that in the true sense this custom cannot be said to be opposed to general custom. It has undoubtedly been laid down as a dictum in Sir William Rattigan's Digest of Customary Law, that a son of a predeceased daughter does not succeed. No authority and no instances are given for this far reaching generalization and we are not prepared to accept it in its entirety and and even if it were accepted we are of opinion that it would not be conclusive where, as in this tribe, the daughter's rights are so clearly established. It is one thing for the son of a predeceased daughter to succeed, where his mother would have succeeded had she lived and a very different one for him to succeed where she would have had no rights. There is a third distinction between this case and *Wazira* v. *Maryan* (2). Some doubt was cast as to the care and thoroughness with which the rewaj-i-am had been prepared in that case but we find that the rewaj-i-am of this District (Gurgaon) has been especially commended in *Muzaffar Ali* v. *Zainab* (1) as

(1) [1910] 58 P. R. 1910=107 P. L. R. 1910=7 I. C. 348=81 P. W. R. 1910.
(2) [1917] 84 P. R. 1917=3 P. L. R. 1918=42 I. C. 358=151 P. W. R. 1917.
(3) A. I. R. 1923 Lah. 401=4 Lah 99.
(4) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).

having been compiled with great care. We hold that the custom has been established and that the plaintiff's suit has rightly been decreed as far as his grandfather's property is concerned.

He has presented a cross-appeal as regards the property of his great uncle regarding which his suit has been dismissed. This his counsel has not been able to support very seriously. He contends that there should have been a separate issue about the great-uncle's property instead of its being contained in one main issue. He has also drawn our attention to ground No. 6 of the appeal to the effect that so far as one-half of the property left by the grand uncle was concerned there was a gift by the widow in favour of the plaintiff's grandfather, but he cannot support this proposition that there can be a partial acceleration by such a gift, it being borne in mind that the collateral obtained possession in spite of the gift within 12 years.

Both appeals are dismissed with costs.

G.B. *Appeal dismissed.*

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* * A. I. R. 1927 Lahore 512

ZAFAR ALI AND JAI LAL, JJ.

Tora Gul Boi—Petitioner.

v.

Commissioner of Income-tax— Respondent.

Civil Reference No. 19 of 1926, Decided on 11th January 1927, made by the Commissioner of Income-tax, Punjab, on 20th May 1926.

* * *Income Tax Act* (1922), *S.* 4 (1)—*Goods sold by agent in Europe and money forwarded to India through Bank—Agent getting a part of the proceeds by compromise between him and principal in Kabul—Agent is liable to pay tax on such amount.*

The Amir of Bukhara having entrusted a large number of valuable furs to an agent for sale in Europe, he conveyed the same to England and disposed of them there for a sum equivalent approximately to 16 lacs of rupees. This money he deposited with Messrs. Cox & Co., to be transferred to their branch in Bombay, and after doing so he departed from England. On arrival in India he came to know that the Amir was a refugee in Kabul. He decided to take up residence in Peshawar and not to return to Bukhara. When the Amir came to know of his arrival, he laid claim to the money, but he refused to pay it to him. The Amir then instituted a suit at Peshawar to recover the money. This suit ended in a compromise by which two lacs were given to the agent as his c mmission.

Held: that the agent received the money in British India within S. 4 (1) after it had been allotted to him by virtue of the compromise and was, therefore, liable to pay income-tax thereon.

Though the compromise was entered into at Kabul, the money was in British India and the agent must have received it within British India because it was held by Messrs. Cox & Co., in Bombay, at the order of the agent.

[P 512, C 2 ; P 513, C 1]

Moti Sagar and *Mohsin Shah*—for Petitioner.

C. Bevan Petman—for Respondent.

Order.—This reference under S. 66 (1) of the Income-tax Act, relating to an assessment made on a person residing in Peshawar, came up once previously before two Judges of this Court, but they returned it to the Income-tax Commissioner by order, dated the 6th January 1926, holding that they had no jurisdiction to entertain it, as the High Court for an assessee residing in Peshawar was the Court of the Judicial Commissioner, North-West Frontier Province, and not the Lahore High Court. But not long after that the Income-tax Amendment Act of 1926 came into operation whereby the jurisdiction of the Lahore High Court for purposes of S. 66 was extended to the North-West Frontier Province and the Income-tax Commissioner has, therefore, re-submitted the reference to this Court and no body now raises the question of jurisdiction.

The facts bearing on the question of law raised by the Income-tax Commissioner are briefly as below:

The Amir of Bukhara having entrusted a large number of valuable furs to Tora Gul Boi (the assessee) and two others for sale in Europe, they conveyed the same to England, and disposed of them there for a sum equivalent approximately to 16 lacs of rupees. This money they deposited with Messrs. Cox & Co., to be transferred to their branch in Bombay, and after doing so they departed from England. On arrival in India they came to know that Bolsheviks had taken possession of Bukhara and that the Amir was a refugee in Kabul. Tora Gul Boi was a trader of Bukhara and his two companions were servants of the Amir. Hearing of the revolution in their country they decided to take up residence in Peshawar and not to return to Bukhara. When the Amir came to know

of their arrival, he laid claim to the money, but they refused to pay it to him. The Amir then instituted a suit in the Court of the District Judge of Peshawar to recover the money. This suit ended in a compromise which was entered into at Kabul and was duly reduced to writing. By this compromise it was agreed that 8 lacs out of the 16 lacs deposited with Messrs. Cox & Co., would be given to the Amir, 5 lacs would be set aside for the benefit of the State of Bukhara, 2 lacs would be given to Tora Gul Boi as his commission, and Rs. 60,000 and Rs. 40,000 to his two companions respectively as their commission. The District Judge granted the Amir a decree for 8 lacs.

Now the question is where and when did Tora Gul Boi receive the sum of 2 lacs allotted to him by the compromise. He was not liable to pay income-tax on this amount unless he received it in British India within the purview of S. 4 (1) of the Income-tax Act. Mr. Moti Sagar, who appears for the assessee, argues that the money was in his possession before his return to India as he had received it in England, and that he could not have received it over again in Peshawar having once received it in England. In support of this contention he relies upon *Sundar Das* v. *Collector of Gujrat* (1) and the cases in which that ruling of this Court was followed by the Madras and Patna High Courts, i. e., *Secretary, Board of Revenue (Income-tax) Madras* v. *Ripon Press and Sugar Mills Co.* (2) and *Ali Imam* v. *Emperor* (3). He also cites *In re Aurangabad Mills, Ltd.* (4). We, however, find all those cases are distinguishable from the present inasmuch as the assessee in every one of those cases was the owner of the money that he received out of British India, while here the assessee and his companions received the money in England, not as owners thereof, but as agents of the Amir. The money no more belonged to them than the furs, and they were as much trustees of the one as of the other. Though these agents of the Amir were entitled to remuneration they were not competent to convert the whole or a considerable portion of the money to their own use before settling with the Amir what was the amount payable to them. This amount was settled by the compromise, and though that compromise was entered into at Kabul the money was in British India, and the agents must have received it within British India because it was held by Messrs. Cox & Co., in Bombay, at the order of all three. Further it is clear that they were not entitled to appropriate any amount as their commission because, according to their own showing, no rate of commission had been agreed upon. They could, therefore, detain some money pending decision as to the rate, but were not competent to appropriate it to their own use. Such being the facts, we are of opinion that the assessee received the money in British India after it had been allotted to him by virtue of the compromise and was, therefore, liable to income-tax thereon.

Mr. Moti Sagar further contends that the above cannot be an answer to the question of law that has been referred to us by the Income-tax Commissioner, which question runs thus:

> Did the decree of the District Judge dated the 24th April 1923, deciding the suit in accordance with the deed of compromise executed at Kabul on the 14th April 1923, result in the receipt by the assessee, Tora Gul Boi of the sum of two lacs of rupees on the date either of the compromise or of the judgment?

The learned counsel argues that the assessee did not receive the two lacs in pursuance of the decree. This is no doubt correct, but the object obviously of the Income-tax Commissioner was to have it decided whether the assessee could be said to have received the money in British India and that is clearly impliedly, if not directly, the object of the reference.

With the above expression of opinion we return the reference.

G.B. *Reference answered.*

(1) A. I. R. 1923 Lah. 14=3 Lah. 349 (F. B.).
(2) A. I. R. 1923 Mad. 574=46 Mad. 706 (F.B.).
(3) A I. R. 1925 Patna 281=4 Pat. 210.
(4) A. I. R. 1921 Bom. 159=45 Bom. 1286.

** A. I. R. 1927 Lahore 513

BROADWAY, Ag. C. J., AND BHIDE, J.

Mohamad Farid Mohammad Shafi—Petitioners.

v.

Commissioner of Income tax, Lahore—Respondent.

Case No. 131 of 1927, Decided on 23rd June 1927.

* * *Income-tax Act* (1922), *S.* 66 (1)—*Reference at assessee's instance is not contemplated—Lahore H. C. cannot issue mandamus to I. T. authority—Sp. Rel. Act, S.* 45.

Clause 1 to S. 66 refers to the reference of a question of law either by the Commissioner on his own motion or on reference from any Income-tax Authority subordinate to him. It does not contemplate a reference at the instance of an assessee. Nor has the Lahore High Court any power to issue madamus directing him to refer questions of law to it for opinion : *A. I. R.* 1926 *Mad.* 1051 (*S.B.*); *A. I. R.* 1926 *Patna* 305; *A. I. R.* 1925 *Patna* 352, *Rel. on*; *A. I. R.* 1924 *Patna* 644, *Doubted.* [P 514 C 2, P 515 C 1]

Jai Gopal Sethi and *Fakir Chand*—for Petitioners.

Jagan Nath Aggarwal—for Respondents.

Broadway, Ag. C. J.—This is an application under S. 66 of the Income-tax Act asking for a mandamus to issue to the Income-tax Commissioner, directing him to refer certain alleged points of law to this Court for opinion.

A preliminary objection has been taken by Mr. Jagan Nath Aggarwal, for the Commissioner of Income-tax, to the effect that the application is incompetent. The facts are briefly these: The firm of Messrs. Mohammad Farid Mohammad Shafi was assessed to income-tax for the year 1923-24 and again for the year 1924-25. The Income-tax Officer excluded from assessment in both years certain large sums of money which the assessees claimed a rebate on as being rental of the factory and premises in which the business was carried on. The assessees accepted this rebate, but preferred an appeal to the Assistant Commissioner against certain other matters in which they were unsuccessful. They then remained content with the position of affairs. In August 1926, however, the Commissioner of Income-tax, acting *suo motu*, sent for the record of proceedings, and after giving notice to the assessees and hearing what they had to say included a sum of Rs. 40,500 which had been exempted from assessment in the assessable income, and called upon the assessees to pay a further sum of Rs. 6,414-8-0. The Commissioner of Income-tax was asked to refer the question as to whether this sum was liable to assessment to this Court, but refused to do so.

Now the learned counsel appearing for the assessees has admitted that this application does not fall within the purview of the second clause to S. 66, inasmuch as the order passed by the Income-tax Commissioner was not passed either under S. 31 or S. 32 of the Act. He contends, however, that this Court has power to direct the submission of a point of a law under the first clause of S. 66. This is to the following effect:

If, in the course of any assessment under this Act, or any proceeding in connexion therewith, etc., a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax Authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

It will be seen that this clause refers to the reference of a question of law either by the Commissioner on his own motion or on reference from any Income-Tax Authority subordinate to him. It does not contemplate a reference at the instance of an assessee. Mr. Sethi urged, however, that this Court had power to issue a mandamus directing the Income-tax Commissioner to do what the Act gives him a discretion to do and in support of his contention cited three authorities. The first of these was *in re, Sheikh Abdul Qadir Marakayar & Co.*, (1), an authority which certainly supports his contention. He next referred to *Sachchidanand Sinha* v. *Commissioner of Income-tax, Bihar* and *Orissa* (2), an authority which also appears to support him. Finally reliance was placed on a decision of their Lordships of the judicial Committee in *Tata Iron* and *Steel Co. Ltd.*, v. *Chief Revenue Authority of Bombay* (3).

Now the Madras and Bombay cases proceed on powers that these High Courts have under S. 45 of the Specific Relief Act. Inasmuch as that section of the Specific Relief Act does not apply to this Court, it is clear that those two authorities do not afford any assistance in the decision of the point before us. The Patna case, however, would need consideration, but for the fact that the correctness of the view in the authority cited has been doubted in *Trikamji Diwan Das* v. *The Commissioner of Income-tax Bihar* and *Orissa* (4). At page 299 (4 Pat.) of the Report the learned

(1) A. I. R. 1926 Mad. 1051=49 Mad. 725 (S. B.).
(2) A. I. R. 1924 Patna 644=3 Patna 664.
(3) A. I. R. 1923 P. C. 148=47 Bom. 724=50 I. A. 212 (P. C.).
(4) 4 Pat. 224=A. I. R. 1925 Pat. 352.

Chief Justice says referring to the Privy Council case:

In the Bombay case which was a decision of their Lordships of the Privy Council, S. 45 of the Specific Relief Act, which gives the three High Courts in the Presidency towns power to make orders in the nature of mandamus requiring specific acts to be done or forborne by persons holding a public office was relied on, but that section does not confer the same powers upon this High Court, and S. 66 of the Income-tax Act, which differs in certain material respects from S. 51 of the Act of 1918 which was in force when the case cited was decided gives the High Court no power over the Income-tax Commissioner except to the limited extent therein provided. The Court, however, by its order considered that it had jurisdiction and ordered the Commissioner to state a case which he has done and it is not competent to this Court now to question the validity of that order.

The correctness of the view was also raised in *Krishnaballabh Sahay* v. *Governor of Bihar* and *Orissa* (5), where it was stated that

it was suggested by the learned vakil for the applicant that this High Court had inherited from the Calcutta High Court much of its inherent jurisdiction including a right to issue a mandamus. In the circumstances of the present application I am content to leave the matter there. When the occasion arises the question can perhaps be further discussed with advantage; but it is noticeable to observe that even by S. 45 of the Specific Relief Act none of the High Courts therein mentioned can make any order binding on a Governor.

In these circumstances I must hold that this Court has no power under S. 45 of the Specific Relief Act to issue the mandamus asked for. S. 66 (1) does not give that power and I know of no other enactment which would enable us to make the order prayed for. Incidentally, as urged by Mr Jagan Nath, it would appear that the Legislature has intentionally altered the old S. 51 by dividing it into two distinct parts, leaving it discretionary in the Commissioner of Income-tax to make reference in certain circumstances while making it compulsory for him to do so, when circumstances arise, within the scope of the second clause to S. 66.

It was next contended that the order passed by the Income-tax Officer was really one under S. 31 or S. 32, and that, therefore, S. 66 (2) would apply. A reference to the proceedings, as stated before us clearly shows that the order of the Commissioner was passed under S. 33: an order which apears to me to have been within his jurisdiction; whether the question involved was one which might well have been referred as urged by Mr. Sethi, is a matter with which we are not now concerned.

The application is, therefore, dismissed. I leave the parties to bear their own costs.

Bhide, J.—I concur.

D.D. *Application dismissed.*

(5) A. I. R. 1925 Pat. 305=5 Pat. 595 (F.B.).

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* A. I. R. 1927 Lahore 515

SHADI LAL, C. J.

Ghulam Muhammad—Complainant—Petitioner.

v.

Vir Bhan—Accused—Respondent.

Criminal Revision Case No. 364 of 1927, Decided on 20th April 1927, reported by the S. J., Sialkot, on 19th February 1927.

* *Criminal P.C., S.250 (1)—Order of discharge and order calling on complainant to show cause against paying compensation passed on same day—One followed the other—S. 250 (1) is complied with.*

Where the trial Magistrate signed and dated his order of discharge, and then recorded an order calling on the complainant to show cause why he should not be directed to pay compensation to the accused, and both the orders were passed on the same day, one following the other:

Held: that there was a substantial compliance with the requirements of S. 250 (1): 8 *Bom. L. R.* 817, *Foll*; *A. I. R.* 1926 *Lah.* 298, *Dist.* [P 516, C 1]

Abdul Ghani—for Respondent.

Facts.—Ghulam Muhammad filed a criminal complaint against Vir Bhan under S. 420, Indian P. C. The lower Court, after issuing summons to the accused, and recording the evidence of the complainant Ghulam Muhammad found that the case was false and frivolous and discharged the accused under S. 253, Criminal P. C. By a separate order recorded on the same date the lower Court then called upon the complainant to show cause why action should not be taken against him under S. 250, Criminal P. C., and why he should not be made to pay compensation. It then took the statement of the complainant and passed an order awarding Rs. 50 compensation to the accused against the complainant.

Grounds.—In arguments before me learned counsel for the petitioner has urged that this order awarding compen-

sation is illegal in view of the fact that the order discharging the accused did not contain the order calling upon the complainant to show cause why he should not be made to pay compensation, and in support of this contention I was referred to *Achhru Mal* v. *Emperor* (1). A perusal of this ruling shows that it is essential that the order of discharge should embody the order calling upon the complainant to show cause why he should not be made to pay compensation. In the present case the two orders are separate although recorded on the same date. This appears to me, on the strength of the ruling cited above, to be contrary to the requirements of S. 250, Criminal P. C. In my opinion, therefore, the order is illegal. I accordingly refer the matter to the High Court with the recommendation that the order in question be set aside.

Order.—In this case the trial Magistrate signed and dated his order of discharge and then recorded an order calling on the complainant to show cause why he should not be directed to pay compensation to the accused. Both the orders were passed on the same day and one followed the other. On these facts I am of opinion that there was a substantial compliance with the requirements of S. 250 (1) of the Criminal P. C. The judgment of the Bombay High Court in *Emperor* v. *Punamchand Hirachand* (2) is on all fours with the present case, and following that judgment I decline to set aside the order granting compensation to the complainant.

R.D. *Order accordingly.*

(1) A. I. R. 1926 Lah. 298=7 Lah. 121.
(2) [1906] 8 Bom. L. R. 847.

A. I. R. 1927 Lahore 516

BROADWAY AND AGHA HAIDAR, JJ.

Nihal Singh and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1205 of 1926, Decided on 8th April 1927, from the order of the Addl. S. J., Lahore, D/- 11th November 1926.

Penal Code, S. 302 — Murder — Elements of preparation and premeditation absent—Transportation was awarded instead of sentence of death.

While a wrestling match was going on the deceased, a Kamin boy, obstructed the sight of an old Jat and consequently there was exchange of abuse. The old man ordered his sons and friends to kill the deceased. Thereupon the appellants, the sons of the old man and his followers assaulted the deceased with lathis and dangs which resulted in the death of the boy and grievous hurt to his father who tried to protect the deceased. The deceased and his father were defenceless, not having even a stick with them.

Held: that the appellants who attacked the deceased with dangs were guilty under S. 302 but as the elements of preparation and premeditation were absent, the sentence to transportation for life should be passed. [P 518, C 1,2]

Nand Lal, Saunders and *Brij Lal*—for Appellants.

Des Raj Sawhney—for Opposite Party.

Agha Haidar, J.—The five appellants before us are Nihal Singh and his two sons, Teja Singh and Banta Singh, and two other persons, namely Ram Singh, and Banta Singh son of Hira Singh. They have all been convicted under Ss. 302/149, Indian Penal Code. Teja Singh and Banta Singh sons of Nihal Singh have been sentenced to death and Nihal Singh and Banta Singh sons of Hira Singh have been transported for life under S. 302/149 Indian Penal Code. Under Ss. 325/149 Indian Penal Code all the five appellants are also sentenced to three years' rigorous imprisonment.

The record is also before us for the confirmation of the death sentences passed upon Teja Singh and Banta Singh under the provisions of S. 374 of the Code of Criminal Procedure.

Briefly stated the story for the prosecution is that on the 8th of August 1926, at about 7 p. m. there was a wrestling match going on between some boys of the village. The match was being watched by a number of people estimated to be between 50 and 60. The deceased Bishan Singh son of Chanda Singh was a sunar by occupation and therefore a Kamin. All the appellant's are Jats of the village. It happened that Bishan Singh, while watching the wrestling match, obstructed the view of Nihal Singh who is stated to be an old man of about 80 and who happened to be watching the match. On this Nihal Singh abused Bishan Singh and ordered him to get out of the way. Bishan Singh also retorted and used some abusive language. On this Nihal Singh considering himself insulted and humiliated by a Kamin lad stood up and called out to his sons and others to kill (*mar do*) "these goldsmith

dogs." At this Teja Singh and Banta Singh, sons of Nihal Singh, Banta Singh son of Hira Singh and Ram Singh stood up and began the assault. Nihal Singh continued shouting to his young followers but did not strike any blow himself. Banta Singh, son of Nihal Singh, inflicted the first blow on the head of the deceased and was followed by Teja Singh his brother who gave another blow on the left temple of the deceased. Chanda Singh, the father of the lad Bishan Singh, deceased, intervened and tried to keep off the assailants, but finding it of no avail threw himself upon the prostrate body of his son in order to protect him. The assailants, Banta Singh and Teja Singh, son of Nihal Singh, according to the evidence, continued striking blows upon the bodies of the father and son as they lay upon the ground. It does not appear, however, that Banta Singh, son of Hira Singh, and Ram Singh struck any blows either to Bishan Singh deceased or to his father Chanda Singh. At this stage Maghar Singh, one of the Jats who was present at the wrestling match, came forward with a view to separate the assailants from Bishan Singh and his father, but Ram Singh and Banta Singh, son of Hira Singh, belaboured him also with dangs.

The result of this savage assault was that the deceased Bishan Singh received three serious injuries; one of the injuries left a contusion mark in front of the head measuring 1" × 3", as a result of which the skull had a fracture of the right side frontal bone extending to the right temporal bone. According to the evidence of the Civil Surgeon death was due to fracture of the skull. Chanda Singh also received no less than eight injuries, and, according to the medical evidence, two of these injuries, that is to say Nos. 1 and 2, were dangerous to life and grievous. Maghar Singh's injuries were also very serious, as according to the medical evidence among other injuries he received a contusion mark 3" × 1" with much swelling on the left forearm, the radius bone under this contusion being broken. The medical evidence is, therefore, clear that Chanda Singh and Maghar Singh received grievous hurt.

After this fight Bishan Singh's friends and relations took him and his father Chanda Singh to their house in the village. Bishan Singh lingered on during the night and expired on the following day at about 8 a. m. It was a wet night and it had been raining also in the morning so that the first information report was made at 2 p. m. on the 9th of August 1926, at the police station of Barki which is at a distance of six miles from the village Thehpura, the scene of the occurrence. It is stated on behalf of the appellants that the first information report was unduly delayed. Having regard to the atmospheric condition it cannot be said that it was belated and that the friends and relations of Bishan Singh were free to go to the police station, leaving him in this critical condition during the night. We have also the evidence of Tara Singh, an uncle of Bishan Singh, deceased, who states that they tried to take Bishan Singh to the hospital, or to go out at night to lodge the first information report, but the accused threatened them with their dangs and would not let them leave the village.

These facts have been established by the evidence of the eye witnesses, Tara Singh, Maghar Singh and Chanda Singh. There is another witness also named Deva Singh who professes to be an eye-witness to the occurrence, but having regard to the fact that his statement was recorded somewhat late and he has failed to account satisfactorily for the delay of five or six days which occurred before his statement was recorded by the police, it would not be safe to place any reliance upon his evidence. Chanda Singh and Maghar Singh received injuries and there can be no manner of doubt that they were present on the spot. Tara Singh also was present on the spot although he was fortunate in not receiving any injuries. The evidence of these eye witnesses is sufficient to prove the story as put forward by the prosecution. It may be mentioned here that the evidence of alibi is worthless. Now, the question before the Court is as to what offence or offences the appellants have committed. The appellants are all Jats and, as stated above, Bishan Singh and his father are goldsmiths and therefore Kamins of the village. Bishan Singh was a lad of 18 only, and it is not at all difficult to believe that the fact of his using abusive language towards an

an old Jat of 80 in the presence of a large assembly must have caused very considerable resentment and annoyance to Nihal Singh and his adherents who are all Jats. When, at the behest of Nihal Singh, the appellants rose and made ready for the assault, there cannot be any doubt that they all intended at least to inflict grievous hurt upon Bishan Singh, deceased, and being five in number including Nihal Singh the case comes under Ss. 325/149, Indian Penal Code.

But the case of the two sons of Nihal Singh, i. e. Banta Singh and Teja Singh, stands upon a different footing. They struck blows with lathis on the head of a defenceless youth of 18. Even when he fell down they continued hitting him. How reckless and violent was the attack can be judged from the fact that when the father of Bishan Singh fell upon him, in order to protect him they continued their assault and inflicted very savage injuries both upon Bishan Singh as well as on his father, Chanda Singh. Their case clearly comes under S. 300, Indian Penal Code. In that the attack upon Bishan Singh which resulted in his death was committed either with the intention of causing death or such bodily injury as they knew to be likely to cause death. No exception under S. 300 applies to the facts of the case, so far as Teja Singh and Banta Singh, sons of Nihal Singh, are concerned.

The quarrel which ended so fatally was begun by Nihal Singh who used abusive language and ordered his sons and others to kill the deceased. There is no evidence whatsoever on the record to show that either Bishan Singh or any one of his party had even an ordinary stick in his hand. The appellants did not receive any injury whatsoever. Thus it appears from the record that the fight was throughout a one-sided affair. The appellants were the aggressors and Bishan Singh and his father and afterwards Maghar Singh were the victims of the appellants' attack.

The question now is what punishment should be awarded to the five appellants. Teja Singh and Banta Singh who struck dangs on the head of the deceased which resulted in his death are undoubtedly guilty of murder under S. 302, but, having regard to the fact that the elements of preparation and premeditation are absent, the ends of justice would be met if the sentence of death is altered to that of transportation for life. Nihal Singh who was at the root of the whole trouble and ordered the fatal assault, deserves no sympathy. He is an old man of 80 and ought to have known better. He let loose his sons and friends upon an unarmed lad of 18 and must, therefore, take the consequence. I, therefore, maintain his conviction and sentence him to seven years rigorous imprisonment under Ss. 325/149 of the Indian Penal Code, as he must have at least contemplated an offence under S. 325 when he gave his word of command.

The appeal of Banta Singh, son of Hira Singh, and Ram Singh is allowed to this extent: that the sentence of transportation for life passed upon them is set aside and in place thereof they are convicted and sentenced to seven years rigorous imprisonment under S. 325/149 of the Indian Penal Code, along with Nihal Singh, Teja Singh and Banta Singh, sons of Nihal Singh, are also guilty under S. 325-149 of the Indian Penal Code. They also deserve punishment under that section. I, therefore, convict them under S. 325/149 and sentence them to seven years rigorous imprisonment. This sentence, however, would run concurrently with the sentence of transportation for life.

The result is that Nihal Singh's appeal is allowed to this extent that the sentence of transportation for life passed upon him by the learned Sessions Judge under Ss. 302/149, Indian Penal Code, is set aside and his conviction under S 325/149, Indian Penal Code, is maintained and he is hereby ordered to suffer seven years' rigorous imprisonment under those sections. Teja Singh and Banta Singh, sons of Nihal Singh's appeal is allowed to this extent : that instead of the sentence of death passed upon them under S. 302, Indian Penal Code, by the learned Sessions Judge they are sentensed to transportation for life. Under Ss. 325/149, Indian Penal Code they are also guilty and are sentenced hereby to seven years rigorous imprisonment. This sentence is to run concurrently with the sentence of transportation for life. Banta Singh son of Hira Singh and Ram Singh's appeal is allowed to this extent : that the sentence of transportation for life passed upon them by

the learned Sessions Judgs is set aside and they are hereby convicted under sections 325/149, Indian Penal Code, and sentenced to seven years' rigorous imprisonment.

Broadway, J.—I concur in the above order.

G.B. *Sentences reduced.*

A. I. R. 1927 Lahore 519

TEK CHAND, J.

Girdhar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 37 of 1927, Decided on 9th March 1927, from an order of the S. J., Hissar, D/- 28th October 1926.

Penal Code, S. 395—Five persons alleged to have committed dacoity—One turning approver—Two acquitted—Remaining two cannot be convicted under S. 395.

Where a dacoity was alleged to be committed by 5 persons, one of whom turned an approver and two were acquitted. *Held*: the remaining two cannot be convicted of dacoity but should be convicted under S. 392 (robbery): 39 *All.* 348; (1910) *M. W. N.* 52, *Foll.* [P 520 C 2]

Des Raj Sawhney—for Opposite Party.

Judgment.—Girdhar appellant in this case and Nahar, appellant in Criminal Appeal No. 38 of 1927, along with two other persons, Het Ram and Badan, were committed to the Sessions Court at Hissar to take their trial for an offence under S. 395, I. P. C., on the allegation that these four, along with one Khichu alias Khacheru approver, had committed a dacoity on the grand trunk road leading from Delhi to Palwal on the night between the 6th and 7th May 1926. The learned Sessions Judge in an elaborate judgment held that there was not sufficient corroboration of the story of the approver against Het Ram and Badan accused. He accordingly acquitted them but holding the other two accused, Girdhar and Nahar, to be guilty convicted them under S. 395, I. P. C., and sentenced each to undergo rigorous imprisonment for five years. Girdhar and Nahar preferred appeals from Jail and I have carefully gone through the record and have heard Mr. Sawhney for the Crown.

From the record it is abundantly clear that P. W. No. 9, Gulsher, along with his father P. W. No. 10, Aziz Khan, and uncle P. W. No. 11, Jahangir Khan, left their village Tigri on the night in question in a cart in which they were carrying 10 or 11 maunds of tobacco bound for a village called Patli near Palwal. Jahangir Khan and Aziz Khan were lying in the cart whereas Gulsher was driving it. At about 11 p. m. when the cart arrived near Budhiyaka nala they were attacked by a number of persons who first hurled stones at them and then began to belabour them with lathis. One of the bullocks having been hit with a lathi got frightened and the cart fell into a khal. On this Gulsher alighted from the cart and then he was caught by one of the assailants and another hit him with a lathi on his head. The other assailant or assailants soon arrived on the scene and inflicted a number of injuries upon Gulsher who was rendered unconscious. They severely beat Aziz Khan and Jahangir Khan also. The assailants removed clothes and about 2½ maunds of tobacco from the cart. They also took a Bhagalpuri turban, a dhoti, a khes, a quilt, an orhna, two chaddars, a marzai and Rs. 40 in cash. As to these incidents the evidence of the approver is fully corroborated by these three witnesses P. W. No. 9, Gulsher, P. W. No. 10, Aziz Khan and P. W. No. 11 Jahangir Khan. Material corroboration of the approver's story as to the part taken in the incident by Nahar, appellant, is found in the fact that he produced the khes Ex. P-1, and quilt P-2, on the 13th May 1926 after having dug them out from his field from a depth of about 1½ feet. Moreover he himself had received injuries on his head which were examined by the Sub-Assistant Surgeon Shambhoo Dial, P. W. No. 2, on the 10th May and appear to have been recently inflicted. Nahar appellant has failed to give any satisfactory explanatiou as to how and where he received these injuries. The defence produced by him is worthless and has been rightly rejected. I find that it is fully proved that he took part in this assault.

Girdhar appellant is also proved to have produced three juttis of tobacco, a chaddar, Ex. P-3, a marazi Ex. P-4 and an orhna Ex. P-5 from his cattle-shed in the presence of P. Ws. Nos. 12, 13 and 14. I have no reason to disbelieve these

witnesses and find that the learned Sessions Judge has come to a correct conclusion that this person took part in the assault and robbery on Gulsher and others on the night in question.

The learned Sessions Judge has, however, convicted the two appellants under S. 395, I. P. C. He held that it was certainly established that the appellants were five and that an offence of dacoity was committed but that on the materials before him he could not definitely say whether Het Ram and Badan did participate in the same. In my opinion, the conviction under S. 395 cannot stand on the present record. The case for the prosecution was that the robbery in question was committed by five persons, namely, the two appellants, Het Ram, Badan and the approver. The learned Sessions Judge has given the benefit of the doubt to Het Ram and Badan and acquitted them. In fact he has definitely found that there was no evidence to connect these two persons with the commission of the offence beyond the bare statement of the approver which he was not prepared to accept, without corroboration. Under these circumstances I cannot hold that five persons took part in the dacoity. The offence is, therefore, one of robbery committed by the two appellants and Khacheru approver. In *Ikram-ud-din* v. *Emperor* (1) nine persons were tried on a charge of dacoity and the case for the prosecution was that the dacoity in question had been committed by these nine persons together with an approver. Seven out of these nine were acquitted and other two convicted of dacoity. On appeal the High Court set aside the conviction for that offence and following the principle laid down in *Rex* v. *Plummer* (2) held that the conviction for dacoity must be quashed. The Madras High Court in a case reported as *Pidda Enumundugaru* v. *Emperor* (3) also held that where the evidence showed that there were six robbers and in the trial three were acquitted the conviction under S. 391 could not be sustained and must be altered to one for robbery under S. 392. As I have said already, on the present record it cannot be definitely said that five persons or more took part in the robbery, I, therefore, alter the conviction to one under S. 392.

As to the sentence it has to be borne in mind that this case was of a robbery committed on the highway between sunset and sunrise and the medical evidence discloses that Gulsher received 8 injuries, Jahangir 5 and Aziz Khan 12, one of which was grievous. I, therefore, think that the sentence of five year's rigorous imprisonment imposed by the learned Sessions Judge is appropriate. I, therefore, alter the conviction from one under S. 395 to that under S. 392, I. P. C. In other respects the appeal is dismissed.

D.D. *Conviction altered.*

(1) [1917] 39 All. 348=39 I. C. 331=15 A. L. J. 205.
(2) [1902] 2 K. B. 339=71 L. J. K. B. 805=66 J. P. 647=86 L. T. 836=20 Cox. C. C. 269=51 W. R. 137=18 T. L. R. 659.
(3) [1910] M. W. N. 52=5 I. C. 797=11 Cr. L. J. 249.

A. I. R. 1927 Lahore 520

SKEMP, J.

Hari Kishen—Accused—Petitioner.

v.

Allah Bakhsh and *others*—Complainants—Respondents.

Criminal Misc. Petition No. 55 of 1927, Decided on 7th May 1927, for transfer of the case from the Court of the 1st Cl. Mag., Multan.

Criminal P. C., S. 526—Complaint injurious to communal feelings should be tried by European Magistrate—Criminal trial.

Where the complaint was by Mussalmans, accusing a Hindu of doing acts in a Mussalman graveyard, with intent to injure their feelings,

Held : that the complaint should, if possible, be tried by a European Magistrate. [P 521 C 1]

Badri Das—for Petitioner.

Abdul Qadir—for Complainants.

C. H. Carden Noad—for the Crown,

Order.-The complainants Allah Bakhsh and Barkhurdar lodged a complaint under S. 297, I. P. C., alleging that one Hari Kishen had bought a graveyard in which their ancestors were buried. The accused intended to build on their graveyard, and demolished five or seven graves and was about to demolish more. He was of the Hindu religion and did this with intent to wound the feelings of the complainants.

The petitioner requested that the District Magistrate should try the case himself. It was, however, sent to a Bench

of Multan consisting of one Hindu and one Mussalman. From there it was withdrawn and was sent to the Court of Sardar Muhammad Ishaq Khan, Magistrate, First Class. Hari Kishen applied to the District Magistrate to transfer the complaint to the Court of a European Magistrate, but the District Magistrate refused. He has now come to this Court with a similar petition.

The particular allegations against the Magistrate have broken down. It is alleged that he substituted the name of Hari Kishen for the original accused Sri Kishen. Hari Kishen and Sri Kishen are really brothers and the name of Sri Kishen was written for Hari Kishen by a clerical error. Summons issued in the name of Sri Kishen but Hari Kishen appeared and explained that his brother who is serving in the police had nothing to do with the case. The Magistrate, after making enquiry, then altered Sri Kishen to Hari Kishen, in the complaint.

At the same time I think it desirable that a complaint by Musalmans which accuse a Hindu of doing acts in a Mussalman graveyard, with intent to injure their feelings should, if possible, be tried by a European Magistrate. It appears that there is a European Magistrate of the First Class serving in the Multan District and I direct the District Magistrate to send the case to him.

R.D. *Case transferred.*

A. I. R. 1927 Lahore 521

JAI LAL, J.

Khuda Yar and *others*—Plaintiffs—Appellants.

v.

Imam Din and *another*—Defendants—Respondents.

Second Appeal No. 577 of 1926, Decided on 8th April 1927, from the decree of the Dist. J., Sialkot, D/- 25th November 1925.

Custom—Punjab—Ancestral property is alienable with consent of male descendants or collaterals in case of sonless proprietor—Such consent can be given after alienation.

The provisions of the Customary Law relating to the right of male proprietors to alienate ancestral immovable property are restrictions on the ordinary right of freedom of contract and should not be extended beyond what they expressly lay down. [P 522 C 2]

Ancestral immovable property is alienable with the consent of male descendants or, in the case of a sonless proprietor, of his male collaterals. There is nothing to preclude the male descendants from giving the consent after the alienation, and the fact that such consent was given on receipt of consideration does not affect its validity. [P 522 C 1,2]

Muhammad Shafi and *Muhammad Rafi*—for Appellants.

Shamair Chand—for Respondents.

Jai Lal, J.—One Imam Din sold his ancestral land for Rs. 9,400 on the 6th of November 1923. His son Allah Lok instituted a suit for a declaration that the sale was without consideration and necessity and shall not affect his reversionary rights. After issues had been framed the dispute was referred to an arbitrator, but before the arbitrator gave his award the parties compromised the matter and filed a written compromise before him. In this compromise Allah Lok, on receipt of Rs. 600, abandoned his suit and admitted the validity of the sale of the land in dispute to the defendant Kesar Shah. The following passage appears in the compromise :

"*man muddai is ki jawaziyat ko durust qabul karta hai aur Kesar Shah mudaaleh ko jaiz mushtri qabul karta hai intiqal ki hajawaziyal par ab muzhir muddai ko koi bht ihtaraz baqi nahin. Kesar Shah mazkur ab arazi mutdawiya Ka malik jaiz tassawar hoga*'.

According to the compromise, the arbitrator gave his award that the plaintiffs' suit be dismissed and the Court granted a decree accordingly. The present suit was then instituted by the plaintiffs, who have been found to be the reversioner of Imam Din, claiming a similar relief as was claimed by Allah Lok in the previous suit. The trial Court and the District Judge have both dismissed the suit, and the reversioners have presented a second appeal in this Court.

The learned counsel for the appellants has strenuously contended before me that the findings of the learned District Judge that (a) the compromise in the previous suit between Allah Lok and the vendee was a bona fide one and that (b) the present suit is a speculative one on the ground that there is no possibility for the plaintiffs to succeed to the alienor in the near future in the presence of his son are erroneous. Having regard to the view that I have taken as to the locus standi of the plaintiffs to institute the present suit, I do not consider it necessary to discuss these matters, though it

appears to me that the intervention of one life, as in this case, can hardly make the suit a speculative one and also that the finding of the District Judge, that the compromise was a bona fide one, is a finding of fact in this sense that, according to the learned Judge, its object was not to defeat the possible claim by the reversioners. Counsel cited a number of authorities on the question of the assent by one reversioner on the rights of the remaining reversioners and also on the question of the speculative nature of a suit. The present case, however, is, in my opinion governed by the rule laid down in Article 59 of Rattigan's Digest of Customary Law which, so far as it applies to this case is as follows :

> Ancestral immovable property is ordinarily inalienable except for necessity or with the consent of male descendants, or, in the case of a soulless proprietor, of his male collaterals.

It is to be observed that the consent of the male descendants is sufficient to validate a sale of ancestral immovable property. Article 67 provides that the proper person to object to an alienation is the nearest reversionary heir, but when it is shown that he is in collusion with the alienor or that he has refused without sufficient cause to institute proceedings, or has precluded himself by his own act or conduct from suing or has concurred in the alienation, the next reversioner is entitled to maintain the action. Counsel for the appellants relies upon this article and contends that the vendor's son Allah Lok, having concurred in the alienation his clients, the next reversioners were entitled to maintain the action. In my opinion, however, the substantive law on the subject is contained in Article 59, according to which the consent of a son, in the case of an alienation by the father of ancestral immovable property, validates the alienation. Article 67 merely lays down the order and the circumstances in which the several persons entitled to institute a suit can maintain it. It does not override the provisions of Article 59, but is to be read subject thereto.

The next question to be considered is whether the consent by the male descendants, such as is contemplated by Article 59 is to be given at or before the alienation, or can be given afterwards. In my opinion there is nothing to preclude the male descendants from giving the consent after the alienation, and the fact that such consent was given on receipt of consideration does not affect its validity. The provisions of the Customary Law relating to the right of male proprietors to alienate ancestral immovable property are restrictions on the ordinary right of freedom of contract and should not be extended beyond what they expressly lay down. I am not, therefore, prepared to restrict the meaning of consent given at or before the alienation. Under the circumstances there is no force in the contention of the learned counsel that the District Judge should have given a finding as to the existence or otherwise of necessity for the sale in question. The sale has been found to be for full consideration, and, though the District Judge has not gone into the question of necessity, he has found that the alienor and his son were both anxious to leave the village in which the land in suit is situated, and to migrate to another village where land can be had at a cheaper rate. This may possibly be an act of prudent management but it is not necessary for me to give any opinion on the matter. I hold that the sale being by a proprietor who had a son existing at the time of alienation, and having been consented to by that son, was valid according to the Customary Law.

I dismiss this appeal with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 522

TEK CHAND, J.

Maulu and *others*—Plaintiffs—Appellants.

v.

Beli Ram and *others*—Defendants—Respondents.

Second Appeal No. 2683 of 1926, Decided on 11th March 1927, from the decree of the Dist. J., Gujranwala, D/- 29th May 1926.

(a) *Civil P. C., O. 3, R. 1—Technical irregularities in vakalatnama should be condoned.*

The memorandum of appeal was accompanied by a vakalatnama which bore the thumb-marks of all the appellants and was signed by the vakil in token of his having agreed to act for the appellants; but in the heading of the vakalatnama the names of the parties to the

case were not filled in. This Vakalatnama was attached to the memorandum of appeal in which the names of all the parties together with their parentage and other particulars were given in detail.

Held: that there can be no manner of doubt that the power of attorney which was duly signed by the appellants and the vakil related to the appeal in question and authorised the vakil, to prefer the appeal: *A. I. R.* 1921 *All.* 210 and *A.I.R.* 1923 *Nag.* 182, *Ref.* [P 523, C 1]

(b) *Civil P. C., S.* 100—*Adverse possession—Question as to, is a mixed one of law and fact.*

Adverse possession is a mixed question of fact and law and cannot be allowed to be pleaded for the first time in the appeal, as a decision on it cannot be arrived at without giving the parties an opportunity of placing on the record all facts relevant thereto. [P 524, C 1]

I. C. Chopra—for Appellants.

M. L. Puri—for Respondents.

Judgment.—A preliminary objection has been raised on behalf of the respondents that there was no proper presentation of this second appeal in this Court within the period of limitation allowed for the institution of such appeals. The judgment of the learned District Judge was delivered on the 29th of May 1926, and the memorandum of second appeal was presented in this Court by Mr. I. C. Chopra, advocate for the appellants, on the 4th of October 1926, the day on which the Court reopened after the long vacation. It appears that the memorandum of appeal was accompanied by a vakalatnama which bore the thumb-marks of all the appellants and was signed by Mr. Chopra in token of his having agreed to act for the appellants; but in the heading of the vakalatnama the names of the parties to the case were not filled in. The memorandum of appeal together with the power of attorney was returned by the office to Mr. Chopra on the 10th of October 1926, with the remark that the defects in the vakalatnama should be removed. Mr. Chopra re-filed the memorandum of appeal with the vakalatnama duly filled in and completed on the 6th of November 1926. Mr. Mukand Lal Puri urges that under these circumstances the appeal should be considered to have been filed on the 6th of November 1926, and is therefore, time-barred. In my opinion the defect in the vakalatnama was merely technical and I cannot hold that there was no proper presentation of the appeal on the 4th of October 1926. The thumb-impressions of all the appellants and the signature of Mr. Chopra were affixed to the vakalatnama and this vakalatnama was attached to the memorandum of appeal in which the names of all the parties together with their parentage and other particulars were given in detail. Copies of the decree of the lower appellate Court and of the judgments of both the Courts below were also attached. Under these circumstances there can be no manner of doubt that the power of attorney which was duly signed by the appellants and Mr. Chopra, related to the second appeal in question and authorized Mr. Chopra to prefer the second appeal to this Court. The omission of the names of the parties in the heading of the power of attorney was obviously an oversight. Reference may in this connexion be made to *Shambhu Nath* v. *Badri Das* (1) and *Maharashtraya Jnankosh Mandal, Ltd.* v. *Bijulal* (2), where techinical objections taken to the presentation of the appeals on the score of clerical mistakes of this kind in vakalatnamas were not accepted. I, therefore, overrule the objection and hold that the appeal was presented within time.

On the merits of the appeal, however, I am of opinion that Mr. Chopra has not succeeded in pointing out any error of law in the judgment of the learned District Judge. The principal point taken in the memorandum of appeal is that the sale-deed dated the 28th of June 1886, by the ancestor of the plaintiffs in favour of the ancestor of the defendants-respondents did not convey a share in the shamilat appurtenant to the khewat land sold by that deed. Mr. Chopra, however, has abandoned this contention to-day. Indeed, a reference to the sale deed shows that the khewat land was sold along with the appurtenant share in the shamilat. Moreover, the learned District Judge has gone into the question very fully and, after an examination of the whole of the evidence on the record, has come to the conclusion that the vendors intended to sell a share in the shamilat-deh along with the khewat land. This is a clear finding of fact which cannot be challenged in second appeal.

Mr. Chopra, however, contends that the sale was effected in 1886 and the mutation relating to the shamilat was

(1) A. I. R. 1921 All. 210=43 All. 392.
(2) A. I. R. 1923 Nag. 182=19 N. L. R. 36.

not sanctioned till the 10th of June 1924. He accordingly, argues that in view of this long delay the plaintiffs-appellants must be considered to have acquired a title to this share of the shamilat by adverse possession. It must, however, be noted that the plaintiffs did not, in the plaint, base their title on adverse possession, nor was the matter put in issue, nor any evidence led in the trial Court. Adverse possession is a mixed question of fact and law and cannot be allowed to be pleaded for the first time in the appeal, as a decision on it cannot be arrived at without giving the parties an opportunity of placing on the record all facts relevant thereto. Moreover, it is clear that there is no substance in this plea. The shamilat-deh is still joint, no partition having taken place up to this time. Under the circumstances, even if the plaintiffs, as cosharers of 7/8ths of the holding, were in possession of the holding in its entirety, their possession cannot be said to be adverse as against the other cosharers. The proposition is too well established to require an elaborate discussion. No other point was urged before me.

For these reasons I am of opinion that this appeal must fail and is dismissed with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 524

ZAFAR ALI, J.

Abdulla and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 626 of 1926, Decided on 8th December 1926, from the order of the S. J., Karnal, D/- 1st May 1926.

Penal Code, S. 401—*Receiver of stolen property from persons described in S.* 401 *does not "belong" to the gang—Persons who form party to commit theft are punishable under S.* 401.

It cannot be laid down as a general proposition that a person who receives stolen property from a gang of the character prescribed in S. 401 is a member of the gang. The word "belong" used in S. 401 is no doubt very comprehensive, but the expression "to belong to a gang of persons, etc." conveys the same idea as "to be one of a gang of persons, etc." The object of the section obviously is to punish the persons who organize thieving expeditions and form a party to commit theft. A person who receives stolen property from them cannot be said to belong to their gang. [P 525, C 2, P 526, C 1]

Shamair Chand and *Parkash Chandra*—for Appellants.

Des Raj Sawhney—for the Crown.

Zafar Ali, J.—On the basis of information given by two avowedly habitual thieves, namely Hasham, and his nephew Ghafur, either of whom accepted a tender of pardon and turned King's Evidence, the Karnal police started investigation and eventually sent up for trial eighteen men on a charge under S. 401, Indian P. C., of belonging to a gang of persons associated for the purpose of habitually committing theft. All of them were committed to the Court of Sessions, but three died and fifteen were tried on that charge by the learned Assistant Sessions Judge of Karnal who acquitted as many as twelve, and convicted the remaining three, namely Abdulla, his brother Nizam, and Masiti. They have appealed through Mr. Shamair Chand.

The learned Assistant Sessions Judge found:

1. that the two approvers Hasham and Ghafur were unscrupulous liars;

2. that they were old enemies of the family of the accused and had implicated every adult male member of that family;

3. that many thefts, stated by the approvers to have been committed by the accused, were not proved; and

4. that in at least two cases, i. e. Nos. 3 and 6 of the list of thefts given by the approvers, the accused had been falsely implicated.

These findings are unassailable and are based on the evidence of a number of prosecution witnesses.

Mr. Shamair Chand contends that in face of the above findings the conviction of any one of the appellants cannot stand, and that the approvers' evidence should be wholly rejected, as was done in the case of the twelve accused who have been acquitted.

The Court below made the following observations with regard to the evidence of the approvers:

I have disbelieved the approvers in the greater part of their evidence, holding them as unreliable persons who, for thair personal motive, have no hesitation in implicating with them persons who might have got no connexion with them. In holding Abdulla, Nizam and Masiti as members of a gang with them I wish to state it

clearly that I do not do so simply because I believe the statement of these approvers. I find them guilty because from independent evidence on record, which corroborates the testimony of the approvers, I am convinced that these men have been associating with the two approvers and are legally liable to be punished under S. 401, I. P. C.

The so-called independent evidence relates to 10 or 11 thefts, but the learned counsel for the Crown, after taking me through the evidence relating to each, concedes that the appellants' connexion has not been established with any of those thefts with the exception of four. These four are No. 10 of the main list and Nos. 5, 6 and 7 of the subsidiary list of thefts. But the evidence produced in respect of even these four cases fails to establish that the appellants were either concerned in those thefts or were members of a gang of five or more persons associated for the purpose of habitually committing theft.

With regard to case No. 5 there were only two witnesses, namely Chhajju, P. W. 63, and Rasalu, P. W. 126. Chhajju's evidence was to the effect that he lost a horse and suspected Munir, Nawab, Murad Ali, Nizam and Abdulla or Dulla; that he took a panchayat to them; and that they demanded Rs. 30 as bhunga, but that he did not pay that sum, nor did he get back his horse. He did not make it clear which of the five men demanded the bhunga, and, therefore, his evidence is of no value as against the appellants. Rasalu, P. W. 126, deposed that he was in that panchayat; that Nawab and Munir admitted that they had stolen the horse and given it to Abdulla and Nizam; and that Abdulla and Nizam stated that they had the horse. Thus he stated facts which were not deposed to by Chhajju, and which, if true, would have come to the knowledge of Chhajju also who was the person most interested and was present in the panchayat. It is, therefore, difficult to believe Rasalu, and the evidence of Chhajju, as already stated, does not prove anything against the appellants. (The judgment here dealt with evidence in the other cases and proceeded.) None of these four thefts was reported to the police, nor was a complaint made in respect of any one of them. In case No. 10 Nizam is not named, in No. 5 Masiti is not mentioned, and in No. 7 there is no reference to Abdulla. There is no previous conviction against any of the appellants and the lower Court found that

> the evidence of general association, that these persons were seen with each other with the approver, is vague and indefinite,

and that

> none of the witnesses on this point was a reliable or a disinterested person.

In respect, of Masiti appellant, the lower Court says;

> It is not proved by any evidence that Masiti stole any cattle himself, but there is ample evidence, as I have stated above, that he has been acting as an Agu or receiver of stolen property, with Abdulla, Nizam, Ghafur and Hasham, for a sufficiently long period.

In *Beja* v. *Emperor* (1) it was held by Shah Din, J., that an Agu or habitual receiver of stolen property from a gang of persons with whom he was associated for the purpose stated in S. 401, I. P. C., belonged to that gang and was liable to punishment under that section. But in that case it was established that the so-called Agus and certain other persons had organized a gang for the purpose of habitually committing theft and that the Agus were necessarily members of that gang. In the present case no association between Masiti and the other alleged member of the gang was proved and Masiti lived at a distance of ten miles from them. It cannot be laid down as a general proposition that a person who receives stolen property from a gang of the character prescribed is S. 401 is a member of the gang. The word 'belong' used in S. 401 is, no doubt, very comprehensive, but the expression "to belong to a gang of persons, etc." conveys the same idea as to be one of a gang of persons etc." 'Gang' is derived from the Anglo-Saxon word 'gangan' (to go,) and its dictionary meaning is

> a number going in company; hence a company or number of persons associated for a particular purpose.

If it could be said that a person belongs to a gang of persons associated for the purpose of habitually committing theft because he receives stolen property from them, then S. 401 would apply to all who may in some way or other be connected with the gang, for instance, the wives and children of the men constituting the gang, and persons who may give them shelter or provide food for them. The object of the section obviously is to punish the persons who or-

(1) [1915] 223 P. L. R. 1915=26 I. C. 625=13 P. R. 1915 Cr.

ganize thieving expeditions and form a party to commit theft. A person who receives stolen property from them, for instance, a saraf, cannot be said to belong to their gang.

The habitual receiver of stolen property is punishable under S. 413 and not under S. 401, I. P. C. In the present case, therefore, Masiti could not be punished under S. 401, I. P. C., on the evidence produced against him. Moreover, as already stated, the thefts attributed to the appellants were not brought home to them, and all that was proved against them was that they had been receiving bhungas, but this act of theirs was not sufficient by itself to show that they constituted a gang of the description defined in S. 401. The convictions, therefore, cannot be maintained, and I accordingly accept the appeal and set them aside. The appellants have already been acquitted and released by order dated the 2nd December 1926.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 526

FFORDE AND TEK CHAND, JJ.

Lehna Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 147 of 1927, Decided on 14th April 1927, from the order of the S. J., Lahore, D/- 11th January 1927.

Penal Code, S. 300—No intention to cause death found—Conviction should be for culpable homicide.

Where there is no evidence that the accused intended to cause the death of the deceased, or that he intended to cause such injuries as were likely to result in death or that he intended to cause such injuries as would in the ordinary course of nature cause death, the only legal conviction which could be had would be under S. 304, Part II, of the Indian Penal Code.

[P 527 C 2]

L. Saunders—for Appellant.

Abdul Rashid—for the Crown.

Fforde, J.—The appellant has been convicted under S. 302, Indian Penal Code, of having murdered one Phumman on the 26th of August 1926.

It has been established beyond doubt that the appellant was carrying on an illicit intrigue with Mt. Lalan, the wife of the deceased. On more than one occasion the deceased had had occasion to remonstrate with his wife upon her conduct with the appellant. On the evening of the occurrence in question the appellant had visited the deceased's house and had had intercourse with his wife. The deceased had come to his house to find the appellant emerging from it and there was an exchange of abuse between them. Shortly after this incident the deceased proceeded to a field where a display of fireworks was taking place on the occasion of the marriage of one Jawahar Singh's daughter. This display was attended by a very large number of persons amongst whom were the deceased and the appellant. It has been proved by a number of witnesses, whose evidence has not been shaken in any way, that the appellant seeing the deceased among the spectators attacked him with a lathi causing injuries from which he died at 1-30 a. m. on the 28th of August. The injuries consisted of a contused wound 3″ long × ½″ wide and scalp deep, on the right side on the head over the parietal region. The blow causing this wound fractured the skull and caused death. Three of the other injuries, namely, a fracture of the lower jaw, a contused wound on the upper lip and a contused wound on the lower lip, were probably the result of one blow. There was also a contusion on the right side of the chest which caused rupture of the liver, and there was a swelling on the back of the right hand.

The circumstances of the attack are very boldly stated by the witnesses, but there can be no doubt that the attack did take place at the time and place alleged by the eyewitnesses. The witnesses called for the defence also stated that the deceased came by his injuries at the scene where the fireworks display was going on.

Mr. Saunders' first contention was that the appellant was probably assaulted by the deceased when found emerging from his house and that in self-defence he struck and killed the latter. This view is entirely against the evidence of the witnesses for both sides.

Mr. Saunders' next contention was that it was not known who killed the deceased but, finding a person who had been seriously injured, the lambardar who had an admitted cause of enmity against the appellant, fabricated the

whole case, using his influence as lambardar, and as owner of the property, upon various menials and tenants to tell a false tale. This defence is obviously untenable in view of the evidence.

I have not the slightest doubt that the appellant did assault and kill Phumman at the place and on the occasion in question. The four assessors stated as their opinion that the appellant had assaulted and caused the death of the deceased as stated by the prosecution witnesses, but were of opinion that the appellant did not, at the time of carrying out his assault, intend to cause the death of the victim. With this opinion the learned Sessions Judge has expressed himself in agreement. He states in his judgment :

> Each of the assessors was of opinion that the prosecution evidence was reliable ; and that the accused had assaulted. and caused the death of, the deceased Phumman, as stated by those prosecution witnesses ; and that the defence evidence was unreliable. They further gave their opinion that the accused did not, at the time of carrying out his assault on Phumman, intend to cause the death of the latter.
>
> I agree with the above opinion of the assessors, and find it clearly established that the accused did, during the fireworks display on that evening, assault Phumman causing him the injuries that have been described above, as a result of which Phumman died some 24 hours or so later.

The learned Sessions Judge further on says :

> I am of opinion that it is possible that he (the appellant) did not intend to cause the death of Phumman at the time of inflicting those injuries upon the latter ; but after considering the general circumstances, the time that had elapsed (at least about the couple of hours or so) since that dispute or quarrel for the above reason with the deceased, and in view of the injuries actually inflicted by him with a dang on the deceased, I hold that the facts in this case are not such as to take the act of the accused out of the purview of S. 302, Indian Penal Code.
>
> There was no excuse for such act and the blows given by him with a dang (two being about the head of Phumman and another a violent blow on the side of the chest, sufficiently violent to rupture the liver in two places), were such as the accused must have known) were quite sufficient to, and probably would cause the death of the person assaulted. The act of the accused certainly does not come within any of the exceptions referred to in S. 300, Indian Penal Code.

Having expressed these views the learned Sessions Judge then convicts the appellant under S. 302, Indian Penal Code, and sentences him to death. Nowhere, throughout his judgment, does the learned Sessions Judge find that the appellant intended to cause the death of the deceased, or that he intended to cause such injuries as were likely to result in death or that he intended to cause such injuries as would in the ordinary course of nature cause death. In fact, as I have pointed out, he has expressly found in agreement with the assessors, that the appellant did not intend to cause death. Upon his findings the only legal conviction which could be had would be under S. 304, Part II, of the Indian Penal Code,

In view of the conclusions upon the evidence arrived at by the learned Sessions Judge I do not think it is possible to support the conviction under S. 302, Indian Penal Code. The learned Sessions Judge who has tried the case with great care and has expressed his views as to the reliability of individual witnesses, has in the end come to a finding that there was no intent to cause death in inflicting the injuries in question : and we would not be justified, sitting as an appellate Court, in holding that on this question of intention there was not at least a reasonable doubt. Under these circumstances I feel bound to accept this appeal to the extent of setting aside the conviction and sentence imposed under S. 302, Indian Penal Code, altering the conviction to one under S. 304, Part II ; and reducing the sentence to one of ten year's rigorous imprisonment.

Tek Chand, J.—I agree.

D.D. *Conviction altered.*

A. I. R. 1927 Lahore 527

ZAFAR ALI, J.

Firm Dittu Ram Narsingh Das — Judgment-debtor—Appellant.

v.

Firm Dal Chand Tulsi Ram—Decree-holder—Respondent.

Misc. First Appeal No. 2401 of 1926, Decided on 7th March 1927, from the order of the Senior Sub-J., Ferozepur, D/- 26th June 1926.

Civil P. C., O. 41, R. 5—Appeal.

Order rejecting security and ordering execution to continue is not appealable : 41 *Cal.* 160, *Foll.* ; *A. I. R.* 1924 *Lah.* 602 *and* 631 *and A. I. R.* 1924 *Lah.* 671 and *A. I. R.* 1925 *Lah.* 69, *not Foll.* [P 528 C 2]

Badri Das and *Jagan Nath Bhandari* —for Appellant.

Moti Sagar—for Respondent.

Judgment.—This is an appeal against an order rejecting a security bond furnished by a judgment-debtor for stay of execution. Mr. Moti Sagar, who appears on behalf of the decree-holder respondent, objects that the appeal does not lie. The security was offered in compliance with an order of Mr. Justice Jai Lal which ran thus :

That within fifteen days from today the judgment-debtor will present to the Senior Subordinate Judge a security bond under which property of the value of Rs. 2,50,000 shall be hypothecated by way of security for the due performance by the judgment-debtor of any decree that may eventually be passed in the case, that the Senior Subordinate Judge shall within one month from the date of the presentation of the security bond enquire into the sufficiency or otherwise of the security and give his decision within the same period. If the security bond is accepted by the Senior Subordinate Judge, the attachment will be removed ; otherwise it will continue.

The judgment-debtor put in a security bond within the prescribed period, but the Senior Subordinate Judge after making an inquiry, came to the conclusion that it was insufficient and then proceeded to execute the decree. Mt. Badri Das who appears on behalf of the appellant contends that the order rejecting the security bond is tantamount to an order not staying execution of the decree and he further contends that an order relating to stay of execution is appealable. In support of his contentions he cites *A. I. R.* 1924 *Lahore*, pages 631 and 602, *Phaggumal Mata Din* v. *Benarsi Das* (1) and *Shankar Das* v. *Kasturi Lal* (2), which are rulings of this Court by Judges sitting in Chambers and the question involved in every one of them related to stay of execution. It was held therein that an order not staying sale of property in execution of a decree was appealable. I am of opinion that the order appealed against in the present case does not relate to stay of execution and there is no authority to show that it does. On the other hand *Saraswati Barmonya* v. *Moti Barmonya* (3) which is relied upon by Mr. Moti Sagar, though a converse case, is strictly in point. In that case also the order of the High Court was materially to the same effect as the order of Mr. Justice Jai Lal in the present case, and the judgment-debtor having furnished security in compliance therewith the executing Court accepted it and stayed execution. It was held that no appeal lay against the order accepting the security. This ruling applies to the present case also because the principle is the same whether a security bond is accepted or rejected. Mr. Badri Das entered into a long discussion on the effect of the omission of the words " or to the stay of execution thereof " from S. 47 of the Civil Procedure Code which occurred in S. 244 of the Code of 1882, and contended that, in spite of the omission of the said words, S. 47 is applicable to orders relating to stay of execution, on that point the High Courts having held conflicting views as pointed out by Mulla at page 133 of his Code of Civil Procedure. But, as pointed out by the Allahabad and other High Courts, it is not every order passed in execution proceedings that is made appealable by S. 47.

It will not be out of place to reproduce here the concluding portion of the judgment of the Calcutta High Court in *Saraswati Barmonya* v. *Moti Barmonya* (3) :

It appears to us to be clearly settled that every order passed in relation to execution need not necessarily be deemed to come within the scope of the definition in S. 2 (2) of the Civil Procedure Code. The order assailed in the present case determines no rights of the parties that are in controversy. It was this Court that directed that the proceedings should be stayed ; and this Court attached the condition that security should be given to the satisfaction of the Court below. That security has been given and the Court below is satisfied with it. It does not appear to us that this order can possibly be regarded as an order determining any rights of the parties, or can be treated as a decree and be the subject of an appeal.

These remarks apply mutatis mutandis to the present case. I therefore hold that the appeal does not lie and dismiss it with costs.

D.D. *Appeal dismissed.*

(1) A. I. R. 1924 Lah. 671.
(2) A. I. R. 1925 Lah. 69.
(3) [1914] 41 Cal. 160=20 I.-C. 72=17 C. W. N. 1240.

A. I. R. 1927 Lahore 529

TEK CHAND, J.

Hazara Singh and *others*—Defendants—Appellants.

v.

Mehnga and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2515 of 1926, Decided on 9th March 1927, from a decree of the Dist. J., Jullunder, D/- 9th June 1926.

(a) *Custom (Punjab)—Alienation by elder brother to discharge father's debts charged on property is binding on minor brother.*

A sale of a portion of minor's estate by his elder brother, who was his de facto guardian to discharge debts, due from the minor's father and charged upon the estate, cannot be said to be without authority : 73 *P. R.* 1890, *Rel. on.* 119 *P. R.* 1919 *Dist.* [P 529 C 2]

(b) *Custom (Punjab)—Alienation—Only small portion not for necessity—Sale is upheld.*

Where, out of the total consideration for a sale only a small portion is found not for necessity, the sale should be upheld ; *A. I. R.* 1927 *P. C.* 37, *Foll.* [P 530 C 1]

Faqir Chand—for Appellants.

J. L. Kapur for *Badri Das*—for Respondents.

Judgment.—On the 15th March, 1916, Bhana, son of Shaman, major, for self and as guardian of his younger brother Mehnga, minor, sold 30 kanals 17 marlas of land (which on re-measurement has been fonnd to be 30 kanals [4 marlas) to Wazira, father of the defendants-appellants for Rs. 900. On the 15th March 1922, Mehnga, having attained majority, instituted a suit claiming, (*a*) a declaration with regard to Bhana's one-half share of the land alleging that the sale was without cosideration and necessity and had been effected to injure the plaintiff's reversionary rights and (*b*) possession of the plaintiff's own half-share which, it was alleged Bhana had sold without authority.

The Subordinate Judge found that consideration and necessity for the sale were proved but in spite of his finding he passed a decree in favour of the plaintiff for both the reliefs prayed for, subject to payment of Rs. 450 by the plaintiff on the death of Bhana. On appeal by the vendees the learned District Judge quite rightly set aside the declaration that had been granted as regards Bhana's one-half share, but affirmed the decree for possession qua the plaintiff's own one-half share, disposing of this part of the case in one sentence as follows :

> As regards the plaintiff's own share [*Thaman Singh* v. *Santa* (1)] is a clear authority that defendant 1 had no right to sell his brother's share even to pay debts which were due from the father.

The defendants who are the sons of the vendee have preferred a second appeal to this Court and pray that the suit should have been dismissed in its entirety.

As the judgment of the learned District Judge on this point is extremely meagre it is necessary to give in some detail the relevant facts. The consideration for the sale-deeds is as follows :

1. Rs. 380, payable to Narain Singh previous mortgagee who was in possession of 22 kanals and 12 marlas of land under mortgage-deeds dated the 23rd February 1909, 3rd March 1909, and 21st May 1910, exeuted by Shaman, the father of Bhana, and Mehnga, plaintiff and by Jiwan, their uncle.
2. Rs 400, payable to Nand Lal, prior creditor as follows :
   (a) Rs. 303-3-6 under decree dated 1st March 1913 and 20th July 1914, passed in favour of Nand Lal against Bhana and Mehnga recoverable from the estate of their father Shaman.
   (b) Rs. 99 due to Nand Lal aforesaid under mortgage-deed dated the 7th February 1906 executed by Shaman and Jiwan in his favour ;
3. Rs. 25, balance due on another decree obtained by Nand Lal against Shaman but not charged on the estate.
4. Rs. 80 payable to Jassa, goldsmith, on the bond dated the 15th November 1910, executed by Shaman and Jiwan.
5. Rs. 15 expenses of registration of the sale-deed.

Total Rs. 900.

It will be seen that items No. 1 and 2, aggregating Rs. 780, where a charge on the estate of Shaman which had been created either by himself in his lifetime or by decrees passed after his death against his estate. One-half of this sum was legally recoverable from the estate of Shaman, which had come into the hands of the plaintiff. A sale of a portion of the plaintiff's estate by his elder brother, who was his de facto if not de jure guardian, to discharge such debts, cannot be said to be without authority. A comparison of the properties sold with those which had been mortgaged by Shaman and Jiwan shows that by the sale in question a field on *chahi* and 6 kanals in area, which was under mortgage with one Narain Singh and also a house which had been mortgaged with possession to

(1) [1919] 119 P. R. 1919=53 I. C. 457.

Nand Lal were both redeemed and were got unencumbered for the benefit of the two brothers. This was undoubtedly an act of good management on the part of the guardian and was obviously beneficial to the minor.

The learned District Judge has entirely overlooked these important facts. He has relied on *Thamman Singh* v. *Santa* (1), but that case is clearly distinguishable. There the debts due by the father of the minor plaintiff had not been made a charge on the father's estate in the hands of the plaintiff and, therefore, under the authority of the Full Bench *Jagdip Singh* v. *Narain Singh* (2), the ancestral estate could not after the father's death be made liable for it.

It is, no doubt, true that items Nos. 3 and 4 aggregating Rs. 105 though due by the father of the plaintiff had not been made a charge on his estate in his lifetime, but one-half of this sum, comes to Rs. 52-8-0 only and forms a very small portion of the total consideration of Rs. 450, and the sale cannot be set aside if necessity or benefit cannot be strictly proved for it. This principle has been laid down in a large number of rulings of the Lahore High Court and the Punjab Chief Court and has been recently affirmed in the judgment of their Lordships of the Privy Council reported as *Sri Krishn Das* v. *Nathu Ram* (3).

For the foregoing reasons I hold that the alienation was for the benefit of the plaintiff and that his elder brother Bhana was competent to make it see *Mastu* v. *Nand Lal* (4). I accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

D.D. *Appeal accepted.*

(2) [1913] 4 P. R. 1913=173 P. L. R. 1912=15 I. C. 866=160 P. W. R. 1912.
(3) A. I. R. 1927 P. C. 37=49 All. 149=54 I A. 79 (P. C.)
(4) [1890] 73 P. R. 1890.

A. I. R. 1927 Lahore 530

JAI LAL, J.

Shanti Sarup—Plaintiff—Appellant.

v.

Lal Chand—Defendant—Respondent.

Second Appeal No. 2520 of 1926, Decided on 22nd April 1927, from the order of the Dist. J., Sialkot, D/- 13th May 1926.

(a) *Civil P. C., S.* 100—*Question of fact.*

The finding as to the nature of the consideration is one of fact and cannot be disturbed in second appeal. [P 531 C 1]

(b) *Contract Act, S.* 23—*Withdrawal of complaint not a consideration for pro-note though withdrawal is due to execution of pro-note—Pro-note is valid.*

Where the withdrawal of the complaint is due to the debtor having executed a pronote in favour of the creditor, but such withdrawal is not the consideration of the pronote, the pronote is not invalid: 31 *P. R.* 1911, *Foll.*; 39 *P. R.* 1914, *Dist.*; *A. I. R.* 1926 *Cal.* 59, *Ref.* [P 533 C 2]

Shamair Chand—for Appellant.

M. L. Puri—for Respondent.

Judgment.—This second appeal is directed against the decree of the District Judge of Sialkot, who, agreeing with the Subordinate Judge, dismissed the plaintiff's suit for recovery of Rs. 745-11-6, principal and interest-claimed to be due from the defendant on a pro-note executed by him in favour of the former on the 22nd of September 1922. It appears, that the defendant representing himself to be a member of a company which it was alleged, could secure the agency for the sale of cigarettes sold or manufactured by the Khatar Pal Company of Rangoon and Burma, received a sum of Rs. 500 from the plaintiff Shanti Sarup on the 1st of October 1921 and undertook to secure the agency for him. The sum of Rs. 500 was paid by the plaintiff to the defendant by way of security for the due performance of the agency business.

It appears that the plaintiff considered himself aggrieved by the manner in which he was treated in the matter of the agency, and, consequently instituted a complaint under S. 420 of the Indian Penal Code against the defendant Lal Chand and a warrant for the arrest of the latter was issued for the 22nd of September 1922. On that date the pronote in suit for Rs. 450 was executed by Lal Chand in favour of Shanti Sarup who then appeared before the Magistrate and stated that his witnesses had been won over by the accused and therefore he did not desire to proceed with the complaint which was consequently dismissed and the accused discharged.

On the present suit being instituted the defendant pleaded that he had executed the pro-note under undue influence, that as a result of the settlement of the agency accounts Rs. 450 was due from

him to the plaintiff which he had already paid to him, but the latter dishonestly denied the receipt thereof and instituted criminal proceedings against him. It was, therefore, alleged that the pro-note was without consideration and was opposed to public policy having been executed in order to stifle a non-compoundable offence and was, therefore, void and unenforceable in the Courts.

The Court below has held that the consideration for the pro-note in suit was illegal as the document "was executed in consideration of the dropping of the criminal prosecution" of the defendant. In coming to this conclusion the District Judge has relied on certain authorities the principal of which I will presently examine but it appears to me that the learned Judge has in arriving at his conclusions, failed to distinguish between the consideration for the contract and the motive for entering into the contract.

At this stage I will shortly dispose of the contention of the counsel for the respondent that the finding of the District Judge as to the nature of the consideration is one of fact and cannot be disturbed in this second appeal. As I have already stated the learned Judge has fallen into a confusion as to the meaning of the expression "consideration." He has merely given a finding that the consideration of the pro-note was the dropping of the criminal prosecution. He has not given any clear finding as to the facts on which this conclusion is based. In my opinion this conclusion under the circumstances of this case, is one of law and not of fact, and I am therefore entitled to examine it on this appeal.

I do not think it necessary for me to discuss the large number of authorities that were cited at the Bar in support of the respective contentions of the parties but I will examine the more important ones.

Counsel for the appellant relied upon a judgment of a Judge in Chambers of this Court in Civil Revision No. 208 of 1924, *Ram Gopal* v. *Ganeshi Lal* (1). In that case the defendant executed certain bonds in favour of the plaintiff and hypothecated some property as security for the debt, but afterwards disposed of the pledged property. The plaintiff, thereupon, instituted criminal preceedings under S. 406, Indian Penal Code and a warrant of arrest was issued against the defendant who thereupen executed a bond in favour of the plaintiff and the criminal proceedings were in consequence, withdrawn against him. On a suit by the plaintiff on the bond executed under the above circumstances the plea of the defendant was that the liability could not be enforced as the bond was illegal having been executed in consideration of the withdrawal of a a non-compoundable criminal offence. Mr. Justice Scott-Smith held that the bond was enforceable and was not void for want of legal consideration. In doing so he followed *Jai Kumar* v. *Gouri Nath* (2), where it was held that a threat to prosecute does not itself vitiate a contract if otherwise it is supported by a just and bona fide pre-existing liability, The learned Judge summed up the case as follows:

> Here there was good consideration for the defendant 1 to pass the bond sued upon, and the mere fact that the plaintiff on recovering the bond gave up the criminal prosecution against his debtor does not appear to me to invalidate the agreement to pay a debt which was just due.

This case was followed by another Judge in Chambers in this Court in *The firm Harjas Rai Arjan Das* v. *Tek Chand* (3).

The next case relied by counsel for the appellant is *Dwijendra Nath Mullick* v. *Gopiram Govindaram* (4). The defendant in that case was in the employ of the plaintiff firm and was charged with criminal breach of trust in respect of a cheque for Rs. 30,000. During the pendency of the criminal proceedings he executed a mortgage deed for a portion of the amount concerned in favour of the plaintiff with a view to the withdrawal of the prosecution, and thereupon the prosecution was, as a matter of fact, withdrawn. The plaintiff having informed the Deputy Commissioner of the Police and the Chief Presidency Magistrate of the fact of their having received satisfaction of their claim in the manner already mentioned the complaint was allowed to be withdrawn and the accused was discharged. It also appears that it was agreed between the parties that the cash to be paid by the accused and the mortgage bond to be executed by him

(1) A. I. R. 1925 Lah. 364.

(2) [1906] 28 All. 718=3 A. L. J. 506=(1906) A. W. N. 212.

(3) A. I. R. 1927 Lah. 465.

(4) A. I. R. 1926 Cal. 59=53 Cal. 51.

would remain with a third party and that the same would be handed over to the plaintiffs, the complainants, after the withdrawal of the criminal proceedings. Whether this was done or not does not appear from the report of the case, but some cash was actually paid to the complainant and a mortgage bond was duly executed in their favour. There were disputes about the registration of the mortgage deed afterwards, but it is not necessary for me to state them in detail here. On a suit being filed for enforcing of the mortgage a plea was raised on behalf of the defendant that the mortgage deed was unenforceable in view of the provisions of S. 23 of the Indian Contract Act and that the contract was vitiated for want of consent. The learned Judge declined to give effect to this plea and held that the mortgage was enforceable. The following passage from the judgment of Mukerjee, J., may be quoted with advantage:

> Now, I am prepared to concede that the defendants would not have parted with a sum of Rs. 15,000 or completed the execution of the bond for Rs. 5,000 unless and until the criminal case against defendant 1 was withdrawn But I am not at all sure that the consideration or object of the agreement was the withdrawal of the said case. The motive for the execution of the bond and the payment of the money was the withdrawal, but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this distinction in view all the more in a case where there is a civil liability already existing which is discharged or remitted by the agreement.

and later:

> If the principle of the doctrine be that you (the accused) shall not make a trade of felony then it is difficult to see how the plaintiff can be said to have acted improperly in entering into the agreement to get what they were justly entitled to. I am therefore not prepared to say that upon the peculiar facts of the present case the contract between the present parties was one opposed to public policy, or that it in any way tended to prejudice the State or hamper the administration of justice.

Counsel for the respondent, on the other hand, principally relied upon *Ghulam Mohi-ud-Din* v. *Deoki Nand* (5). In that case the plaintiff instituted a criminal prosecution under S. 406, I.P.C. against the defendant. When the prosecution was still pending a pronote was executed by the accused in favour of the plaintiff, the complainant, and the criminal case was withdrawn. It appears that the pronote was not handed over to the complainant till after the prosecution had been withdrawn and the withdrawal thereof accepted by the Magistrate. It was also found that there was distinct agreement to the effect that the promissory note would not be handed over to the plaintiff unless the appellants were discharged by the Magistrate. The learned Judges held that the pronote executed under the circumstances mentioned above could not be enforced; that the consideration for it was clearly an agreement to compound an offence which by law was not compoundable and that it was, therefore, unlawful within the meaning of S. 23 of the Indian Contract Act. The learned Judge considered a previous judgment of the Chief Court of the Punjab reported as *Karm Chand* v. *Mt. Basant Kaur* (6), and distinguished the same in the following terms:

> In *Karm Chand* v. *Mt. Basant Kaur* (6) it would appear from the judgment that S. Kalwant Singh who executed the mortgage deed there sued upon had executed and handed over the deed to the mortgagee before the criminal prosecution launched by the latter against him was terminated by the complaint being dismissed in default. The completion of the contract of mortgage by the delivery of the deed to the mortgagee was not made contingent upon the complaint being dismissed or the mortgagor being discharged by the Magistrate; the mortgage was completed and the deed was handed over to the complainant independently of the result of the criminal prosecution, though the necessary consequence of the complainant being satisfied once the deed of mortgage was executed in his favour was that he did not appear in the Magistrate's Court and therefore the complaint was dismissed in default.

It is therefore to be observed that the Chief Court of the Punjab has made a distinction in cases where: (a) the liability under the document in suit is not made contingent upon the complaint being dismissed or withdrawn; and (b) where the document sued upon is expressly made to take effect only after the complaint is withdrawn and the accused discharged. In the latter case the document has been held to have been executed in consideration of the withdrawal of a non-compoundable criminal case and therefore unenforceable but not so in the former case where though the motive for the execution of the document has been held to be the withdrawal of a non-compoundable criminal case, the consideration has been

(5) [1914] 54 P. L. R. 1914=57 P. W. R. 1914=22 I. C. 393=39 P. R 1914.

(6) [1911] 31 P. R. 1911=192 P. L. R. 1911=11 I. C. 321=236 P. W. R. 1911.

held to be quite legal provided there was an enforceable pre-existing liability.

Counsel for the respondent also cited some authorities to show that where part of the consideration for a particular transaction is the withdrawal of a complaint in a non-compoundable criminal case the whole of such transaction is to be deemed to be void. Such authorities do not, in my opinion, appear to have any bearing on this case. Here there is no question of any part of the consideration being distinguishable from the rest, either the whole of the consideration is illegal or none at all.

Now, what are the facts to which the law as stated above is to be applied. The defendant admits that he owned Rs. 450 to the plaintiff but that he had paid it. The plaintiff-complainant distinctly denied the receipt of Rs. 450 and instituted a complaint against him under S. 420 of the Indian Penal Code. The defendant executed the pronote in suit and thereupon the complaint was withdrawn against him.

I may mention here that the learned District Judge has referred to the testimony of two witnesses, Ganda Singh and Arur Singh, produced by the defendant in support of his plea relating to the want of and illegality of consideration, but these witnesses give quite a different story to that given by the defendant himself. (His Lordship after considering evidence proceeded.) The evidence of these witnesses is clearly contradictory to each other and certainly does not support the plea of the defendant. Moreover their testimony does not lead to the inference, as held by the learned District Judge, that the pronote "was executed in consideration for the dropping of the criminal prosecution" in the sense in which the expression 'consideration' is used in S. 23 of the Indian Contract Act. I also hold that the receipt relied upon by the defendant does not establish that the liability under the pronote in suit was discharged. According to the plaintiff the original payment of Rs. 500 was made to the defendant in his capacity as a partner of the company and the receipt was executed by him in favour of the defendant as such partner when the pronote in suit was executed. That is to say the liability of the company was discharged and the accounts between the company and the plaintiff settled by the execution of the pronote in suit by the defendant who thereafter made himself personally liable in the amount due. This I hold is a correct statement of facts.

It is thus to be observed that the withdrawal of the complaint was no doubt due to the defendant having executed the pronote in suit in favour of the plaintiff but such withdrawal was not the consideration of the pronote. This pronote was not left in possession of a third party to be handed over to the plaintiff after the withdrawal of the complaint nor was it expressly agreed that the liability thereunder would not arise till after the complaint had been withdrawn. The case, therefore is governed by *Karm Chand* v. *Mt. Basant Kaur* (6) rather than *Ghulam Mohi-ud-din* v. *Deoki Nand* (5). If, however, the view that was taken in *Dwijendra Nath Mullick* v. *Gopiram Govindaram* (4) is correct, and the later authorities of this Court seem to follow that view, but it is not necessary for me to express a definite opinion on the point, then the plaintiff is entitled to a decree in any case.

The next question that I have to consider is this: whether the plaintiff has established a pre-existing civil liability of the defendant to entitle him to a decree or whether the case should be sent back to the trial Court to ascertain if such liability in favour of the plaintiff existed. It is to be observed that the defendant admitted in his written statements that Rs. 450 were due from him to the plaintiff and that he had repaid the same. There is no proof in support of the allegation as to repayment. The liability having been admitted the burden of proof of its discharge was on the defendant and he has failed to discharge it. It must, therefore, be presumed, in the absence of evidence to the contrary, that the pronote was for consideration which is the pre-existing liability of the defendant for Rs. 450. In my opinion it is not necessary, having regard to the fact that the parties produced the whole of their evidence in the trial Court, to remand the case for further evidence on the plea of the defendant that he had repaid Rs. 450, admitted to be due from him to the plaintiff.

I accept this appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs throughout.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 534 (1)

ZAFAR ALI, J.

Mt. Har Kaur and *others*—Plaintiffs—Appellants.

v.

Kharga and *others*—Defendants—Respondents.

Misc. Second Appeal No. 593 of 1926, Decided on 7th April 1927, from the order of the Dist. J., Hissar, D/- 23rd October 1925.

Occupancy holding—Collaterals entering into possession after last male holder—They must prove their right to hold possession as against landlord.

Even where the collaterals of an occupancy tenant enter into possession and are entered in the jamabandi as occupancy tenants they have still to establish that they were entitled to succeed to the holding and rightly took possession thereof. The landlord cannot be called upon to prove the negative that the land was not occupied by the common ancestor. From their having taken possession of the land it cannot be inferred that they (collaterals) were entitled to do so. [P. 534, C. 2]

Nanwa Mal—for Appellants.

Shamair Chand—for Respondents.

Judgment.—After the death of Mt. Gulab Kaur, the widow of Ram Rattan, the last male tenant of the occupancy holding in dispute, his collaterals took possession of it, and it was accordingly mutated in their names and the mutation order was embodied in the jamabandi that was prepared later. The landlords then sued for possession stating that as the common ancestor of Ram Rattan and his collaterals had never occupied the land they (collaterals) had no right to succeed to it. The trial Court placed the onus of proving that the land had descended from the common ancestor of the defendants (collaterals) and found that they had discharged it. On appeal by the plaintiffs the District Judge held that it was upon them (plaintiffs) to establish that the occupancy holding had not descended from the common ancestor because the defendants were in possession and were shown in the jamabandi as occupancy tenants. Thus shifting the onus on to the plaintiffs the District Judge remanded the case to enable them to produce evidence to discharge it. They appeal against this order of remand.

It is clear that the view taken by the lower appellate Court is erroneous. Though the collaterals are in possession and are entered in the jamabandi as occupancy tenants they have still to establish that they were entitled to succeed to the holding and rightly took possession thereof. The plaintiffs cannot be called upon to prove the negative that the land was not occupied by the common ancestor. From their having taken possession of the land it cannot be inferred that they (collaterals) were entitled to do so. I, therefore, accept the appeal, set aside the order of remand and send back the case to the District Judge to be decided on the record as it stands. Court-fee on the memo. of appeal will be refunded; other costs will abide the event. The order will be the same in the connected identical Appeals Nos. 594 to 596 of 1926.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 534 (2)

AGHA HAIDAR, J.

Jiwan Ram and *others*—Plaintiffs—Appellants.

v.

Hussain Bakhsh and *others*—Defendants—Respondents.

Second Appeal No. 355 of 1927, Decided on 27th April 1927.

(a) *Tort—Trespass—Infringement of legal right—Actual damage need not be proved.*

If a person has got any legal right in any property he is entitled to claim relief if his rights are infringed by any co-sharers or outsiders although he does not suffer any damage or inconvenience by the infringement during his absence. [P. 535, C. 2]

(b) *Practice—New plea.*

A party should not be allowed to make out a new case in appeal, if it involves questions of fact for which no evidence has been given. [P. 535, C. 2]

(c) *Adverse possession—Court cannot force owner to accept compensation.*

No Court can force a party to part with his property for a money compensation to his adversary who has taken unlawful possession of it by erecting his building on it. [P. 535, C. 2]

Fakir Chand—for Appellants.

Judgment.—This is a plaintiffs' appeal arising out of a suit for possession of half the land in dispute and also for payment of Rs. 15 as compensation for the price of building materials alleged to have been misappropriated by defendants 1 to 4 and also for the demolition of certain buildings. The plaint is not very clearly drafted 'and the written statement is also not a very lucid document. The plaintiffs alleged that they and defendants 5 to 7 were the owners of the land and that defendants 1 to 4 purchased half the land from defendants 5 to 7 and that afterwards the defendants demolished the old building which was standing on the land and put up a new building on it. The plaintiffs further alleged that they lived somewhere in the Barh District and this building had been put up by defendants 1 to 4 unlawfully after taking possession of the land, in the plaintiffs' absence. They further pleaded that defendants 5 to 7 had no right to sell the joint property.

The defendants 1 to 4 pleaded that the plaintiffs and defendants 5 to 7 have conveyed to them by way of an oral sale the whole of the land in suit and, therefore, the plaintiffs had no right to bring this action and then in somewhat vague manner suggested that as the plaintiffs themselves helped them in laying the foundations of the new structures the plaintiffs have got no right to bring the suit.

The trial Court gave a decree in favour of the plaintiffs for half of the site in dispute with costs and also ordered defendants 1 to 4 to remove their building materials within three months from the date of the order. The defendants went in appeal to the learned District Judge and in their memorandum of appeal raised only three grounds. Ground No. 1 repeats the plea, which was taken by the defendants in the trial Court and alleged that the plaintiffs sold the land in suit to the defendants and, therefore, they had no locus standi. They also pleaded that the plaintiffs were estopped from maintaining the suit and in the third and the last ground they urged that the plaintiffs were not entitled to a decree for possession by demolition of the building and that, on the other hand, a pecuniary compensation would meet the ends of justice. The learned Judge of the lower appellate Court after summarizing the findings of the learned Judge of the trial Court proceeded to observe that the only point really urged before him was that the plaintiffs have suffered no damage and that the defendants are willing to pay reasonable monetary compensation instead of being called upon to destroy the new building.

Now, the findings of the learned District Judge on both these points are erroneous. He says that the plaintiffs on their own allegations were living away from the village and, therefore, they could not have sustained any damage by erection of the new building. This is not correct. If a person has got any legal right in any property he is entitled to claim relief if his rights are infringed by any co-sharers or outsiders although he does not suffer any damage or inconvenience by the infringement during his absence. On the second point also he is wrong when he says that the offer of the defendants that monetary compensation might be awarded is a reasonable one. In the first place this plea was not taken either in the pleadings or at any stage while the suit was pending in the trial Court and a party should not be allowed to make out a new case in appeal: *Shivabasava* v. *Sangappa* (1). Moreover, this was a plea which involved questions of fact which could only be decided on a consideration of proper evidence and it is apparent that no evidence was led on this point as it was taken up by the learned Judge in appeal for the first time. In the second place, even if this point had properly been taken by the defendants at the right moment it would have been open to the legal objection that no Court can force a party to part with his property for a money compensation to his adversary who has taken unlawful possession of it by erecting his building on it. On both these points I set aside the judgment of the lower appellate Court.

It appears, however, that the plea of acquiescence was taken in the trial Court and the learned Judge of the lower appellate Court has also considered it. Now, in answer to the argument put forward by the plaintiffs that they did not know of the erection of the building

(1) [1905] 29 Bom. 1=31 I. A. 154=6 Bom. L. R. 770=8 Sar. 720 (P. C.).

because they happened to be away, the learned Judge has not arrived at a finding whether this statement of the plaintiffs was correct or not. He simply observes that they did not live in the village and it cannot be said that they sustained any damage by the erection of the building. He further says that they took no steps to stop it and tacitly acquiesced in it and now demand its demolition. His finding on this point is meagre and unsatisfactory. I invite the attention of the learned Judge to the leading case on the subject *Beni Ram* v. *Kundan Lal* (2). I therefore set aside the judgment of the learned District Judge on the main point which had been urged before him and on which he had recorded a finding, and I remand the case to him to raise proper issues both of fact and law having regard to the observations of their Lordships of the Privy Council in the case noted above on the question of acquiescence Costs here and thereafter would abide the result.

D.D. *Case remanded.*

(2) [1899] 21 All. 496=26 I. A. 58=7 Sar 523 (P. C.).

A. I. R. 1927 Lahore 536 (1)

SHADI LAL, C. J., AND JAI LAL, J.

Sangat Singh and *another*—Defendants—Appellants.

v.

Ishar Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 708 of 1923, Decided on 21st April 1927, from the decree of the Addl. Dist. J., Hoshiarpur, D/- 6th March 1923.

Custom (Punjab)—Alienation—Ancestral property—Common ancestor holding as occupancy tenant—Last holder acquiring proprietary rights—Property is not ancestral.

Where the common ancestor occupied the lands as an occupancy tenant and the rights of the landlord were purchased by the last male holder, the occupancy rights merged in the proprietary rights and the property cannot then be treated to be ancestral property. [P 536 C 2]

Badri Das and *J. L. Kapur* for Appellants.

Judgment.—The dispute in this appeal relates to a moiety of the estate left by one Ran Singh, whose relationship with the contesting defendants is shown in the pedigree-table set out in the judgment of the lower appellate Court. It is beyond dispute that Ran Singh's first cousin Maya Singh was entitled to succeed to one-half of the estate and that he transferred his share of the inheritance to the plaintiffs.

Mr. Badri Das, for the contesting defendants contends that Maya Singh had renounced the world, and that he was consequently not entitled to inherit the property of Ran Singh. On the question the Courts below have recorded their opinion against the appellants and we see no reason, whatsoever, to dissent from that conclusion. Nor do we find any evidence in support of the contention that Ran Singh was entitled to only one-fourth and not to one-half of the house in dispute.

With regard to the land, it is urged that it is ancestral qua the contesting defendants, and that the sale effected by Maya Singh in favour of the plaintiffs should not affect the reversionary rights of the defendants after the death of the vendor. The history of this land is set out in the judgment of the lower appellate Court at page 9 of the printed paper-book, and we find that, though the common ancestor Jassa occupied the land as an occupancy tenant, the rights of the landlord were purchased by Ran Singh himself. The occupancy rights, therefore, merged in the proprietary rights, and the learned counsel for the appellants has not been able to cite to us any authority in support of his contention that the property should, in these circumstances, be treated to be ancestral property.

We accordingly affirm the decision of the lower appellate Court and dismiss the appeal.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 536 (2)

HARRISON AND DALIP SINGH, JJ.

Diala Ram—Plaintiff—Appellant.

v.

Sarga and *others*—Defendants—Respondents.

First Appeal No. 2444 of 1922, Decided on 25th April 1927.

(a) *Punjab Chief Court Circulars, Vol. 1, page 99—Undue influence must be found for circular to apply.*

Before any reduction can be allowed on the rate of interest under the Punjab Chief Court Circulars, Vol. I, page 99, undue influence must be proved to have been exercised. [P 537, C 1]

(b) *Contract Act, S. 16, Ill. (c)—Defendant renewing debt on unconscionable Terms—Plaintiff, money-lender of his village—Presumption of undue influence arises.*

When the defendant was in debt to the plaintiff a money-lender of his village, and contracted a fresh loan on unconscionable terms :

Held : that undue influence must be presumed. [P 537, C 2]

Jagan Nath and *Lal Chand Malhotra* —for Appellant.

Hargopal and *S. R. Laul*—for Respondents.

Judgment.—The defendants in this case executed a bond in favour of the plaintiff acknowledging the receipt of Rs. 67 in cash and promising to pay interest at the rate of 18¾ per cent. thereon. He also acknowledged the existence of an old grain account carrying interest at the rate of 37½ per cent. per annum, and made a promise to continue this rate of interest as also the payment of four *trangars* of *bhoosa* as additional interest. The plaintiff sues to recover the grain and *bhoosa* only, and has been given a decree in which interest has been calculated at 18¾ per cent. on the strength of Chief Court Circulars, Vol. I, page 99. Instalments have been fixed and future interest has been allowed at the rate of 6 per cent. The plaintiff appeals and claims the full rate of interest entered in the bond and also the conversion of the grain into cash at the date of suit as against the date immediately following the execution of the bond.

So far as the first point is concerned the passage in the circular does not give the extensive power which the Senior Subordinate Judge appears to think it does, and before any reduction can be allowed on the rate of interest undue influence must be held to have been exercised. Such undue influence was pleaded but no issue was framed in so many words and no decision has been given regarding it. The defendants-respondents contend that Ill. (c) to S. 16, Contract Act governs the case. In our opinion it does govern the case to this extent that the history of the parties as disclosed by the evidence and the constant renewal of the loan at this very high rate of compound interest, does establish a presumption which the plaintiff has to rebut. It has been laid down by the Privy Council that by itself a high rate of interest raises no such presumption but here, in our opinion, all the circumstances exist which are contemplated in Ill. (c). The defendants, or rather their father, was in debt to the plaintiff and contracted a fresh loan on terms which appear to us to be unconscionable. The only point on which there could possibly be any doubt is whether the plaintiff in this case comes within the definition of "the money-lender of his village" (i. e. the defendant's village). He is a money-lender of the village. The relationship as established, being that he was the financier of the defendant who was naturally not in a position to go elsewhere for money. We are of opinion that he should be held to be "the money-lender of his village" in the sense in which the words are used in the illustration. A presumption, therefore, exists and it is for the plaintiff to rebut it. He must, however, have an opportunity to do so. We, therefore, frame the additional issue :

Did the plaintiff not exercise undue influence over the father of the defendants and thereby induce him to execute Ex. P-1.

We remand the case for the taking of evidence and the decision of this issue under O. 41, R. 25. The trial Court will try this issue and return the evidence, together with its findings thereon and the reasons therefor, on or before the 1st October 1927.

G.B. *Case remanded.*

A. I. R. 1927 Lahore 537

AGHA HAIDAR, J.

Karam Chand Madan & Sons—Defendants—Appellants.

v.

Dunlop Rubber Co., Ltd.—Plaintiff—Respondent.

Misc. First Appeal No. 497 of 1927, Decided on 27th April 1927, from an order of the 1st Cl. Sub-J., Lahore, D/- 25th February 1927.

Civil P. C;, O., 21, *R.* 2—*Oral agreement not acted up cannot bar execution.*

An oral agreement which has not yet been performed by either party cannot successfully be set up in order to prevent a decree-holder from proceeding with the execution of the decree: *A. I. R.* 1922 *All.* 13, *Foll.* [P 538.C 2]

Ram Lal Anand—for Appellants.

Mackay and *Bhagat Ishar Das*— for Respondent.

Judgment.—This is a judgment-debtor's appeal. The plaintiff obtained a money-decree in the Court of the learned Subordinate Judge Delhi on the 12th of April 1926. The decree, was subsequently transferred to the Court of the Subordinate Judge, First Class, Lahore. On the 3rd June 1926, an application was made on behalf of the decree-holder for the execution of his decree and in pursuance of that application a warrant of attachment of the property belonging to the judgment-debtor was issued on the 15th June 1926. On the 3rd July 1926, the judgment-debtor put in an application in which he referred to the terms of some oral arrangement which it is alleged was arrived at between the decree-holder and the judgment-debtor. The Court, after the perusal of this application, made an order that the decree-holder should come and file his objection, if any, to this application. On the 12th of July 1926, the decree-holder, in para. 3. of his replication says that

> it is correct that Karam Chand did call upon me, but I did not enter into an arrangement as to the mode of satisfaction of the decree.

And again in para. 5 the decree-holder alleges that the agreement cannot be certified for the simple reason that it was never entered into. I notice that in his replication dated the 12th July 1926, no specific objection was taken by the decree-holder that even assuming that there was an oral agreement, that oral agreement cannot be relied upon by the judgment-debtor for the purpose of being recorded by way of adjustment of the decree. It appears, however, that at the time of the argument the point was definitely raised seeing that the learned Senior Subordinate Judge observes as follows:

> The following point for determination arises:
>
> (1) Is the application of the judgment-debtor for the alleged adjustment to be certified entertainable?

With the second point we are not concerned so far as this appeal goes. Hence the position is that neither party was taken by surprise and each of them knew the case that he had to meet. The learned Subordinate Judge, after hearing arguments, held that in view of the case decided by the Allahabad High Court, *Lachhmin Das* v. *Ram Nath* (1) it is not competent to the judgment-debtors to set up an oral agreement by way of the adjustment of the decree. Mr. Ram Lal Anand, on behalf of the judgment-debtor has cited a case of the Calcutta High Court in which the question has been dealt with in view of the provisions of Ss. 91 and 92, Evidence Act. For the purposes of deciding this case it is unnecessary for me to go into this question, although the judgment of Mr. Justice Walsh, in the case reported in *Lachhmin Das* v. *Ram Nath* (1), has dealt with this question. I base my decision upon the reasoning adopted by Mr. Justice Piggott in his judgment. His view is that an oral agreement which has not yet been performed by either party could not successfully be set up in order to prevent a decree-holder from proceeding with the execution of the de cree. The facts are precisely the same here. The judgment-debtor has not in any way performed or attempted to perform the terms of the alleged agreement on which he relies. He simply urged before the learned Judge of the Court below that the adjustment of the decree may be recorded on the basis of some oral evidence. The Court below was right in holding that such matters cannot be enquired into by an executing Court. Mr. Justice Walsh in his judgment very succinctly remarked:

> An inchoate contract which if completed would bar execution of a decree, cannot be pleaded as a bar to execution under O. 21, R. 2, and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution.

With this reasoning of the learned Judges of the Allahabad High Court I respectfully agree. As I have indicated above it is not necessary for me for the purposes of this case to go into the question involving the application of Ss. 91 and 92, Indian Evidence Act, to the facts of this case.

(1) A. I. R. 1922 All. 13=44 All. 258.

I would, therefore, under the circumstances dismiss the appeal and affirm the order of the Court below with costs. The order of stay of execution would necessarily, having regard to the order passed me, be vacated.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 539

HARRISON AND DALIP SINGH, JJ.

Umra and *others*—Defendants—Appellants.

v.

Mt. Durga Dei and *others*—Plaintiffs—Respondents.

First Appeal No. 2257 of 1922, Decided on 18th February 1927, from the decree of the Sr. Sub-J., Jullundur, D/- 16th May 1922

(a) *Custom—Punjab—Chopra Khatris of Jullundur—Custom excluding daughter from inheriting father's property, who was separate, in presence of collaterals, not proved.*

There is no custom among the Chopra Khatris of Jullundur District whereby daughters are excluded from inheriting the property of their father by collaterals even though the father was separate from collaterals. [P 540 C 1]

(b) *Custom—Punjab—High Class Hindus—Custom excluding daughter from inheriting—Onus is on party alleging it—Evidence Act, S. 101.*

In the case of High Class Hindus, where a custom is alleged to exist whereby daughter is excluded by collaterals from inheriting the property of her father who was separate, the onus of proving such a custom is on the party alleging it. [P 539 C 2]

Bidri Das and *Des Raj Sawhney*—for Appellants.

Fakir Chand and *Vasdev*—for Respondents.

Dalip Singh, J.—The pedigree table of the parties is printed at page 74 of the paper-book. The plaintiffs are the daughters of Megh Raj, deceased and they sued his brother Ganesh Das, and the widow of one Nundu, son of another brother of Megh Raj, namely Chint Ram, and Umra, grandson of Chint Ram, for possession of their father's property. They also claimed Rs. 400 from Ganesh Das alleging that the said sum had been deposited with Ganesh Das by their mother Mt. Ralli. Ganesh Das died during the pendency of the suit, and his sons were brought on the record as his legal reprsentatives. Various pleas were raised by the defendants, but the trial Court decreed the plaintiffs' suit except as to a half-share in the property shown as (d) in the plaint, namely a shop situate in Lal Bazar, Jullundur city, and as to the Rs. 400 alleged to have been deposited with Ganesh Das. Both sides have appealed.

So far as the appeal of Umra and others is concerned the sole point urged before us has been that by the custom of the Chopra Khatris of Jullundur District daughters are excluded from inheriting the property of their father by collaterals, even though the father was separate from the collaterals. The parties are high caste Hindus, and the onus admittedly lies heavily on the appellants to prove the special custom alleged. The evidence given in the case is oral. Various instances are given by the witnesses in which daughters were exsluded by the collaterals. It is also urged that a custom of this kind can be proved by the statements of persons of the brotherhood, who are in a position to know the facts and who have deposed to the existence of this custom. It is also contended that there is no rebuttal of the evidence given on behalf of the appellants, and that not a single instance has been proved by the other side in which a daughter succeeded to the exclusion of the collaterals. We have been through the instances adduced in support of the custom and we are satisfied that they are not sufficient to prove the alleged custom. In many of the cases it is not clear that the deceased father was separate from the collaterals who excluded the daughters. In others it seems that the daughters had no issue and were maintained by the collaterals. In such cases it is quite possible that the daughter was unwilling to assert her right to a life-interest in her father's property, and it does not follow that she could not have inherited the property of her separated father if she had chosen to assert that right instead of contesting herself with being maintained. We have been pressed by the argument that the respondents have been unable to produce a single instance of a daughter succeeding in the presence of collaterals. It must, however, be borne in mind that these Chopra families in the Jullunder District are not very numerous, and it is possible that no case has

arisen in which a separated Chopra Khatri died leaving no sons, and leaving daughters who were in a position to assert their right of succession. We are, therefore, of opinion that the defendants-appellants have failed to establish the special custom, which they pleaded and the appeal therefore fails and is dismissed with costs.

As regards the cross-appeal of the plaintiffs the important document mentioned in the judgment (Ex. P. 19) has not been printed and by the rules of this Court cannot, therefore, be referred to. There is no excuse for the non-printing of this document, which is distinctly referred to in the judgment. The cross-appeal, therefore, as to the half-share of the shop, which is disallowed must also fail as the plaintiffs-appellants cannot establish that Kishen Chand was a tenant of the shop. The only other point urged by counsel for the appellants was that the costs should have been given in proportion to the success of the parties. It seems to us, however, that the defendants-appellants had some ground for raising the plea of custom and the plaintiffs failed as to that part of the case on which they produced evidence. The only question, therefore, could be of pleader's fee. In the circumstances we are not prepared to interfere with the discretion of the trial Court in the matter, and we therefore dismiss the cross-appeal with costs also.

G.B. *Appeal* and *cross-appeal dismissed.*

A. I. R. 1927 Lahore 540

SHADI LAL, C. J., AND BROADWAY, J.

Pahlad Rai—Petitioner—Appellant.

v.

Shiv Ram and *others* — Defendants—Respondents.

Letters Patent Appeal No. 8 of 1927, Decided on 29th April 1927, from an order of Jai Lal, J., reported in *A. I. R.* 1927 *Lahore* 183.

Letters Patent (Lahore) Cl. 10—Order refusing transfer is not judgment.

An order refusing to transfer a case pending before a Subordinate Court is not a judgment within Cl. 10 of the Letters Patent as it does not put an end to the proceeding before that Court : *A.I.R.* 1922 *Lah.* 380, *Appl.* : *A. I.R.* 1924 *Mad.* 90 ; 47 *Cal.* 1104, *Dist.* [P 540 C 2 ; P 541 C 1]

Bevan Petman—for Appellant.

Fakir Chand—for Respondents.

Shadi Lal, C. J.—This is an appeal under Cl. 10 of the Letters Patent from an order of Mr. Justice Jai Lal refusing an application for the transfer of a case pending in the Court of the Senior Subordinate Judge at Ludhiana ; and the question for determination is whether the order amounts to a "judgment" within the meaning of that clause. There has been a considerable diversity of judicial opinion as to the definition of the expression "judgment," but it is unnecessary to discuss the matter at length. This Court has held in *Ruldu Singh* v. *Sawal Singh* (1) that :

> in order to decide whether an adjudication should be treated as a 'judgment' within the meaning of Cl. 10, Letters Patent, regard should be had not to the form of the adjudication but to its effect upon the suit or the civil proceeding in which it was made. If its effect, whatever its form may be and whatever be the nature of the civil proceeding in which it is made, is to put an end to the suit or proceeding, so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause.

It is clear that the order in question does not put an end to the suit so far as the Court dealing with it is concerned. The learned Judge has declined to transfer the suit, and it cannot, therefore, be said that his order has put an end to it. The Ludhiana Court has still to decide the suit, and its jurisdiction has not been interfered with by the order appealed against.

Our attention has been invited to the decision in *Krishna Reddy* v. *Thanikachela Mudali* (2), in which an order of a Single Judge transferring a suit was held to be a judgment. A contrary view has, however, been taken by a Division Bench of the Calcutta High Court in *Khatizan* v. *Sonairam Daulatram* (3). It is unnecessary to choose between the two rival views, because neither of the cases deals with an order refusing to transfer a case. It is true that an order directing a transfer puts an end to the case so far as the Court dealing with it is concerned, but the same thing cannot be said with respect to an order declining to transfer

(1) A.I.R 1922 Lah. 380 = 3 Lah. 184.
(2) A.I.R. 1924 Mad. 90 = 47 Mad. 136.
(3) [1920] 47 Cal. 1104 = 60 I.C. 963.

a case. Such an order does not disturb the status quo ante and does not in any way affect the jurisdiction of the Court, before which it was pending to determine it in accordance with law. I accordingly hold that no appeal lies from the order made by the Single Judge and I would, therefore, dismiss the appeal with costs.

Broadway, J.—I concur.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 541

BROADWAY AND SKEMP, JJ.

Besant Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 183 of 1927, Decided on 17th May 1927, from an order of the S. J., Amritsar, D/- 25th January 1927.

Penal Code, S. 302 — Accused last seen with deceased while living and accused showing place where corpse of deceased was buried are not sufficient for conviction of murder.

The fact that the accused was one of two persons with whom the deceased was last seen alive, and the fact that he pointed out the spot where the dead body was ultimately found, are not sufficient to draw the inference that the accused was one of the actual murderers. No doubt grave suspicion attaches to him in this connexion, but grave suspicion is not sufficient. [P 542, C 2]

Brij Lal—for Appellant.

Des Raj Sawhney—for the Crown.

Broadway, J.—Basant Singh, son of Ishar Singh, a Jat of Mauza Dhudra in the District of Amritsar has been found guilty of having caused the death of one Teja Singh and under S. 302 I. P. C., has been sentenced to death. Against his conviction and sentence he has preferred this appeal and the case is also before the Court under S. 374, Criminal P. C.,

The facts briefly are these: The deceased was a young man of about 25 years of age and was living with Mt. Hukmi, a woman who had had two previous husbands and for the last two or three years had been living as the deceased's keep. She is aged 50 years. On the 18th of June, according to her story, the appellant and his brother Harnam Singh came to Teja Singh's house and called him away. As Teja Singh did not come back that night Mt. Hukmi went the following day to Basant Singh and asked him Teja Singh's whereabouts. Basant Singh told her that he had gone to Amritsar. On the following day she met Basant Singh again and was told the same story. A day later, however, Basant Singh and his brothers Harnam Singh and Santa Singh came to Mt. Hukmi's house and began to weep saying what a fine fellow Teja Singh had been. This aroused Mt. Hukmi's suspicion and she went to the lambardar Sunder Singh and told him that Teja Singh had gone away with Basant Singh and Harnam Singh some days previously and had not been back home since. The matter was reported to the police but apparently no action was taken and in spite of one or two further reports of Teja Singh's continuous absence no serious steps were taken to investigate the question. Finally Mt. Hukmi was taken to headquarters by jamadar Mit Singh where she made an application to the Superintendent of Police who deputed the District Inspector, Bakhshi Shiva Sahai Singh, to make special efforts in the matter. Bakhshi Shiv Sahai Singh made enquiries at first without any result. Finally on the 16th of August 1926, he summoned Basant Singh before him and after questioning him thoroughly and carefully without any result, he proceeded to send for spades announcing his intention of digging up the house and the haveli of Basant Singh and his two brothers.

Thereupon it is said, that Basant Singh fell at his feet and made a statement the exact words of which the District Inspector did not recollect but which amounted to information that the body they were looking for was buried in the haveli. Upon receipt of this information Basant Singh was called upon to point out the place where the body was buried. He accordingly got the key of the haveli from his brother Santa Singh, and took the police, and other persons taking part in the investigation, to his haveli and pointed out a particular spot under a stack of *bhusa* where the body would be found. The *bhusa* was removed and Basant Singh was given a *kali* with which he proceeded to dig up the ground, aided by his brothers, Harnam Singh and Santa Singh. After

digging about 4½ feet they came to a bundle wrapped in sacking which Basant Singh drew out and which on being opened was found to contain the corpse of Teja Singh. The head had been completely severed from the trunk and was lying under one of the arm pits. The people on the spot at once identified the corpse as that of Teja Singh. Certain clothes which were found with the body are also said to have been identified and in due course the three brothers were sent up for trial. The evidence of the Civil Surgeon was to the effect that the body on which he held the post mortem examination could not have been dead for more than seven days, and was scarcely identifiable when he saw it. On the question of identity I have no hesitation in accepting the evidence of the witnesses for prosecution. They saw the body immediately after it was taken out of the ground whereas the Civil Surgeon did not see it till 48 hours had elapsed during which time the corpse had been exposed to heat and air. The opinion expressed by the Civil Surgeon that the death had been caused some seven days before the post mortem obviously led the assessors to give a verdit of 'not guilty' as the appellant and his brothers had been practically in police custody since about the 3rd of August. After giving due consideration to the opinion of the Civil Surgeon and to the evidence on the record I am not prepared to accept the opinion of the medical witness as conclusive. It is not known exactly when Teja Singh was murdered but I have no doubt that he met with his death a considerable time before the post mortem examination was held.

The learned Sessions Judge acquitted Harnam Singh and Santa Singh and convicted the present appellant on the following grounds: Firstly, that he was one of those who on the 18th June 1926, had called Teja Singh away from his house; secondly that he with his brothers had a motive for getting rid of Teja Singh, and finally that he had actually pointed out where the body was buried and had made certain statements which incriminated him at the time. That there is a certain amount of motive cannot seriously be denied. Basant Singh and his brothers are among the reversioners of the deceased and in the event of his dying without issue would succeed to a part of his estate. It appears that Teja Singh had mortgaged a good portion of his holding to his reversioners, partly to one Abdulla a convert to Islam and partly to the father of the three brothers. In 1923, Teja Singh had through Basant Singh and his brothers purchased a wife who, however, ran away from him after two or three days. He suspected the appellant and his brothers of having been instrumental in her leaving him and proceeded to mortgage that part of the property which was held by the appellants' family to one Gurdit Singh paying off his cousin. Later he also mortgaged some more property of his to the same Gurdit Singh. Gurdit Singh has appeared in the witness-box and has stated that this fact had angered Basant Singh and his brothers who had threatened him. I think there can be no doubt that Teja Singh was taken away on the night of 18th of June 1926, by Basant Singh and his brothers. There is also no doubt whatever that the body was recovered directly through information furnished by the appellant. The question is whether these circumstances conclusively prove that he was concerned in the murder of Teja Singh.

These witnesses who deposed to what Basant Singh stated at the time when he offered to point out the body are not agreed as to the actual words used and it would, therefore, be unsafe to accept any of these statements as being the exact expressions used by Basant Singh. So much of his statement is undoubtedly admissible and relevant as amounts to his having stated that he had buried the body of Teja Singh in his haveli, but more than that I think should be eliminated from consideration.

We have thus against the appellant the fact that he was one of two persons with whom Teja Singh was last seen alive on the 18th June 1926, and the fact that he pointed out the spot where Teja Singh's corpse was ultimately found. After careful consideration I do not think that it will be safe to draw the inference from these facts that the appellant was one of the actual murderers. No doubt grave suspicion attaches to him in this connexion but grave suspicion is not sufficient and it is possible that Teja Singh might have met

with his death at the hands of other persons and that Basant Singh had merely assisted in disposing of the body and, therefore, is not guilty under S. 302, I. P. C. That he has committed an offence the punishment for which is provided for in S. 201, I. P. C., is, however, perfectly clear. In my judgment it has not been proved that Basant Singh murdered Teja Singh but it has been established that he knew that he had been murdered and concealed his body with the intention of screening the offender. I would, therefore, accept the appeal so far as to set aside the conviction and sentence under S. 302, I P. C., and find Basant Singh guilty of an offence under S. 201, I. P. C, and sentence him to seven years' rigorous imprisonment including three months' solitary confinement.

Skemp, J.—I agree.

D.D. *Conviction altered.*

A, I. R. 1927 Lahore 543

JAI LAL, J.

Karam Chand—Plaintiff—Appellant.

v.

Jullundur Bank, Ltd., in liquidation—Defendants—Respondents.

Second Appeal No. 221 of 1927, Decided on 11th April 1927, from the Decree of the Dist. J., Jullundur, D/- 4th November 1926.

Civil P. C., O. 2, R. 2—Part of claim may be relinquished in appeal.

There is nothing to debar the appellant from relinquishing a part of his claim and to claim the rest, paying Court-fee stamp on the memorandum of appeal on the claim as reduced on appeal. [P 543 C 2]

Fakir Chand—for Appellant.

Bhawani Singh Puri—for Respondents.

Judgment—Daulat Ram, respondent, had ten shares in the Jullundur Bank Ltd., having paid Rs. 5 per share on application and Rs. 5 per share on allotment. It appears that two calls of Rs. 5 per share on each occasion were made on the 17th of April 1913 and 27th of November 1913, but nothing was paid by Daulat Ram. The bank went into liquidation on the 29th of November 1914, and Lala Dhanpat Rai, pleader, was appointed its liquidator. It is alleged that the liquidator made two calls for the balance from the shareholders, that is Rs. 10 per share, on the 26th July 1924, and Rs. 20 per share on the 20th of November 1924, and that Daulat Ram, respondent, did not pay the amounts so called and his liability was sold to Karam Chand, appellant. The present suit was instituted by Karam Chand for the recovery of Rs. 547-3-6, being Rs. 400, the principal amount due to the liquidator on account of the calls, and Rs. 147-3-6, on account of interest thereon. The plaintiff appears to have purchased this liability for Rs. 500. The plea of the defendant was that he had been made to purchase the shares by fraud, that no calls had been made from him, and that interest was not claimable, and further that the suit was barred by time. The trial Court held that there was no fraud or undue influence in the matter of the purchase of the shares, that there was nothing to prove that the defendant had any notice of the calls stated to have been made by the liquidator, that the suit was barred by time, and that no interest was claimable. It therefore dismissed the suit. The District Judge, on appeal, has held the suit to be barred by time, and, without going into the other matters involved in the case, has dismissed the appeal. The plaintiff appeals to this Court.

A preliminary objection is taken on behalf of the respondent that the memorandum of appeal is not properly stamped. It appears that the appellant has relinquished a portion of his claim in order to take advantage of the reduced scale of Court-fee payable on suits of the value of Rs. 500 or less. It is explained that the plaintiff really intended to relinquish the interest claimed by him and that he intended to value the relief claimed on appeal at Rs. 400, the principal amount due but that by mistake he valued it at Rs. 500. Be that as it may, it seems that there is nothing to debar the appellant from relinquishing a part of his claim and to claim the rest, paying Court-fee stamp on the memorandum of appeal on the claim as reduced on appeal. I overrule the preliminary objection.

On the merits it is admitted by Mr. Faqir Chand that the first two calls were made in 1913 before the Company

went into liquidation and that the aggregate amount payable on such calls is Rs. 100. It is not the case of the liquidator and consequently of the present plaintiff that any fresh call was made in respect of that amount. It therefore appears to me that whether the suit is governed by Art. 112 or by Art. 120, Indian Limitation Act, it would be barred by time so far as Rs. 100 is concerned. With regard to the remaining Rs. 300, it is alleged by the liquidator that he made the calls on the 26th of July 1924, in respect of Rs. 100, and on the 20th of November 1924, in respect of Rs. 200. If that it so then the cause of action arises on the date of those calls and whether Art. 112 or Art. 120 applies the suit would be within limitation. The counsel for the respondent, however, contends that as a matter of fact no calls were made. That is a question into which the learned District Judge has not gone. In any case the respondent must fail on the question of limitation so far as the claim for Rs. 300 to be due on the calls alleged to have been made on the 26th of July 1924 and 20th of November 1924 is concerned. Whether the suit is premature for want of a proper call on the defendant or whether there is any substance in the other pleas of the defendant are matters for the decision of the District Judge. Holding as I do that the suit is not barred by time, so far as the claim for Rs. 300 is concerned, I accept the appeals, set aside the decree of the District Judge and remand the case to him under O. 41, R. 23, Civil P. C., with directions to decide the other matters involved in the appeal before him. The Court-fee paid on the memorandum of appeal to this Court shall be refunded and other costs will abide the result.

D.D. *Case remanded.*

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* A. I. R. 1927 Lahore 541

JAI LAL, J.

Sumer Chand and *others*—Judgment-debtors—Appellants.

v.

Chiranji Lal and *others*—Decree-holder—Respondents.

Misc. First Appeal No 2809 of 1926, Decided on 21st April 1927.

* (a) *Civil P. C., O. 21, R. 2—Adjustment need not be in writing—A completed compromise is sufficient adjustment.*

There is no justification for holding that an adjustment must be in writing or that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder to satisfy the decree. The question really depends upon the intention of the parties at the time when the agreement is entered into, and if they make a final and binding agreement with regard to the decree then it amounts to an adjustment. If, on the other hand, the finality of the agreement or compromise is conditional on the future acts of the parties, as for instance, the execution of documents, then the agreement is still in the executory stage and does not come within the definition of adjustment : *A. I. R.* 1922 *All.* 13, *not Foll.* [P 545 C 1]

(b) *Civil P. C., O. 21, R. 2—Judgment-debtor pleading binding adjustment—Opportunity must be given to establish the allegation.*

If the judgment-debtor pleads an adjustment which is binding on the parties, then the judgment-debtor is entitled to an opportunity to establish his allegations. [P 546 C 2]

Shamair Chand—for Appellants.

Jagan Nath—for Respondents.

Judgment.—This appeal is directed against an order dated 23rd October 1926, made by the Senior Subordinate Judge of Ambala, declining to entertain an application under O. 21, R. 2, Civil P. C., made by the appellant praying that an alleged adjustment of the money-decree passed against him may be recorded. The order of the learned Judge below is in the following terms :

Lala Baland Rai, counsel for the decree-holders, and Lala Sri Rama, advocate for the judgment-debtors, are present. Hitherto the judgment-debtor has repeatedly been getting time. Instead of making payment of the decretal amount he now resorts to a new device and pleads an oral adjustment which the decree-holder denies. This is mere pretext to avoid payment. It is, therefore, ordered that the attachment proceeding be taken.

The counsel for the decree-holder should file a list of the property sought to be attached. The case to come off on the 20th November 1926.

The allegation of the judgment-debtor was that an oral adjustment of the decree to the following effect had been made between the decree-holder and himself :

The judgment-debtor shall pay the principal amount without interest and the costs to the decree-holder, that is, the judgment-debtor shall pay Rs. 1,500 to the decree-holders within the period of three years by annual instalments of Rs. 500 and the remaining amount within the next seven years. In default of payment of any of the annual instalments the decree-holders will be entitled to recover at once the whole of the amount due to them. The first annual

instalment shall be payable by the 20th October 1927.

On this appeal it is contended on behalf of the appellant that the learned senior Subordinate Judge was bound under O. 21, R. 2 (2) to serve a notice on the decree-holder and to make an enquiry such as is required by that rule and pass orders on the merits of the appellants' application. The rule referred to above provides that a judgment-debtor may inform the Court of an adjustment of the decree to the satisfaction of the decree-holder and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such adjustment should not be recorded as certified and that if after service of such notice the decree-holder fails to show cause why the adjustment should not be recorded as certified, the Court shall record the same accordingly.

Counsel for the decree-holders, on the other hand, relies principally on *Lachhmin Das* v. *Ram Nath* (1) and contends that the facts stated by the judgment-debtor do not amount to an adjustment of the decree as that term is used in O. 21, R. 2. His contention was two fold: (*a*) that an oral executory contract providing for the satisfaction of the decree does not fall within the meaning of the adjustment; and (*b*) that an agreement which can be recorded as certified under O. 21, R 2, as an adjustment of the decree must be either in writing or one which has actually been carried out by the parties so that nothing remains to be done by the judgment-debtor towards the performance of its terms: *Lachhmin Das* v. *Ram Nath* (1), no doubt, supports the contention of the learned counsel, but in miscellaneous civil appeal No. 799 of 1926, *Bakhshi Ram* v. *Des Raj* I felt some difficulty in following that case and nothing that has now been urged has induced me to change my opinion. In that case I considered that there was no justification for holding that an adjustment must be in writing or that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder to satisfy the decree. I consider that the question really depends upon the intention of the parties at the time when the agreement was entered into and that if they made a final and binding agreement with regard to the decree then it amounts to an adjustment. If, on the other hand, the finality of the agreement or compromise is conditional on the future acts of the parties, as for instance, the execution of documents, then the agreement is still in the executory stage and does not come within the definition of adjustment.

In the case before me on the allegation made by the judgment-debtor, it appears that there was an adjustment which was considered by the parties to be binding on each. Whether such an adjustment actually was made is a question which remains to be determined. The learned senior Subordinate Judge has declined to give an opportunity to the judgment-debtor to prove his allegation on the ground that it was merely a new device to avoid payment and to delay the proceedings. If it was an adjustment which was binding on the parties then the judgment-debtor was entitled to an opportunity to establish his allegations. This the learned senior Subordinate Judge declined to give.

Another argument of the counsel for the decree-holder was that under O. 20, R. 11 (2) the terms of the decree as to payment can be varied only with the consent of the decree-holder. In my opinion that rule has no application to the present case. The judgment-debtor does not ask the Court to vary the terms of the decree by granting him instalments, but he alleges that the decree-holder made a certain arrangement as to the satisfaction of the decree with him which arrangement, according to him, amounts to an adjustment and asked the Court to record the same. I accept this appeal, set aside the order of the learded Judge below and remit the case to him with directions to proceed with the adjudication of the application made by the judgment-debtor in accordance with law. Costs of this appeal will abide the result.

G.B. *Appeal accepted.*

(1) A. I. R. 1922 All. 13=44 All. 258.

A. I. R. 1927 Lahore 546 (1)

JAI LAL, J.

Mohammad Shafi — Accused— Petitioner.

v.

Emperor—Opposite Party.

Criminal Petition No. 67 of 1927, Decided on 6th May 1927, for transfer of the case from the Court of the 1st Cl. Mag., Amritsar, to any other Court.

Criminal P. C., S. 526—Case remanded by appellate Court for re-trial need not necessarily be transferred to another Magistrate.

It is not a general rule that when a case is remanded by the appellate Court for re-trial, it should always be sent to a different Magistrate to the one who held the trial originally, merely on the ground that the former Magistrate having already expressed an opinion against the accused when convicting him the latter has a reasonable apprehension that he will not have a fair trial in the Court of that Magistrate: *A. I. R. 1926 Cal. 1173, Dist.*

[P 546 C 1]

Azim Ullah—for Petitioner.

Order.—The petitioner was convicted of an offence under S. 61 of the Punjab Excise Act by a Magistrate, but the conviction was set aside by the Sessions Judge on appeal owing to some defect in procedure and the case sent back to the same Magistrate for re-trial from the stage at which the charge was framed. This is an application for transfer of the case to some other Magistrate merely on the ground that the former Magistrate having already expressed an opinion against the petitioner when convicting him the latter has a reasonable apprehension that he will not have a fair trial in the Court of that Magistrate.

I am unable to see any reason of such an apprehension or any ground for transfer of the case. *Bali Ram Kalwar* v. *Sitaram Kulwar* (1) is distinguishable and does not in my opinion lay down the rule, as contended by counsel for the petitioner, that when a case is remanded by the appellate Court for re-trial it should always be sent to a different Magistrate to the one who held the trial originally. Each case must be decided on its own merits. In this case there is no ground for transfer.

D.D. *Petition dismissed.*

(1) A. I. R. 1926 All. 1173.

A. I. R. 1927 Lahore 546 (2)

ADDISON AND AGHA HAIDAR, JJ.

Nand Lal—Defendant—Appellant.

v.

Ram Sarup and *another*—Plaintiff & Defendants—Respondents.

First Misc. Appeal No. 1860 of 1926, Decided on 25th April 1927, from an order of the Sub-J., 1st Cl., Delhi, D/- 17th June 1926.

(a) *Civil P. C., O. 43, R. (1) (m)—Order refusing to record compromise on the ground of its invalidity is appealable — Civil P. C., O. 23, R. 3.*

Where the Court, holding that the compromise is not valid and binding on the parties refuses to record to same, an appeal lies under O. 43, R. (1) (m) assailing the grounds for refusal to record.

[P 548 C 1]

(b) *Contract Act, S. 16—One party cripple and of weak intellect — His supporter himself interested in the terms—Terms of compromise very unfavourable to the party—Compromise is void and suit cannot be said as adjusted by lawful compromise within Civil P. C., O. 23, R. 3.*

Where the parties to a compromise in a suit for partition of family property were two brothers and their father on one side and S. the son of their paternal uncle on the other and S was a congenital cripple and weak in intellect and unfit for every kind of business and he was represented in the compromise by his maternal uncle who was himself interested in the terms of the compromise, which was extremely improvident on the very fact of it:

Held: that the compromise was obtained by the exercise of undue influence, and it cannot be said, therefore, that the suit had been adjusted wholly by a lawful agreement or compromise as required by the provisions of O. 23, R. 3.

[P 549 C 1, 2]

Sardha Ram and *Bishen Narain*—for Appellant.

Mool Chand and *Nawal Kishore*—for Respondents.

Agha Haidar, J.—Under an order dated the 11th January 1927, the present appeal (1860 of 1926) was connected with first appeal No. 1066 of 1922, and on the application of the appellant, Nand Lal, through his counsel Mr. Sardha Ram the two appeals were to be heard together.

This appeal arises out of certain compromise proceedings in the Court of the learned senior Subordinate Judge of Delhi. The facts leading up to the order under appeal are as follows; and in order to understand them the following short pedigree would be helpful in understanding the relationship of the parties:

CHAIN SUKH

Ram Kishen, defendant 2	Ram Saran Dass
	Sri Ram, defendant 1.
Ram Sarup, plaintiff.	Nand Lal, defendant 3.

On the 16th March 1921, Sri Ram, respondent in the present case, brought a suit against his uncle Ram Kishen, father of Ram Sarup and Nand Lal, for partition of the family property and rendition of accounts. On the 18th January 1922, the learned Subordinate Judge passed a preliminary decree for partition as regards the four houses only. This decree was the subject-matter of first appeal No. 1066 of 1922 filed by Sri Ram on the 24th April 1922. This appeal has been disposed of along with the present appeal. There seems to have been another litigation to which we find references on the record of the present case in which Nand Lal had sued Sri Ram and others for an injunction restraining Sri Ram from wasting the family property or some such relief. That suit was dismissed. The present suit out of which this appeal from order arises was instituted on the 25th June 1925, by Ram Sarup against Sri Ram respondent and his own brother Nand Lal and his father Ram Kishen. There cannot be the least doubt that Ram Kishen having practically failed in the previous suit, his son Ram Sarup has filed the present suit in order to save what had been lost in the previous litigation.

The first date of hearing in the present suit was the 3rd August 1925. On this date the plaintiff was present through his pleader and the defendant Sri Ram was present in person. Defendants 2 and 3 were not present, although notice was served upon them personally and it was ordered that the proceedings against them shall be ex parte. The defendant Sri Ram took time for putting in his written statement in the case and hearing was adjourned till the 25th August 1925. Sri Ram, however, filed his written statement on the 3rd August 1925. The plaint in the present suit is an important document. It says (vide para. 3) that defendant 1 is a congenital cripple, that he is impotent and weak in intellect and is unfit for every kind of business. It further goes on to say (vide para. 4) that according to law and custom, defendant 1 is not entitled to ancestral property. The relief claimed is that it may be declared that the property is ancestral and that defendant 1 is not entitled to recover any share in it and that the plaintiff is entitled to one-third, the remaining two-thirds naturally going to defendants 2 and 3, the father and brother respectively of the plaintiff Ram Sarup. In other words the object of the suit was that the whole family property should be secured for the benefit of the plaintiff and his brother and father and that defendant 1, the owner of half-share should be left absolutely destitute. Ordinarily speaking, Sri Ram, defendant 1, would be entitled to half of the family property. In fact this suit as regards this half-share was decreed by the learned Subordinate Judge and that decree has been affirmed by an order passed by this Court in the connected appeal (first appeal No. 1066 of 1922).

On the adjourned date, i. e., on the 25th August 1925, Sri Ram was present and the plaintiff's vakil was present, but the case could not proceed. On the 31st August 1925, Nand Lal produced a document, the subject-matter of the present appeal. It purported to be a compromise arrived at between all the members of the family under which for a consideration of Rs. 6,600, Sri Ram was to give up all claim to family property and also to a decree for Rs. 386 which he had obtained in the revenue Court against Nand Lal, defendant 3, and also the costs of his suit which had been awarded to him against defendants 2 and 3. Sri Ram was under the terms of this compromise to be maintained by the plaintiff. It may be noted here that one Singha the maternal uncle of Sri Ram also signed this document as a surety. Originally the compromise bore the date the 18th July 1925, but this date was subsequently altered to 31st August 1925 the date on which it was filed in Court. The case came up again on the 20th October 1925, and on this date defendant 1 happened to be absent and proceedings against him were ordered to be taken ex parte. The plaintiff Ram Sarup and defendants 2 and 3 readily admitted the alleged compromise and the said compromise was ordered to be recorded and it was further ordered that a decree may be passed in accordance with its

terms. Sri Ram subsequently made an application for setting aside the ex-parte decree and on the 29th January 1926, the said decree was set aside. On the 13th February 1926, Sri Ram filed his objections to the petition of compromise. In this application Sri Ram pleaded that he did not enter into the compromise voluntarily and of his own accord and that it was obtained from him by the exercise of fraud, deception, undue influence and threats. He further pleaded that, having regard to his success in the previous litigations, there was no compelling necessity for him to enter into any compromise with Ram Sarup plaintiff and defendants 2 and 3. Finally, he pleads that he is a cripple and a crazy person with a weak intellect and is incapable of understanding the conditions of the deed of compromise which was on the face of it unenforceable. He also supports his application by making a statement on oath on the 13th February 1926. The learned Subordinete Judge raised two issues which are as follows :

(1) Was there any valid and binding compromise between the parties ? Onus on defendant, Nand Lal.

(2) Did the defendant Sri Ram sign the compromise under undue influence ? If so how this affects the case ? Onus on defendant, Nand Lal.

(His Lordship then set out the evidence and continued). The learned Subordinate Judge came to the conclusion that

it is not proved that any undue influence was brought on Sri Ram in securing his signature on the compromise petition, but this much is very clear that Sri Ram did not willingly sign the compromise.

He accordingly held that the compromise relied upon by defendant 1 was not valid and binding upon the parties. He accordingly refused tc record it. Nand Lal comes up in appeal.

On the case being called Mr. Mool Chand on behalf of the respondent, Sri Ram, raised a preliminary objection that as the finding of the Court below was that there was in fact no compromise, no appeal lay to this Court under the provisions of O. 43, R. 1, Cl. (m), Civil P. C. He relied upon a decision of a learned Judge of this Court reported as *Shanti Sarup* v. *Firm Jahangir Mal-Bansi Mal* (1). In my opinion this preliminary objection has no force. The Court having refused to record the compromise it was open to the party who founded upon the said compromise to come up in appeal to this Court and challenge the grounds of refusal of the Court below to record the same. The appeal before us assails the reasons which led the Court below to decline to record the compromise. This is perfectly legitimate object of the appeal. I accordingly overrule the preliminary objection.

After hearing the parties I may observe at the outset that the proceedings out of which this appeal has arisen are devoid of all merit. Ram Kishen being baulked in the suit brought by Sri Ram against him has put his son Ram Sarup to file the present suit. Nand Lal, undoubtedly, is acting in concert with his brother Ram Sarup, the plaintiff, and defendant 2, his father, and their object is to deprive Sri Ram of his proper share in the family property. Although the Court below has rightly dismissed the application of Nand Lal on the ground that Sri Ram did not voluntarily sign the document, there are, however, ample materials on the record that the document can be challenged also on the ground of having been obtained from Sri Ram by the exercise of undue influence. On one side we have got Ram Kishen and his two sons who are acting under the advice of a pleader B. Kirpa Ram. On the other side we have got a cripple weak in body and feeble in mind and subject to various infirmities which would, undoubtedly, have the effect of impairing his intellect and undermining his will-power. He had not the advantage of having a legal adviser in the matter and his sole relation, his maternal uncle, named Singha, who, though not directly interested in the result of the compromise is undoubtedly colluding with the parties who support the compromise. He has his own ulterior object to gain. He has got a claim for Rs. 6,000 against Sri Ram and the compromise, if carried through, would afford him an admirable opportunity of realizing this sum from him. There is ample material on the record that the document was signed by Sri Ram as the result of the exercise of undue influence. (After quoting S. 16; Indian Contract Act, his Lordship proceeded.) As already stated, Nand Lal, and Ram Sarup are acting in collusion and though this suit was brought in the name

(1) A. I. R. 1924 Lah. 248.

of Ram Sarup, it was really intended to equally benefit defendants 2 and 3. Ram Sarup and Nand Lal are brothers and Ram Kishen is their father, and there is nothing on the record to assume that the relations existing between them are abnormal and not such as in the ordinary course of nature would exist between such close relations. Ram Sarup in para. 3 of the written statement has definitly said that defendant 1 is a congenital cripple that he is impotent and weak in intellect and is unfit for every kind of business. Under the circumstances a Court of justice would be justified in tying down Ram Sarup and his confederates, defendants 2 and 3 to the words used by him in a formal document like the plaint which under the law requires to be verified. It is true that in his written statement Sri Ram had controverted these allegations ; but I am satisfied on a perusal of the evidence on the record that the allegations contained in para. 3 are substantially correct. The document, which is a long and complicated one, was not properly read over and explained to Sri Ram who at the time was surrounded by self-seeking persons, including his own maternal uncle, named Singha, who, as already stated, had his own axe to grind. A perusal of the document also conclusively shows that the transaction was an unconscionable one in that it is extremely improvident on the very face of it. The value of the house property alone in the connected case which has been disposed of by first appeal No. 1066 of 1922 was Rs. 17,829. To this must be added the value of the revenue-paying property. Under the alleged compromise Sri Ram stood to lose his half-share in the whole of the ancestral property. The decree which Sri Ram had obtained against defendant 3 in the revenue Court and a decree for costs in his own favour against defendants 2 and 3 in the Court of Lala Radha Kishen, Subordinate Judge, were to be wiped off. He was to receive in return a sum of Rs. 1,604-4-3 which was in deposit in Lloyd's Bank, Delhi in the name of Sri Ram or his pleader B. Sumet Parshad. The remaining amount Rs. 4,995-11-9 was promised to Sri Ram by the plaintiff and defendants 2 and 3 with a further provision that defendant 1, while in Delhi, shall have a right to live with the plaintiff.

In my opinion the document was obtained by the exercise of undue influence, and it cannot be said, therefore, that suit No. 274 of 1925 (*Ram Sarup* v. *Sri Ram*) had been adjusted wholly by a "lawful agreement" or "compromise" as required by the provisions of O. 23, R. 3, Civil P. C. This being so, the Court below was right in refusing to record the compromise. I accordingly affirm the order of the Court below and dismiss the appeal with costs.

Addison, J.—I concur.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 549

ADDISON AND SKEMP, JJ.

Emperor—Complainant—Appellant.

v.

Bakhtawar Lal — Accused — Respondent.

Criminal Appeal No. 1245 of 1926, Decided on 22nd April 1927, from an order of the 1st Cl. Mag., Rohtak, D/- 31st July 1926.

(a) *Evidence Act, S. 54—Previous acts of dishonesty—Relevancy discussed.*

Evidence of a previous act of dishonesty of the accused can only be allowed to prevent the accused person from pleading that the act under consideration was committed without a dishonest intention. [P 551; C 1]

(b) *Evidence Act, S. 31 — Admissions explained away are similar to retracted confession.*

Admissions are on a somewhat similar footing to a retracted confession, and it is difficult to base a conviction on such an admission. [P 554 C 1]

(c) *Criminal P. C., S. 417—Appeal from acquittal—Interference is justified if finding is wrong—It need not be perverse.*

In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have obstinately blundered in coming to it, but upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside

than would be necessary in the case of a judgment of conviction ; 7 *P. R.* 1904, *Cr., Foll.*
[P 554 C 1]

Abdul Rashid and *Sham Lal*—for the Crown.

Shamair Chand, Sardha Ram and *Nawal Kishore*—for Respondent.

Skemp, J.—This is an appeal by the Crown against an order of a Magistrate acquitting one Bakhtawar Lal of a charge under S. 409, I. P. C. Bakhtawar Lal lives in the town of Bahadurgarh in the District of Rohtak and has been vice-president of the Municipal Committee. In 1917 the committee sold shop sites in the Mandi and thereby obtained a considerable sum of money which was invested in Government bonds to the amount of Rs. 47,500. In 1921 these bonds were converted into a single bond for that sum. In 1922 the bond was sold through a firm styled Bihari Lal-Budha Mal for cash in respect of Rs. 20,000 at 10 per cent. discount, and for six bonds worth Rs. 27,500 which remained the property of the committee. These six bonds which, according to the prosecution were entrusted for safe keeping to Bakhtawar Lal, form the subject of the present case. Subsequently a sum of Rs. 24,000 was required by the Municipality for payment to Government on Government taking over the Bahadurgarh High School. The Municipality called on Bakhtawar Lal to produce the bonds, but he failed to do so though he made good the sum of Rs. 27,500 after the committee had formally reported the matter to the Deputy Commissioner. The bonds had in fact been deposited with the Allahabad Bank, apparently as collateral security for a pro-note account opened in the name of the firm Behari Lal-Budha Mal and had been sold by the bank to liquidate the account.

Bakhtawar Lal was charged with selling the bonds, the real act of dishonesty, however, was in using these bonds, the property of the Municipal Committee, as security for a private account. This was done with the intention of causing wrongful gain to the depositor, and it is not disputed that it was a dishonest act within the meaning of S. 24, I. P. C. The questions in the case are: Who was the person who did this dishonest act ? Was it Bakhtawar Lal respondent ? Was Bakhtawar Lal the proprietor of, or a partner in, the firm Bihari Lal-Budha Mal, in whose account the bonds had been deposited ? Were the bonds entrusted by the municipality to Bakhtawar Lal ?

On the institution of the municipality of Bahadurgarh in the eighties inconvenience was felt as to the safe custody of its income as the town is situated at a considerable distance from any treasury. Thereupon Bihari Lal was appointed tahwildar without any remuneration. The word "tahwildar" is consistently used throughout the records of the committee and of this case which are in vernacular It has been variously translated "trustee" "custodian" "treasurer" which latter I prefer ; in a letter by the Commissioner about the subject the expression "local banker" occurs. There are on the record a resolution of the year 1892 (Ex. D. P.) which shows that Bihari Lal had already been acting for some time and another resolution of the year 1923 (Ex. P. A. 26) which states that Bihari Lal had been working as honorary tahwildar almost since the institution of the committee.

It is not clear when the firm Bihari Lal-Budha Mal came into existence. It is first heard of in the year 1917, when it purchased a shop site No. 42, in the new mandi. The original deposit, and ultimately the balance of the price, were paid by Bakhtawar Lal although Bihari Lal and Budha Mal were both present at the auction. Bakhtawar Lal is the grand nephew of Bihari Lal and is married to the sister of Budha Mal. Bihari Lal is an old man 75 years of age, without wife or child, and Bakhtawar Lal is one of his nearest relations. It was even suggested that Bakhtawar Lal was Bihari Lal's adopted son, but this has broken down. Budha Mal does not live at Bahadurgarh but in the Gurgaon District. It will now be clear how Bakhtawar Lal may have been entrusted with the bonds by the Bahadurgarh Municipality and may have deposited them with the Allahabad Bank.

The main items of evidence adduced by the prosecution are :

1. The bid and deposit of the year 1917 which were made by Bakhtawar Lal although both Bihari Lal and Budha Mal were present at the auction.

2. Certain petitions about the Mandi which were signed by Bakhtawar Lal, one of the petitions specifying shop No. 42

In 1917 Bakhtawar Lal deposited in the Rohtak Treasury the proceeds of the sales of the Mandi sites and subsequently received travelling allowance for doing so.

4. In 1920 Bakhtawar Lal, who was then a member of the Bahadurgarh Municipal Committee, submitted an application Ex. P. A-13 setting forth that he had kept the income of the committee for some time but had no safe and he requested that he should be supplied with a pistol. The members of the committee recommended that he should be granted a license for a pistol and also decided to get him an iron safe.

The present and past Registers of Tools and Plant of the Bahadurgarh Municipality, maintained under the Municipal Account Code, refer to an iron safe for the use of the tahwildar and note that the safe is with Bakhtawar Lal. The second of these registers has a series of signatures of Bakhtawar Lal, all dated 1st April 1922, purporting to indicate that he checked the register as a member of the committee.

5. In accordance with resolutions of the committee dated 22nd March 1922, and 6th April 1922, the bond was sold through the firm Bihari Lal-Budha Mal as honorary tahwildar at 10 per cent. discount and bonds for Rs. 27,500 purchased.

Counsel for the Crown, Mr. Abdul Rashid, wished to argue that this transaction was a dishonest one, but if it were, it is immaterial to the charge. Evidence of a previous act of dishonesty can only be allowed to prevent the accused person from pleading that the act of embezzlement charged was committed without a dishonest intention, but in error, and here the dishonesty of the act charged is admitted.

Subsequent proceedings in regard to this transaction are, however, relevant otherwise. Out of the sum of Rs. 18,000 Rs. 7,200 was deposited on the 13th of July 1922, and the balance of Rs. 10,800 remained. The president, on 17th July, noted on a report of the secretary that the firm "should b directed to deposit the balance within fifteen days or pay interest," and on the following day, 18th July, the committee adopted a resolution, No. 32 of that date, in accordance with the president's proposal. It was also decided that the bonds for Rs. 27,500 should remain with the tahwildar. Bakhtawar Lal and other members signed the proceedings for the day.

Accordingly, the municipality's register of investments shows Rs. 7,200 as realized through the tahwildar on the 13th of July, Rs. 10,800 invested at 6 per cent. It then gives the details of the bonds for Rs. 27,500, and says that they have been realized and placed in the iron safe. This note is signed by Bakhtawar Lal.

The local auditor objected to the deposit of Rs. 10,800 without security with a private firm and an application, Ex. P. W. was put in, written entirely in the hand of Bakhtawar Lal, saying that he would lodge a formal agreement within a week. This was signed "Bihari Lal-Budha Mal, Malik Bakhtawar Lal." A few days later a formal agreement Ex. P. 10, executed on a stamped paper was lodged in reference to this Rs. 10,800 signed in the Hindi character Bihari Lal-Budha Mal. This agreement is dated 20th of April 1923.

The local auditor further objected that in accordance with the rules the bonds should be kept with the Accountant General and the committee, on 30th October 1924, adopted a resolution, Ex. P.-A-14, to this effect. The proceedings for the day were signed among others by Bakhtawar Lal as vice-president, but according to the papers lodged by the Allahabad Bank the bonds had already been sold the previous May—a fact of which the respondent, if he knew it, did not think fit to inform the committee.

The proposal to send the bonds to the Accountant General was ultimately dropped because the greater part of the money was immediately required for payment to Government in connexion with the school. In May 1925, the respondents' enemies then being in power in the Municipal Committee, he was called upon to produce the bonds at once, and on his failing to do so a report was made at the Bahadurgarh police station on 11th May, and later, on 16th July, a formal complaint was lodged on behalf of the Municipal Committee through its president Lala Jowala Parshad.

The matter had already been brought to the notice of the Deputy Commissioner who with considerable difficulty induced Bakhtawar Lal to deposit the principal amount. On the 15th June

Bakhtawar Lal made a statement before the Deputy Commissioner that he would deposit the money in 15 or 20 days and was allowed till the 25th of June. On that date Mutsaddi Lal, a Munim, stated that he had deposited Rs. 9,500 on the 23rd and Rs. 4,000 on the 25th of June. Bakhtawar Lal was ordered to deposit the balance by the 7th of July. He then begged for time on the ground that his securities were in Delhi and no business could be done in Delhi on account of Baqr Id riots. The balance was actually paid on the 13th of July. On the 29th of July he made a statement before the Deputy Commissioner in the following terms :

Bonds worth Rs. 27,500 were made over to me in the capacity of tahwildar by the Bahadurgarh municipality when I was a member and vice-president of that body. This was in 1922. I sold those bonds in May 1924.

At the same time he produced a letter Ex. P. A., issued by the bank on the 7th May 1924, to Messrs. Bihari Lal-Budha Mal giving a statement of account, and showing the sale of the bonds.

This is the case for the prosecution. It rests mainly upon admissions by Bakhtawar Lal himself that he acted as tahwildar, that the bonds were made over to him and that he sold them. The most important of those admissions is that which has just been quoted.

In his statement as an accused, Bakhtawar Lal admitted that the firm Bihari Lal-Budha Mal was the honorary tahwildar of the municipality but denied that he was the proprietor thereof. He said that Bihari Lal was the proprietor of the firm and the tahwildar of the municipality.

The following points were urged in explanation or criticizm of the evidence for the prosecution : With reference to Bakhtawar Lal's bidding and payment for the shop sites Bakhtawar Lal said that he did this at the instance of Bihari Lal and Budha Mal. It is urged that at the time Bihari Lal was a member of the committee and debarred by S. 48, Municipal Act, from purchasing a site, and hence Bakhtawar Lal did this benami on his behalf. The payment of the deposits at the municipal offices and his signing the petitions in reference to the mandi as proprietor naturally followed.

As to the payment of the sums received from the sales into the Rohtak Treasury, Bakhtawar Lal denied the allegations which, however, are fully proved. His counsel, Mr. Shamair Chand, urges that Bakhtawar Lal did this to save his old grand-uncle from troublesome journeys and that as he made the journeys he naturally drew the travelling allowance.

As to the iron safe : this part of the prosecution case has broken down. The Magistrate inspected various shops in Bahadurgarh city and found four separate serai's shops in a line which belonged to the following persons :

1. Ajudhia Parshad.
2. Bihari Lal.
3. Bakhtawar Lal
4. Mutsaddi Lal.

Ajudhia Parshad and Mutsaddi Lal are half-brothers of Bihari Lal. In each of the four shops was a safe and the president of the committee, L. Jowala Parshad, complainant, informed the Magistrate that he thought that the safe in Bihari Lal's shop was that belonging to the committee. The Magistrate did not inspect the shop of the grain commission agency styled Bihari Lal-Budha Mal in the mandi. There is also defence evidence about the safe : that of one Shafi, lohar, who made it and states that the safe in question is that in the city shop of Bihari Lal. Ghisu Lal, late secretary, and Akhtar Ali Khan, a former member of the committee, both prosecution witnesses, state that the municipal safe was kept in the city shop of L. Bihari Lal.

In October 1924, when the committee proposed to resume custody of the safe, an application signed in the Hindi character was made on behalf of the firm Bihari Lal-Budha Lal that the safe was fixed in a wall and could not be removed. This is admittedly false, and no safe was fixed in any wall. Bihari Lal says that he made and signed the application and that he did so in order to avoid the disgrace of removal, offering to pay the value of the safe.

Thus, although the committee's registers show the safe for the use of the tahwildar to be with Bakhtwar Lal and one of the registers is signed by Bakhtawar Lal, in point of fact, according to the evidence, the safe was found in the shop of Bihari Lal who also supports Shafi's statement.

The very damaging admissions made by Bakhtawar Lal before the Deputy Commissioner are explained as being

made in order to save Bihari Lal from trouble.

There are other difficulties in the case for the prosecution. There is no evidence that Bihari Lal ever ceased to be tahwildar. On the other hand, there is a good deal of evidence that he was still acting as tahwildar. The resolution P. A-26 of April 1923, which has already been referred to, speaks of him as still working as an honorary tahwildar. The letter Ex. D. G., from the Commissioner, desiring that the local banker should furnish security was forwarded on 5th December 1923, by Ghisu Mal, secretary of the committee, to "L. Bihari Lal, Banker, tahwildar Bahadurgarh Municipal Committee." There is also evidence, the truth of which is not denied by the prosecution, that the daily income of the committee was taken regularly to the shop of Bihari Lal This evidence is borne out by the *siha* registers which are signed in the majority of instances by Bihari Lal. The details are given in the evidence of Amin Chand, the present secretary; and the Magistrate in his judgment calculated that during a period of five years and four months from 1919 to 7th May 1924, Bakhtawar Lal signed the receipts of daily income 59 times only, while all the other receipts were signed by Bihari Lal. Bakhtawar Lal explains his signatures as made on behalf of Bihari Lal.

One member of the committee at least was conscious of this difficulty, for the resolution marked P. V. passed on 6th May 1923, sets forth the opinion of Munshi Muhammad Akhtar Khan who wanted to know whether L. Bakhtawar Lal or Bihari Lal-Budha Mal was the honorary tahwildar of the committee. This very pertinent question remains unanswered.

Counsel for the Crown replied by saying that although Behari Lal dealt with the daily income of the committee, all the entries and admissions in reference to the dealings in these bonds were by the respondent. This is the fact, with one curious exception Ex. P. X., the formal agreement about the Rs. 10,800. According to the president, the Hindi signature of the firm Bihari Lal-Budha Mal is in the respondent's own hand, but there is no evidence to corroborate this and Bihari Lal states that he signed P-X. Bakhtawar Lal generally signed his name in the Persian character but not invariably.

Lala Uggar Sain, a Hindi knowing pleader, accustomed to the work was appointed as commissioner to examine the accounts of the firm Bihari Lal-Budha Mal and his evidence supports the defence. He found nothing to indicate any connexion between Bakhtawar Lal and the firm, but on the other hand, the account of Bakhtawar Lal was entered in the firm's bahi. It was suggested for the Crown that the real bahis were not placed before the Commissioner, but if the criticizm be well founded it does not benefit the prosecution which has to discharge the onus of proof.

Bihari Lal, as defence witness stated that he was tahwildar of the municipality, that he was proprietor of the firm Bihari Lal-Budha Mal, that he received the bonds as treasurer of the municipality and that it was he who deposited them with the Allahabad Bank.

The evidence as to the dealings with the bank does not really help the prosecution. Bakhtawar Lal himself had produced before the Deputy Commissioner the letter Ex. P. A. and the bank sent a clerk with no personal knowledge of the proceedings, who put in some further accounts of no great importance. What was really required by the prosecution was a sworn statement as to the identity of the person taking the bonds to the bank, or the production of the original letter under cover of which the bonds were sent.

Apart from the admissions of Bakhtawar Lal there is little evidence and it is not reliable. The important prosecution witnesses, other than formal witnesses are all residents of Bahadurgarh connected with the committee. All but Ghisu Lal, the late Secretary, belong to the faction opposed to the accused and any statement of theirs that Bakhtawar Lal was proprieter of the firm Bihari Lal-Budha Mal, or that Hindi signatures which they cannot read were made by Bakhtawar Lal, must be received with caution.

The case then depends partly on the admissions of Lala Bakhtawar Lal to be found in the course of municipal proceedings that he was acting as tahwildar and that he was the proprietor of the firm Bihari Lal-Budha Mal, but mainly on his

conduct in refunding the Rs. 27,500 owing to pressure from the Deputy Commissioner and on his admission of the 29th July 1925.

The only explanation offered for these last admissions is that Bakhtawar Lal was trying to save Bihari Lal who now in his own turn comes forward to support the defence. But it is a matter of opinion whether the truth lies in the admissions or the explanation. The admissions are under the circumstances on a somewhat similar footing to a retracted confession, and it would be difficult to base a conviction on a retracted confession supported by no reliable evidence. There is nothing but Bakhtawar Lal's admissions to show that he was tahwildar, or that he was a partner in Bihari Lal-Budha Mal or that he had anything to do with the criminal breach of trust committed in respect of the bonds.

In *King-Emperor* v. *Chattar Singh* (1), a ruling very frequently cited and followed in this Court, the Judges laid down the following principles :

> In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have obstinately blundered in coming to it, but that upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction.

On these principles the appeal is dismissed.

Addison, J.—I concur.

D.D. *Appeal dismissed.*

(1) [1904] 7 P. R. 1904 Cr=97 P. L. R. 1904.

A. I. R. 1927 Lahore 554

CAMPBELL, J.

Amar Das—Defendant—Appellant.

v.

Firm Harbhagwan-Inder Sen—Plaintiffs—Respondents.

Second Appeal No. 92 of 1927, Decided on 9th April 1927, from a decree of the Dist. J., Jhelum, D/- 1st December 1926.

Interest—Money borrowed from moneylender—Implied agreement to pay interest must be presumed.

In the case of a debt due by a borrower to a money lender, the presumption is that both parties intended that interest will be charged, and in the absence of any stipulation as to the rate of interest to be charged, interest at a reasonable rate should be allowed : 104 *P. R.* 1901, *Dist.* [P '555 C 1]

Sain Das—for Appellant.

Amar Nath Chona—for Respondents.

Judgment. — This was a suit for money based on two entries by the defendant in the plaintiffs' account book. The claim was for Rs. 217-13-6 principal and Rs. 268-2-6 interest. This amount was decreed by the trial Court. The defendant appealed to the District Judge who held on the issue 3 that the plaintiff had failed to prove the rate of interest agreed upon which he alleged, namely, Re. 1-9-0 per cent. per mensem. The learned District Judge nevertheless held that since the parties were traders a reasonable rate of interest was allowable to the plaintiff and he fixed the rate of 9 per cent and gave a decree for Rs. 415-14-9.

The defendant has come to this Court on second appeal and the second appeal was admitted by a Division Bench because of an arithmetical mistake by the learned District Judge in giving a decree for Rs. 414-14-9 instead of for Rs. 405-14-9. It was observed by the admitting Judges that the arithmetical mistake could have been rectified by the lower appellate Court, but since that had not been done, notice would issue. It is admitted by the learned counsel for the plaintiff-respondent that a mistake was made and that the decree should be one for Rs. 405-14-9.

The defendant, however, before me has urged his ground of appeal No. 3 that as there was no understanding between the parties with regard to interest, the Courts below could not allow any. It is argued that when the learned District Judge held that the entries relied upon do not contain any stipulation to pay interest and that the plaintiff had failed to prove the rate alleged by him, it was contrary to law to allow any rate of interest. I do not, however, understand the learned District Judge to have held that there was no implied agreement to pay interest. What he observes is as follows :

He (i. e. the plaintiff) sat silent for four years without taking any steps to secure any writing about the interest or its rate, so I hold that he is not entitled to this rate. The parties are traders, and a reasonable rate of interest can be allowed. I fix it at 9 per cent.

The law is stated thus in *Bura* v. *Mailia Shah* (1). In a case for the recovery of the amount due on a balance struck by the defendants, where no express or implied agreement to pay interest is proved, and in the absence of evidence that by usage interest was chargeable, and where the requirements of Act 32 of 1839 had not been satisfied, interest should not be awarded as damages. The debt dealt with was stated by the learned Judges to be peculiar one being the amount due at the dissolution of a partnership account. The amount was recoverable at any time and there was evidence to show demand, but there was no written demand for interest.

The present debt was due by a borrower to a money lender, and ordinarily in a transaction between such parties both parties are aware and intend that the borrower shall not have the use of the borrowed money for nothing. I consider also that the learned District Judge has held, although his language is not as clear as it might be, that interest was chargeable by usage, and on the facts proved regarding the nature of the transaction this finding was warranted.

I hold, therefore, that the learned District Judge did not act contrary to law in awarding interest. The appeal is accepted to the extent only of reducing the decree to one for Rs. 405-14-9. Since the defendant-appellant could have had the arithmetical mistake rectified by the lower appellate Court without bringing the plaintiff to this Court, and, since he has failed upon ground of appeal No. 3 regarding interest, I direct that the appellant pay the costs of the respondent in this appeal.

G.B. *Appeal partly accepted.*

(1) [1901] 104 P. R. 1901=19 P. L. R. 1902.

A. I. R. 1927 Lahore 555

ZAFAR ALI, J.

Abdul Kadir—Defendant—Petitioner.

v.

Nur Din and *another*—Plaintiff and Defendant—Respondents.

Civil Revision Petition No. 669 of 1926, Decided on 14th April 1927, from a decree of the Sr. Sub-J., Jhelum, D/- 21st May 1926.

Civil P. C., S. 115—New plea of limitation cannot be raised in revision.

A party cannot be allowed to raise for the first time in revision to the High Court the objection that the rule of limitation applicable to the case was contained in Art. 7, and not in Art 102 of the Limitation Act. [P 555, C 2]

Nanak Chand—for Petitioner.

Muhammad Monir and *Muhammad Amin*—for Respondents.

Judgment.—This was a suit to recover Rs. 105. There were three defendants, but the plaintiff prayed for a decree against defendant 1 or all the defendants or any one of them. The trial Court granted him a decree against defendant 1. On appeal by the latter the lower appellate Court confirmed the decree against him, and along with him granted a decree against defendant 3 also. Defendant 1 and defendant 3 are both dissatisfied and each has filed an application for revision.

As regards defendant 3 it is argued that the lower appellate Court had no jurisdiction to pass a decree against him. The illustration to O. 41, R. 33, Civil P. C., refuses this contention. The second contention, that no decree could be passed on the basis of the ruqqa relied upon by the Courts below, is also untenable. I therefore dismiss this application with costs.

As regards the second petitioner: he cannot be allowed to raise for the first time in this Court the objection that the rule of limitation applicable to the case was contained in Art. 7 and not in Art. 102, Sch. 1, Limitation Act, which was applied by the Courts below. This application is also dismissed with costs.

D.D. *Applications dismissed.*

A. I. R. 1927 Lahore 556 (1)

SHADI LAL, C. J., AND JAI LAL, J.

Kartar Singh and *another*—Defendants—Appellants.

v.

Labh Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 225 of 1923, Decided on 22nd April 1927, from the Decree of the Dist. J., Jullundur, D/- 16th November 1922.

Custom—Punjab—Alienation—Necessity.

Payment of antecedent debts due to third persons constitutes valid necessity. [P. 556, C. 2]

Mehr Chand Mahajan—for Appellants.

Behari Lal—for Respondents.

Judgment.—The suit out of which this second appeal has arisen was instituted by the plaintiffs-respondents to set aside a sale of ancestral land for Rs. 1,165 on the ground that the same was without consideration and valid necessity. The trial Court dismissed the suit holding that consideration and necessity had both been established. The learned District Judge on appeal held that Rs. 965 was the real consideration for the sale, that the remaining Rs. 200 was fictitious, and that necessity had been proved to the extent of Rs. 685, and therefore, reversing the decree of the Subordinate Judge, he held that the sale shall be binding only to the extent of Rs. 685. It may be mentioned that out of the total area of 19 kanals 18 marlas sold khasra No. 811, measuring 5 kanals 12 marlas, was held to be non-ancestral.

The decree of the District Judge is attacked on the ground that he wrongly held that two items of Rs. 65 and Rs. 46, paid to one Kishen Singh and Puran Singh respectively, did not constitute a valid necessity. Both these sums were held by the trial Court to be due to Kishen Singh and Puran Singh respectively, but the learned Judge held that there was no satisfactory proof of necessity with regard to them though later in the judgment he remarked that

as there was no bad faith in the transaction necessity will have to be presumed even for such small items as Rs. 65 or Rs. 46 and also for Rs. 139 taken in cash.

The learned District Judge has remarked that the trial Court held the item of Rs. 46 not proved. In this he is mistaken. In our opinion these items being on account of antecedent debts due to third persons the payments thereof constitute valid necessity. It is not denied before us that the alienee paid these amounts to the respective creditors of the alienor.

Out of the total genuine consideration of Rs. 966, therefore, Rs. 796 has been proved to be for necessity, and 5 kanals 12 marlas of the land sold was non-ancestral. We consider that under the circumstances the sale of the ancestral land also should have been upheld. Accepting this appeal we set aside the decree of the District Judge and restore that of the Subordinate Judge. The appellants will get their costs from the respondents throughout.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 556 (2)

SHADI LAL, C. J., AND JAI LAL, J.

Firm Prabh Dial-Chhajju Mal and *others*—Defendants—Appellants.

v.

Firm Ganpat Rai-Ram Dial and *another*—Plaintiff—Defendant—Respondents.

Second Appeal No. 308 of 1923, Decided on 23rd April 1927, from the Decree of the Addl. Dist. J., Amritsar, D/- 20th December 1922.

Civil P. C., O. 30, R. 4—R. 4 applies only to firms of two or more persons—Death of sole proprietor—Case comes under O. 22, R. 3.

Rule 4 applies only to such firms as are owned by two or more persons, but where a sole proprietor dies and the firm ceases to exist, it is necessary to bring on the record the legal representatives of the deceased sole proprietor under the provisions of O. 22, R. 3. [P. 557, C. 1]

Dev Raj Sawhney for *J. G. Sethi*—for Appellants.

H. C. Kumar—for Respondents.

Judgment.—The respondent firm instituted a suit for recovery of damages against the firm of Prabh Dial-Kishen Chand and Prabh Dial-Chhajju Mal. The trial Court and the District Judge have agreed in holding the appellant responsible for the damages claimed by the plaintiff firm and have decreed the suit accordingly.

This is a second appeal by the firm of Prabh Dial-Chhajju Mal against the

decree of the District Judge. A preliminary objection is taken on behalf of the respondent that Chhajju Mal, the sole proprietor of the appellant firm, having died on the 18th of June 1926, and no application having been made to bring on record his legal representative till the 1st of November 1926, when the period provided for the purpose had expired, the appeal has abated. It is common ground that Prabh Dial whose name occurs in both the defendant firms, is the deceased ancestor of Kishen Chand and Chhajju Mal, and that Chhajju Mal is the father of Kishen Chand who apparently is the sole proprietor of Prabh Dial-Kishen Chand. It is not shown that there was any other partner with Chhajju Mal in the firm Prabh Dial-Chhajju Mal. On the other hand it appears that he was the sole proprietor and that his sons, who are mentioned in the application of the 1st November 1926, are his legal representatives.

Under the circumstances the case is not covered by O. 30, R. 4 which provides that two or more persons may sue or be sued in the name of a firm under the provisions of that Order and if any of such persons dies, it shall not be necessary to join the legal representatives of the deceased as a party to the suit, because that rule applies only to such firms as are owned by two or more persons. O. 30, R. 10 enables a person carrying on business in a name or style other than his own name to be sued in such name or style as if it were a firm name and all the rules under O. 30 apply to such suits so far as the nature of the case may permit. The difference in the two rules referred to above is this : that in cases falling under O. 30, R. 4, if one of the partners dies the other partners can still continue to carry on the litigation on behalf of the firm. They are, whether their names are actually disclosed or not, in fact parties to the suit, being represented by the firm. But in the case of the death of the sole proprietor of a so-called firm nobody remains on the record competent to represent the firm. The firm in fact ceases to exist on the death of its proprietor and in such a case, in our opinion, it is necessary to bring on the record the legal representatives of the deceased sole proprietor under the provisions of O. 22, R. 3, Civil P. C. No cause whatsoever has been shown in this case why an application was not made within the period of limitation for bringing on the record the legal representatives of Chhajju Mal.

The consequence is that this appeal has, in our opinion, abated and we dismiss it with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 557

ZAFAR ALI AND ADDISON, JJ.

Prag Das-Budh Sen—Defendants—Appellants.

v.

Munni Lal—Plaintiff—Respondent.

First Appeal No. 435 of 1922, Decided on 3rd December 1925, from the Decree of the Senior Sub-J., Delhi, D/- 31st January 1922.

(a) Contract—Construction—Due date of performance is the date in the contemplation of parties at the time of entering into the contract and not the date at which it had to be postponed.

The due date of the performance of the contract is the date which is in the contemplation of the parties at the time when the contract was entered into and not the date to which, owing to circumstances beyond the control of the parties, the actual performance had necessarily to be postponed but without any express agreement between the parties : *A. I. R.* 1927 *Lah.* 481, *Foll.* [P 560 C 1]

(b) Contract—Construction—Indent providing that if sellers inform that if shipments would be late buyers should elect within three days whether time should be extended or contract cancelled —Sellers, when actually informing buyers, need not draw their attention to the three days time allowed by cmtract.

Defendants agreed to sell and plaintiffs agreed to purchase certain goods. The indent provided that if sellers informed purchasers that shipments would be made late, the purchasers had a choice either to extend the time for shipments, or cancel the contract within three days. If election is not made within three days, the contract would be deemed to be rescinded. Defendant, as per instructions from suppliers, wrote to plaintiffs that, as shipments would be late, the plaintiffs should take early action and inform whether they would cancel the contract or extend time. Plaintiffs informed after a week that they were willing to extend the time for shipment.

Held : that as per condition in the indent, the plaintiffs were bound to make election within three days and when they failed to inform the defendants within three days, the contract was cancelled. It was not necessary for defendants to mention the terms of the indent that only three days time was allowed : *A. I. R.* 1922 *Lah.* 149, *Foll.* [P 559 C 1]

Prem Lal and *Sardha Ram*—for Appellants.

Tek Chand and *Bishan Narayan*—for Respondent.

Addison, J.—This appeal arises out of a suit for damages for breach of contract brought by the plaintiff-respondent against the defendant-appellant. On the 19th November 1916 defendant agreed to sell to the plaintiff 102 cases of D. I. white shirting, imported solely by R. J. Wood & Co., at 17 shillings three pence per piece plus Re. 1-1-0 profit, the shipments to be from November 1916 to April 1917. It was alleged that the defendant broke the contract and failed to deliver the goods. Accordingly there was a survey on the 21st August 1917 regarding 13 cases of the December shipment when Rs. 325 were awarded to the plaintiff, and another survey regarding the remaining goods on the 26th November 1917, proceedings being ex parte in the second survey against the defendant, when the plaintiff was awarded Rs. 17,501. Thus Rs. 17,826, together with Rupees 2,054-7-0 for interest, total Rs. 19,880-7-0 were due. This amount was claimed on the awards or, in the alternative, as damages.

The defence was that the November shipment was lost at sea and that 13 cases of the December shipment were received, the other four being similarly lost. The plaintiff refused to take the 13 cases mentioned above and himself broke the contract as regards them. It was admitted that there was a survey as regards these 13 cases, in which the arbitrators said that the plaintiff had been careless. It was further pleaded that on the 11th May 1927 the defendant wrote to the plaintiff that the remaining goods would be shipped late and, as the plaintiff did not reply within the time fixed by Cl, 8 of the Indent form, the contract was ipso facto cancelled. As regards the second ex-parte award: it was objected that it was invalid for various specified reasons which need not be detailed.

The trial Court held (1): that the first award about the December shipment was valid and the second invalid; (2) that 11 bales out of the November shipment were lost at sea; (3) that the contract for the shipments from January onwards was not cancelled by the plaintiff failing to reply to the defendant's letter of the 11th May 1917, within three days; and (4) that the plaintiff was entitled to damages as regards each shipment at the rate prevailing on the day that R. J. Wood & Co., the importers, received the last lot of that particular shipment. As this sum was larger than what was claimed, the suit was decreed with costs.

In the appeal only three points were taken. The first was that the award dated the 21st August 1917 regarding the December shipment was perverse and should be set aside. By that award the two arbitrators held that the plaintiff was entitled to Rs. 325 for the 13 cases of that shipment which arrived, because they were not satisfied that the defendant was justified in selling the goods though the plaintiff was somewhat backward in taking delivery. In the pleas all that defendant said about this award was that the surveyors admitted carelessness on the part of the plaintiff. Nothing else was alleged. Mr. Roberts, one of the arbitrators, was called as defendant's first witness, but was not examined by the defendant, after he had been sworn, the Court recording a note that this survey report was admitted by both parties. In these circumstances it is obvious that this award must stand. It cannot be said that it was perverse, and under para. 15 of the Indent the decision of the arbitrators, against whom no misconduct was alleged, was final.

The next point taken was that the contract as regards the shipments from January onwards was cancelled under Cl. 8 or Cl. 8 (c) of the Indent. It is in evidence that each shipment should have arrived within two months at the latest. On the 5th May 1917 the firm of R. J., Wood & Co., who had contracted to supply the defendant with 150 bales or cases, wrote to the defendant that, owing to the commandeering of tonnage and the drain of their workmen, it was quite impossible to keep deliveries up to time and that this was beyond their control. They therefore asked the defendant to give them an undertaking not to cancel any goods for late shipment and added that, if the defendant was unable to agree to that, they must ask him to consider all orders as cancelled. If, however, the defendant agreed, he should return a form which was enclosed before the 12th May 1917. On the 11th May the defendant wrote

to the plaintiff's office in Delhi, with which all the dealings had been, enclosing a copy of the letter received from R. J. Wood & Co., and asking the plaintiff to take early action in the matter, i. e. the plaintiff was requested to intimate if he extended the time of shipment under his indent or cancelled the contract. The plaintiff replied the same day that the letter of defendant had been sent to the head office at Amritsar and, on hearing from it, a reply would be sent. The defendant wrote the same day (i. e. the 11th May 1917) that he had no concern with the head office at Amritsar and that a reply should be given within 24 hours, else he would consider the goods (i. e. from January onwards) as cancelled. On the 19th May, that is eight days after receiving intimation, the plaintiff wrote that he would accept shipments even if they were late. To this the defendant replied on the 21st May 1917 that, as plaintiff did not exercise his option within the three days fixed by the contract, the contract was cancelled as regards the balance of the goods. Now there is no question that under Cl, 8 or Cl. 8 (c) of the Indent, the plaintiff should have replied within three days. It was argued, however, that as the firm of R. J. Wood & Co. gave the defendant seven days to reply, and as the defendant in his first letter of the 11th May only asked the plaintiff to take early action without mentioning the three days allowed by the contract, it should be held that the defendant was not acting under the contract, but was giving the plaintiff a reasonable time within which he could reply. It seems to us that this argument be accepted. Under Cl. 8 the plaintiff had three days within which he could exercise his option after receiving intimation that the goods would be shipped late. It was therefore his duty to reply within that time or automatically the contract was cancelled. It was not necessary for the defendant to point out the terms of the contract by mentioning the period fixed in it. Though the firm of R. J. Wood & Co. gave the defendant a concession, there was no reason why the defendant should give the same concession to the plaintiff. This question has already been decided in *Mansa Ram* v. *Mangal Sain* (1) which was a case where the indent was exactly similar. The following words may be quoted :

> There can be no doubt whatever that the contract with respect to these goods was otherwise put an end to by the parties in view of the provisions of Cl. (8) of the Indent. The plain meanings of this clause are that the purchasers, on receiving information from their sellers that there will be a late shipment, will either cancel the goods or extend time for their delivery as may suit them best, and that they shall have three days time within which to make their choice If an election is not made within three days, it will be understood that the purchasers are not willing to extend the time and that the contract is rescinded. This clause is generally inserted in commercial contracts in the interest of both the parties, the sellers as well as the purchasers. The object is to have a speedy decision as to whether the purchasers will accept late shipment or not. If the purchasers are unable to make up their mind speedily the law will take its own course, and the contract will be deemed to have been cancelled. It seem to us that there is no room for any doubt as to the construction of this clause. The defendants in this case gave an intimation to the plaintiffs on the 18th June that the goods were late. According to plaintiffs' own showing, this letter reached them on the 20th June. They could have made their choice up to the evening of the 23rd, either to cancel the goods or to accept late shipment. They did neither, but kept on shilly-shallying. The fact that the defendants gave them 24 hours within which to make their choice is of no importance and does not affect the contract itself under which the plaintiffs had three days to make an election. In our opinion, the plaintiffs having failed to make their choice by the evening of the 23rd June, the contract ipso facto came to an end, and we are wholly at a loss to understand how, under these circumstances, the plaintiffs could treat the contract as still subsisting and claim performance when they by their own silence had allowed it to be rescinded.

With this reasoning we are in full accord, and we hold that the contract for the shipments from January onwards was automatically cancelled by the failure of the plaintiff to reply by the 14th May.

In any case it is also clear that the plaintiff did not reply within a reasonable time. A reply by telegram can be received from Amritsar in one day and it only takes one night for a letter to go between the two places. The plaintiff could therefore easily have replied within three days even if it was desired to consult the Amritsar office. In fact this was done as regards another dispute about the same time by the plaintiff firm. The defendant informed the plaintiff on the 7th May that the goods could not come in tin-lined cases, but only in bales as tin was not allowed to be exported from England owing to the war. The plaintiff was asked to let the defendant

(1) A. I. R. 1922 Lah. 149.

know within three days if he would accept delivery in bales. The plaintiff replied on the same date that the Head office at Amritsar would have to be consulted, but on the 10th May finally replied that he would take the goods in bales. This shows that three days was a reasonable time for replying even if the plaintiff desired to consult his head office. It is therefore beyond any dispute that eight days was in no circumstances a reasonable time. Further the contract was with the plaintiff's branch at Delhli and the plaintiff was not entitled to any time in order to consult the Amritsar office.

On the above finding it follows that apart from the December shipment the defendant only committed a breach as regards the six bales of the November shipment. The contract rate per piece was 17*s.* 3*d.* @ 1*s.* 4*d* 9/23*d*=Rs. 12-11-5
plus charges @ 10 to 11% „ 1- 4-7
plus defendant's profit ... „ 1- 1-0

Total ... Rs. 15- 1-0

The trial Court held that the plaintiffs was entitled to wait until the last lot of the November shipment reached the importing firm of R. J. Wood & Co. at Delhi before considering that a breach had been committed. It took this date to be the 31st March 1917 and found the market rate on that day to be Rs. 15-8-0 It was argued, however, by the learned counsel for the appellant that the date of the breach must be taken as the date when the goods would normally have reached Delhi at that time. This view was taken by the learned Judges who decided *Ganeshi Lal Kundan Lal* v. *Debi. Sahai Gulzari Mal* (2). They held that the due date of the performance of the contract was the date which was in the contemplation of the parties at the time when the contract was entered into and not the date to which, owing to circumstances beyond the control of the parties, the actual performance had necessarily to be postponed but without any express agreement between the parties. In that case, which was about a similar contract entered into about the same time as this, the goods came late and it was held that the date of the breach was the date when goods normally would arrive from England. This was held to be two months at that time owing to the war.

(2) A. I. R. 1927 Lah. 481.

With this view we are in entire agreement. The due date as regards the November shipment was, therefore, the beginning of February at the latest when the market rate was Rs. 15-4-0. The damages, therefore, for the six cases of the November shipment came to 3 annas a piece. There are 50 pieces in each case. The loss to the plaintiff on this shipment was, therefore, only Rs. 56-4-0.

This disposes of the appeal; but we think it proper briefly to discuss the only other point taken before us, though it does not arise in view of our finding as to the shipments from January onwards being cancelled. It was also held by the trial Court that the plaintiff was entitled to take the due dates as regards these shipments to be the dates when the last lots of the various shipments reached the sole importing firm of R. J. Wood & Co. As regards them the learned counsel for the appellant again contended that the due dates were when each shipment would normally have reached Delhi, i. e., about two months after the dates of shipments as given in the contract. It might be noted here that up to July 1917 the market rate only reached Rs. 16, so that the loss incurred by the plaintiff would be very small in any view of the case if this argument is correct. It was not till October that the rate reached Rs. 24 and it was this rise that raised the decree to such a large amount on the view taken by the trial Court. As against this the learned counsel for the respondent supported the finding of the Court below and, in the alternative argued that the due dates which should have been taken for the purpose of calculating damages on these shipments were the dates when the defendant actually got the goods from the sole importing firm of R. J. Wood & Co. It seems to us that none of these contentions can be accepted and that, if it could be held that the contract for the goods of these shipments was not cancelled by reason of their being shipped late, that would necessarily imply an agreement to extend the dates of shipment to the months in which they were actually shipped. That being so, the same principle, which we have accepted as regards the November shipment, would apply and the due dates would be the date when they would normally have arrived, i. e. two months after the months when the various ship-

ments took place. It is obvious that the date on which R. J. Wood & Co., received the last lot of any particular shipment cannot be taken as the due date of that shipment as between the plaintiff and defendant ; while the date, when defendant actually took his bale from R. J. Wood & Co. also cannot be said to be the due date as between the parties to this suit, for defendant may have delayed taking delivery for any reason, and cannot be penalized for that. It should be noted that the view taken by the lower Court gives much heavier damages than the alternative view advanced by the respondent's counsel. It cannot be said what damages would result on our finding as the dates of shipment do not seem to have been proved.

For the reasons given we accept the appeal and reduce the amount decreed to Rs. 325 for the December shipment, plus Rs. 56-4-0, for the November shipment ; total Rs. 381-4-0. As the defendant-appellant has been substantially successful, he will get his costs on Rs. 19,000 here and below.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 561

ZAFAR ALI, J.

Ghulam Mohammad—Accused—Appellant.

v.

Emperor—Opposite Party,

Criminal Appeal No. 267 of 1927, Decided on 16th May 1927, from the Order of the 1st Cl. Mag., Sialkot, D/- 23rd February 1927.

Arms Act, Ss. 19 (f) and 20—Intention specified in S. 20 cannot be inferred by merely carrying a small arm in pocket.

If a person carries on his person a small weapon such as a pistol, a dagger, or a blade of a chhavi, he naturally puts it in his pocket or dab, and if with that weapon in his pocket or dab he is in his house or in his village or in a bazar or in a Court compound, it cannot be inferred that he was so carrying the weapon with the intention specified in S. 20. [P 561, C 2]

M. L. Puri—for Appellant.

C. H. Carden Nord—for the Crown.

Judgment.—The appellant Ghulam Mohammad zargar of Narowal, in the Sialkot District, has been found guilty of having 'unlawfully in his possession and concealed in his *dab* a chhavi blade and has been sentenced under S. 20, Arms Act (11 of 1878) to rigorous imprisonment for five years.

To answer a charge of abduction under S. 498, I. P. C., Ghulam Mohammad was present in the compound of the Kutchery at Sialkot and his prosecutor accompained by his friends including Mehdi Shah, badmash, was also there. The sub-inspector of Narowal police station and a naib-tahsildar also happened to be in the kutchery compound. Mehdi Shah came to know somehow that the appellant had a chhavi blade in his *dab*, and after apprising the sub-inspector of it he went up to Ghulam Mohammad, appellant, and clasping him round the waist he raised an outcry. Thereupon the sub-inspector, the naib-tahsildar and other respectable persons went up and in their presence a chhavi blade was found in the right *dab* or fold of the loincloth of the appellant. The unimpeachable testimony of the naib-tahsildar establishes that it was so found in the *dab* of the appellant. The defence theory, that Mehdi Shah, after catching hold of the appellant managed to put the blade in his *dab*, appears highly improbable. The sub-inspector undoubtedly gave a false account of what took place inasmuch as he stated that it was he who went up to and caught hold of the appellant, and he further stated that he could not say whether his informer was Mehdi Shah ; but Mehdi Shah, the naib-tahsildar and others gave him the lie direct and it appears that the account of the recovery of the weapon given by these witnesses is the correct one. This conflict in evidence, however does not in any way affect the case for the prosecution and the finding that the chhavi blade was in the *dab* of the appellant is undoubtedly correct.

The next question is whether the case falls under S. 19 (f) or S. 20. If a person carries on his person a small weapon such as a pistol, a dagger or a blade of a chhavi, he naturally puts it in his pocket or *dab* and if with that weapon in his pocket or *dab* he is in his house or in his village or in a bazar or in a Court compound, it cannot be inferred in the absence of any indications to the contrary that he was so carrying the weapon with the intention specified in S. 20.

In the case of a chhavi blade he may not even know that he cannot keep it without a license. The appellant had no stick with him which could have been used as a handle for the blade and what he had in his possession was only a part of an arm which was practically quit harmless. In all these circumstances S. 20 does not appear to be applicable. I, therefore, alter the conviction to one under S. 19 (f) and reduce the sentence to rigorous imprisonment for six months only. The sentence imposed by the Magistrate may in the circumstances of the case be characterized as a savage one.

Sentence reduced.

R.K.

A. I. R. 1927 Lahore 562 (1)

SHADI LAL, C. J.

Lal Chand—Defendant-Petitioner.

v.

Kaka Ram and *another*—Plaintiff and Defendant—Respondents.

Civil Revision Petition No. 641 of 1926, Decided on 6th May 1927, from an order of the Addl. Dist. J., Lahore D/- 7th May 1926.

Civil P. C., O. 17, R. 3—Decree passed on merits—Party cannot appeal against order setting it aside but must appeal against the decree.

Where a Court has passed a decree on the merits purporting to act under O. 17, R. 3, the party against whom the decree is passed cannot treat it as an ex-parte decree and appeal against the order refusing to set it aside, but he ought to prefer an appeal against the decree: 3 *L. W.* 524, *Foll.* [P 562, C 1, 2]

Lal Chand Mehra—for Petitioner.

Nawal Kishore and *Jamna Das*—for Respondent.

Judgment.—There can be no doubt that the trial Court decided the suit on the merits under O. 17, R. 3, Civil P. C. and that the defendants' remedy was by way of an appeal from the decree passed against him. Assuming for the sake of argument that the Court should have proceeded, not under O. 17, R. 3, but under O. 17, R. 2, I am of opinion that where a Court has passed a decree on the merits purporting to act under O. 17, R. 3, the party against whom the decree is passed cannot treat it as an ex-parte decree and appeal against the order refusing to set it aside, but he ought to prefer an appeal against the decree. If any authority were needed, I would refer to *Ghundan* v. *Kamakha Rama Chetti* (1).

The application for revision is accordingly dismissed with costs.

R.D. *Application dismissed.*

(1) [1916] 3 M. L. W. 524=33 I. C. 660.

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* A. I. R. 1927 Lahore 562 (2)

HARRISON AND DALIP SINGH, JJ.

Jai Parshad and *another*—Plaintiffs—Appellants.

v.

Chartered Bank of India, Australia and China, Delhi—Defendant—Respondent.

F. A. No. 2276 of 1922, Decided on 19th April 1927, from the decree of the 1st Class Sub-Judge, Delhi, D/- 22nd May 1922.

* (a) *Contract Act, S. 182—Person dealing with one branch of a bank as agent—Other branches do not become agents.*

Where a person appoints one branch of a bank as agent for him, all other branches do not become agents of the person for purposes of carrying out instructions in respect of that agency. [P 564, C 1]

* (b) *Contract Act, S. 194—One branch of a bank appointed as agent for purchase of goods—Such branch instructing another branch to pay for and take delivery of goods—Latter branch becomes agent of the client—Per Dalip Singh, J., (contra Harrison, J.): Any custom preventing latter branch from carrying out instructions of the client would be contrary to law.*

Per Daliph Singh, J.—Where a person appoints one branch of a bank as his agent for the purchase of certain goods, and that branch instructs another branch of the same bank to pay for and take delivery of the goods for such person, the latter branch becomes substituted agent of the person and is bound to carry out all the instructions of the principal in respect of the transaction. [P 564, C 2]

Any custom by which the latter branch would not be bound to receive or carry out the instructions of the principal, would be contrary to law and cannot be pleaded and Courts will not take judicial notice of such a custom. [P 564, C 2]

Per Harrison, J.—In spite of the existence of S. 194, branch banks do not recognize nor carry out instructions given by clients of other branches unless they have been definitely instructed to do so; as an act of courtesy one branch may try to oblige the client of another branch by making enquiries, etc., but for practical purposes, and so far as their obligations are concerned, the branches do not recognise any

liability whatsoever to carry out instructions from the clients of other branches unless these be properly conveyed through the branch bank, with which the client deals. This is a universal practice and Courts will take cognizance of it.
[P 565 C 1 & 2]

Further, no distinction can be made between instructions to do nothing and incur no liability and instructions which might involve the bank in some liability. P 565 C 2]

Badri Das and *J. L. Kapur*—for Appellants.

Sardha Ram and *Sheo Narain*—for Respondents.

Dalip Singh, J.—The plaintiffs in this case sued the Chartered Bank of India, alleging that the plaintiffs have given a tender for 1000 tolas of gold in the Government sales held on the 5th February 1920 and had sent the deposit through the defendants as plaintiffs' agent to the currency office at Bombay. The tender was accepted on the 10th February and plaintiffs were informed by the defendants on the 14th February. On the 15th February an express telegram was sent by the plaintiffs to the defendants' Bombay branch, and a letter to the same effect to the Delhi branch, instructing defendant not to take delivery as the price of gold was falling and had fallen owing to the resolution of the Government fixing the exchange price of the sovereign at Rs. 10. The plaintiffs stated that in spite of these directions the defendants paid the balance of the price on the 17th February and took delivery on the 21st. Goods arrived at Delhi on the 26th and the plaintiffs thereupon paid Rs. 25,099-14-6, balance of price with brokerage, etc., and resold on the same day for Rs. 22,471 thus suffering a loss of Rs. 4,628-14-6, through defendants' want of reasonable deligence, business skill and negligence. The plaintiffs claimed to recover Rs. 4,628-14-6, with interest at 10 per cent per annum, i. e. Rs. 5,085-15-0 with future interest till realization and costs of the suit.

The defendants pleaded that they had received at their Delhi branch on the 17th February a letter from the plaintiffs instructing defendants not to take delivery and that in compliance with these instructions defendants' Delhi branch had wired to the Bombay branch to stop taking delivery, but the telegram arrived too late as the Bombay branch had already taken delivery. They alleged that the plaintiffs had no business to communicate with defendant's Bombay office and that in any event the instructions so given were vague. They further contended that the plaintiffs were estopped by their conduct in taking delivery without objection from raising the pleas that they had.

The trial Court framed issues and held that the defendants had acted with reasonable diligence and without negligence, that they had not failed to carry out any binding instructions of the plaintiffs because plaintiffs were not entitled to give instructions direct to the Bombay branch and that the plaintiffs were estopped from claiming the amount of the loss. It therefore dismissed the suit.

The plaintiffs have appealed and their counsel contends, firstly, that on the Government notification and the consequent fall in the price of gold the defendants would have acted with reasonable skill in cancelling the contract without instructions from the plaintiffs. I am unable to accept this contention. It is not proved that the Government notification necessarily led to a fall in the price of gold, nor that the plaintiffs' benefit from the contract necessarily depended on the price of gold remaining at the original figure or rising higher. Plaintiffs' counsel next contended that the Bombay branch had been negligent in that they could have paid the money and taken delivery at any time between the 10th and the 17th and should not have waited the whole week because the price of gold was falling steadily. Further that when they did pay the money on the 17th, they could have taken delivery on that very day and not waited till the 21st and all this had caused loss to the plaintiffs. There is nothing, however, to show that the bank acted without due diligence in not paying at once or in not taking delivery at once, because we cannot hold that the bank could foresee how the price of gold would vary on any one of these dates. I therefore repell this contention also.

The next point raised by counsel for the plaintiffs is that the Chartered Bank was really the agent and branches of the bank are the agent itself in different forms, and instructions conveyed to one

branch which was actually dealing with the business of the plaintiff were instructions to the agent, the Chartered Bank, and therefore the defendants were bound to carry out the instructions of the plaintiffs not to take delivery. Had they done so it is conceded on both sides that the plaintiffs would only have forfeited their deposit money, namely Rs. 2,000. For the legal proposition that the branches of a bank are representatives only of the sole juristic person, namely the bank, the counsel has relied upon *Garnet* v. *M'Kewan* (1), *Fielding & Co.* v. *Corry* (2), *Prince* v. *Oriental Bank Corporation* (3). In the last case it was held that branches are agencies of one corporation and that notice of dishonour to one branch is notice to the other branch. These cases do not bear out the plaintiffs' contention. The contract may be with the bank, but it does not follow from that that the contractor has by entering into a contract with the bank secured a right to command the service of all branches of the bank other than the particular branch with which he is dealing. Plaintiffs' counsel, however, contends in the alternative that if for purposes of receiving instructions the branches be considered as two different entities, then the Delhi office of the Chartered Bank was the agent of the plaintiffs. Under S. 194, Contract Act, that agent had express power on the facts of this case to appoint another agent, namely the Bombay branch of the bank, to carry out the purpose of the agency to the extent of making payment for the gold and taking delivery of the same. This being so, under the said section the Bombay branch itself became the agent. Counsel for the defendants conceded that ordinarily speaking if a person is an agent of another for the purpose of taking delivery, the principal is entitled to order the agent not to take delivery, but he contends that in case of a substituted agent under S. 194, Contract Act, the principal can only instruct the agent as to the mode of taking delivery but cannot instruct him not to take delivery at all. I am quite unable to accept this contention. I fail to see why when the law declares that the substituted agent is for the purposes of the agency entrusted to him to be considered the agent of the principal, the authority of the principal to direct him not to carry out the agency should be different in the one case from the other. I therefore consider that there is force in the argument of the counsel for the plaintiffs that the Bombay branch became the agent of the plaintiffs by virtue of S. 194, Contract Act, and therefore the plaintiffs were entitled to instruct the Bombay branch, in the absence of any agreement to the contrary not to take delivery. It has never been the bank's case that the Bombay branch could not tell from whom the telegram, that they admittedly received on the 16th, had come or that the Bombay branch were unaware that they were the agents for the plaintiffs. This being so it seems to me that the Bombay branch were bound to accept the plaintiffs' direction and this more especially when those directions were simply an order to refrain from further action. It seems to me perfectly clear that the telegram of the plaintiffs was intelligible and the defendants' Bombay branch should have neither made payment nor taken delivery.

It has further been contended by counsel for the defendants that it is proved that there was a custom or usage by which customers of the Delhi branch understood that they could not instruct the Bombay branch of the bank. No such custom was pleaded, nor can I hold on the evidence that it is proved. Further, I am doubtful if such a custom, which is contrary to law, could be pleaded at all, but even conceding that it could be pleaded, the fact remains that it was not pleaded and that there was no issue on the point, nor is there sufficient evidence to justify my holding that such a usage is proved. Speaking for myself I am unaware as to what the practice of the bank in such matters is, and I am unable to hold that I can take judicial notice of such a practice. It is conceded by counsel for the plaintiffs that from this aspect of the matter the amount of his damages is only Rs. 2,628-14-6 because he would in any event, if his instruction had been carried out, have forfeited his deposit money, viz., Rs. 2,000.

Counsel for the defendants has next contended that there is an estoppel-

(1) [1873] 8 Ex. 10=21 W. R. 57=42 L. J. Ex. 1=27 L. T. 560.
(2) [1898] 1 Q. B. 268=46 W. R. 97=67 L. J. Q. B. 7=14 T. L. R. 35=77 L. T. 453.
(3) [1878] 3 A. C. 325=26 W. R. 543=47 L. J. P. C. 42=38 L. T. 41.

I am unable to see how the question of estoppel can arise because the property belonged to the plaintiffs and the bank could not have lawfully refused to part with the property if the plaintiffs had paid all their dues; nor can I see how the bank's position has been in any way rendered worse by the plaintiffs taking delivery of the gold. The bank has not challenged the bona fides of the resale by the plaintiffs or that the price they obtained was not the market price on that date.

I would therefore accept this appeal to the extent of Rs. 2,628-14-6 and would give interest at the rate of 6 per cent per annum from the date of suit till realization. In the circumstances I would leave the parties to bear their own costs.

Harrison, J.—I agree throughout with the reasoning and the conclusions of my learned brother with only one exception. S. 194, Contract Act, makes the Bombay branch of the defendant Bank liable as an agent and the law is very clear. In spite of this it appears to me that banking practice overrides and qualifies that law and the position to my mind is precisely the same as in 2 *K. B.* 1915, 576. In that case the learned Judge explained the legal position, but said that the practice of all banks qualified that legal position and reduced the legal obligations of the bank in a most important detail. He then went on to explain that this was so of necessity, that it was logical and sound, and that banks could not function if they were strictly tied to the legal position. Whether he took judicial notice of the practice and then explained how logical and necessary it was, or on the contrary he deduced the rule which he enforced, from the circumstances under which the banking is carried on does not appear to me to be very material, but I think he adopted the former course. This case appears to me exactly similar. In spite of the existence of S. 194 branch banks do not recognize nor carry out instructions given by clients of other branches unless they have been definitely instructed to do so; As an act of courtesy one branch may try to oblige the client of another branch by making enquiries, etc., but for practical purposes, and so far as their obligations are concerned the branches do not recognize any liability whatsoever to carry out instructions from the clients of other branches unless these be properly conveyed through the branch bank, with which the client deals. This is a universal practice and I take cognizance of it. But it is urged no such custom was pleaded and being contrary to law it is doubtful whether it could be pleaded. In the English case the modification accepted by the Judge was just as contrary to law, and so far as the pleading in this case is concerned it may, I think, be held to govern the position. In the written reply the defendant bank stated:

> Plaintiffs had no business to communicate with defendant's Bombay office.

Issue No. 2 is as follows:

> Whether the defendants failed to carry out instructions of the plaintiffs binding upon the former?

Mr. Macpherson of the Chartered Bank stated:

> The Bombay office only acts upon the instructions sent from here with regard to the tenders, etc. The Chartered Bank, Bombay, was to make payments under instructions from the Chartered Bank, Delhi;

and this is followed by a sentence which is, I think, instructive as showing the attitude of mind of a trained banker.

> Every constituent is supposed to have sense enough to know that he cannot communicate with our Bombay office direct; that is why we do not tell anybody about it.

Pundit Brij Bhushan Lal, D. W. 2, who has speculated in the Bombay market through the Delhi office of this branch on more than one occasion says:

> I never communicated directly with the Chartered Bank, Bombay.

The case has been very badly conducted by the defendant. The obvious plea that no action could be taken on a telegram was not taken, banking practice was not pleaded in absolutely clear language, but I think the position taken in the written reply was meant to convey, and did convey the meaning that direct communication of this nature is never allowed by banks, and that such is the universal banking practice.

An attempt has been made to distinguish between instructions, as given here, to do nothing and incur no liability and instructions which might involve the bank in some liability. Such a distinction cannot, I think, be drawn. Either instructions are accepted or ignored and it would be wholly impossible for the agent to work out and calculate the possible results and consequences before deciding whether to act or not. If the

test of logical soundness be applied it appears to me that this rule is, every bit, as sound and necessary as the rule laid down in *Clare & Co.* v. *Dresdner Bank* (4). Each branch has clients with whom it has very intimate relations especially if there be any question of financing speculation, and to me it is unconceivable that such work should continue if the sub-agent bank, to which the order is entrusted is to become at once an agent and to be liable under S. 194 and the original agent bank is to be ignored.

I am therefore of opinion that the appeal should be dismissed.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

G.B. *Appeal dismissed.*

(4) [1915] 2 K. B. 576=31 T. L. R. 278=84 L. J. K. B. 1443=113 L T. 93=21 Com. Cas. 62.

A. I. R. 1927 Lahore 566

ADDISON AND AGHA HAIDAR, JJ.

Sri Ram—Plaintiff—Appellant.

v.

Ram Kishen Das—Defendant—Respondent.

First Appeal No. 1066 of 1922, Decided on 25th April 1927, from the Preliminary Decree of the 1st Cl. Sub-J., Delhi, D/- 18th January 1922.

Partition—Suit for—Rendition of accounts—Plaintiff must prove defendant's liability to account.

Before a plaintiff in a suit for rendition of accounts can succeed he must lay the foundation of his case by proving, by means of proper evidence, that the defendant is an accounting party. It is only then that the Court is justified in passing a preliminary decree in his favour and ordering the defendant to render account of his agency or stewardship in Court : (1905) *A. W. N.* 1 *and* 27 *All.* 374, *Foll.* [P 567 C 1]

Mool Chand and *Nawal Kishore*—for Appellant.

Sardha Ram Kapur and *Bishen Narain*—for Respondent.

Agha Haidar, J.—This is a plaintiff's appeal arising out of a suit for partition and rendition of account. The property in suit is of two kinds, house property consisting of four houses detailed at the foot of the plaint and some landed property liable to pay revenue. The plaintiff came into Court on the allegation that he and defendant 1, are agriculturists by occupation and governed by the customary law prevailing among the agriculturists. The defendant is the uncle of the plaintiff and the plaintiff's allegation is that after the death of the plaintiff's father and grandfather his uncle (the defendant in the suit) has been looking after and managing the whole property. He says that he does not wish to remain joint with his uncle (the defendant) and hence the present suit. The defendant denied the allegation contained in para. 4 of the plaint and pleaded that he was not liable to render any account. He further pleaded that the suit for partition of the landed property in khewat No. 1, and for rendition of account regarding the said land was not entertainable by the civil Court, the revenue Court having exclusive jurisdiction to try such a suit. He further said that the houses mentioned in the plaint had been purchased and constructed out of the income of the ancestral property and that there was no objection to their partition. On the 18th May 1921, the statements of the parties were taken by the Court, and Lala Sumat Parshad, the pleader for the plaintiff said :

I admit that the partition of the agricultural land cannot be effected through civil Courts. I will claim three years' mesne profits in the Revenue Court. The partition of four houses is now claimed.

After the recording of this formal statement by the pleader for the plaintiff, it is somewhat surprising that, on the 19th August 1921, the learned Subordinate Judge framed the following issue :

"Can a suit for rendition of account lie in this Court?

Seeing that the plaintiff's pleader had definitely abandoned his claim as regards the rendition of account in the civil Court, it may be noted here that there is no suggestion in the proceedings that any other account, except that of the income accruing from the landed property, was ever intended to be claimed. The parties produced no evidence whatsoever. The learned Subordinate Judge rightly held on the admission of the plaintiff's counsel that the present suit, so far as the partition of the landed property was concerned, was not cognizable by the civil Courts. He, however, passed a preliminary decree in favour of the

plaintiff for partition of the house property.

The plaintiff comes up in appeal. It is to be regretted that he was not well advised in filing the present appeal. The appeal has no force whatsoever, and there is not the slightest foundation on which any one of the grounds of appeal can be supported. An attempt is made by the learned counsel for the appellant to show that the right to claim mesne profits accruing from the house property was not abandoned and his client's claim under this head ought to have been tried on the merits. There is no force whatsoever in this contention. In the Court below, so far as the proceedings are before us, such accounts were not claimed. It had not been shown that any income accrued from the landed property or that the defendant-respondent had been realizing such income for and on behalf of the plaintiff. Before a plaintiff in a suit for rendition of accounts can succeed he must lay the foundation of his case by proving by means of proper evidence that the defendant was an accounting party: vide *Ram Das* v. *Bhagwat Das* (1) and *Raghunath* v. *Ganpatji* (2). It is only when he has proved that the defendant is an accounting party that the Court is justified in passing a preliminary decree in his favour and ordering the defendant to render account of his agency or stewardship in Court. In the present case the plaintiff has given no evidence whatsoever and his allegation in para. 4 of the plaint, wherein he says that the defendant had been managing his property, was categorically denied by the defendant in his written statement.

Under these circumstances the decree of the Court below was right and we hold that on the record, as it stands, the plaintiff neither alleged nor proved that there was any income accruing from the landed property in dispute or that the defendant was in any way liable to render account of the income of the property to the plaintiff.

I therefore affirm the decree of the Court below and dismiss the plaintiff's appeal with costs.

Addison, J.—I concur.

R.D. *Appeal dismissed.*

(1) [1905] A. W. N. 1=1 A. L. J. 347.
(2) [1905] 27 All. 374=(1905) A. W. N. 3.

A. I. R. 1927 Lahore 567

BROADWAY AND SKEMP, JJ.

Abdul Rashid—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 341 of 1927, Decided on 26th May 1927, from an order of Sub. Judge, Delhi, D/- 14th March 1927.

Penal Code, S. 84—The fact that accused is conceited, odd and irascible is not sufficient for exemption from Criminal liability.

Even if it be proved that an accused charged of murder was conceited, odd and irascible, and his brain was not quite all right, it cannot be said that he was incapable of knowing that murder was wrong, so as to exempt him from criminal liability under S. 84. [P 570 C 1]

A. S. Osborne and *Zafrulla Khan*—for Appellant.

C. H. Carden Noad—for the Crown.

Skemp, J.—Abdul Rashid has been convicted by the learned Sessions Judge, Delhi, of murdering Swami Shardhanand. His appeal has been argued by Mr. Osborne and the sentence of death is also before us for confirmation.

The case for the prosecution and the finding of the learned Sessions Judge are that about 4 p. m. on the 23rd December 1926, Abdul Rashid entered the house of Swami Shardhanand in Burn Bastion Road, Delhi, and shot him dead. The appellant's case as presented in this Court is:

(1) That the evidence is insufficient to prove that he committed the murder; and

(2) that if he did commit the murder then he was insane at the time.

It must be observed that the adoption of this double line of defence weakens each line. If Abdul Rashid did not shoot Swami Shardhanand why attempt to prove that he was insane? If he was really insane then why pretend that he did not commit the murder?

There is abundant evidence in support of the finding of the learned Sessions Judge. Abdul Rashid having enquired from Ram Lal, a shopkeeper in Burn Bastion Road, where the Swami's room was, came to the upper storey of the house where Swami Shardanand lived. At the time the Swami was ill in bed recovering from an attack of pneumonia. His body servant Dharm Singh (P. W. No. 3) was outside the door and at the request of the appellant told the Swami that a Mahomedan had come to see him. The Swami allowed the visitor in

on condition that he would not talk. Having obtained entrance into the Swami's room the appellant asked for water and Dharm Singh took him outside and gave him water out of a lota. After drinking the appellant returned to the Swami's room and while Dharm Singh was putting down the lota fired at the Swami. Dharm Singh rushed in and caught Abdul Rashid, but Abdul Rashid fired a second and a third time. Finally he shot Dharm Singh.

The Swami's private secretary Dharm Pal was lying asleep or half asleep in the room just outside, was aroused by the shots, ran into the room, grappled with Abdul Rashid, overpowered him and held him until the arrival of the police. The police were summoned by Mehr Chand P. W. 6) who was auditing the accounts of the Hindu Shudhi Sabha and sent a telephonic message after coming into the room and seeing what had happened. The deceased's son Indar and other persons also came to the spot before the arrival of the police. Sardar Chet Singh, sub-inspector (P. W. 15), arrived 20 or 25 minutes later. The Swami was then dead, Dharm Pal still holding the appellant whom Sardar Chet Singh disarmed. The appellant's pistol proved to be a Belgian automatic pistol of old type with a chip out at the stock whereby several of the witnesses identified it; when taken from the accused it contained a loaded cartridge and a discharged cartridge. Four other empty cartridge cases were found in the room. A bullet was found among the clothes of the deceased, another on the floor and a third was extracted from the body of the deceased. There is expert evidence that all the bullets and cartridges fit the pistol.

Abdul Rashid's explanation was that he was passing the Swami's house; he was called in by some one who said "Mianji, idhar ao." He went up the stairs, was knocked and gagged and did not recover consciousness till the arrival of the police; he had no pistol.

It was contended in this Court that if the prosecution story had been true the Swami's followers would have man-handled the assassin and also that they would have taken away the pistol before the arrival of the sub-inspector. It was also argued that if Dharm Singh had been wounded as described, there would have been blood-marks on the floor, whereas no blood-marks were noticed.

It is difficult to be patient with arguments of this kind. What took place is proved absolutely by the evidence of the eyewitnesses. If there were only Dharm Singh and Dharm Pal without anyone else they would be quite sufficient.

As to the second line of defence: the law in India is the same as the law in England and is embodied in S. 84 I. P. C:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Now, the defence called fifty-five witnesses as to the accused's state of mind. As pointed out by the learned Sessions Judge in his admirably written and succinct review of their evidence, these witnesses were called in no regular order and for the most called in on single instances, i. e. they do not corroborate each other. They are grouped in several categories by the Sessions Judge.

(1) Witnesses who say that Abdul Rashid behaved strangely in the mosque; that once he turned round as if he were the Imam; that he prayed too little or too much; that he used two water-pots instead of one; that he kicked water-pots if empty and so forth.

(2) The testimony of printers and copyists. Abdul Rashid earned his living as a katib or khush nawis, i. e. he used to write vernacular in a hand suitable for reproduction from a lithographic stone. Some witnesses say that he would improve in his copies on the original, twice improving his religious works and once a work on anatomy by a doctor. He would break off work, would lose his temper if any mistake were pointed out, once threw ink about, once broke flower-pots. But the witnesses had to admit that Abdul Rashid earned his living as a katib and supported his wife and child, and one of them (D. W. 42) describes his work as "averagely good."

(3) There was only one incident to which there was more than one witness. There are three witnesses who say that the appellant entered the house of a complete stranger and when turned out and beaten, the by-standers said that he was mad.

(4) There were two witnesses to a similar incident that the appellant went

into the Tibbia College and assaulted the Vice-Principal Qari Muhammad Ibrahim. One of these witnesses gives purely hearsay evidence and Qari Muhammad Ibrahim, though alive and his address known, has not come into the witness-box. This particular incident must, therefore, be regarded as unproved.

(5) There are also a number of insolated episodes that the appellant tore up his work, argued with a druggist, stood, up after micturition without pulling up his pyjama, dreamed that he was the mahdi, danced naked in a printing press and said that he was the king of Delhi. Used abusive language, took a *thela* of parcels to a railway station and left them there unbooked.

(6) The next group is that of four private medical practitioners, D. Ws. 8, 25, 39 and 51. Dr. Amir Hussain (D. W. 8) says that he treated Abdul Rashid in October last. Abdul Rashid said that he had taken a lota of tea and charas and was having strange dreams. He dreamt that he was riding on an elephant and the people were salaaming him. This led the witness to treat him for melancholia. Khan Sahib Siraj-ud-din (D. W. 25) diagnosed a certain dryness "(khushki) in the brain" of "the appellant, and discovered a combination of heat and cold." Zaki Ahmad (D. W. 39) treated the accused for palpitation of the heart and headache and added that the appellant was half-witted. He admitted, however, that he had given the appellant "copy work" to do and that "a man who does copy work needs a clear mind." Anwar-ul-haq (D. W. 51) belongs to Bulandshahr, the native district of the appellant, and treated the accused one day when his clothes were in a torn condition. The accused frequently went in that state and asked the witness to cure him; the appellant recovered in two or three days. He was of opinion that the accused had signs of craziness and might be difficult to restrain if not treated regularly. This particular episode took place when the appellant, who is now 50 years of age, appeared to be a boy of 16 or 17. Obviously this kind of evidence is worthless.

(7) Only two of the appellant's relations were called: his son-in-law Nawab Ali (D. W. 49) and his brother-in-law Bakhshish Haq (D. W. 53). Nawab Ali states that in the first week of December the appellant came to see him and told him about a dream that his daughter was clothed in red garments and a man resembling Nawab Ali was saying that he had divorced his wife and that his daughter's clothes changed colour in the dream. This witness attempted to prove a letter and a fatwa from the accused. But as he did not say that he knew Abdul Rashid's handwriting and admitted that he never received any other letter from him, these two documents, the genuineness of which was disbelieved by the learned Sessions Judge, cannot be regarded as proved. Bakhshish Haq is the brother of the appellant's first wife who died nine or ten years ago after being divorced by the appellant. He says that the appellant once severely beat his wife without cause, that once, 15 years ago, he did not speak to anyone for a day, that on another occasion he talked volubly, beat his wife and when stopped began to weep.

This evidence is open to criticizm of many kinds. The appellant's father and brother are both alive, but they have not gone into the witness-box. There is no reliable evidence as to insanity in the family. One of the witnesses (D. W. 18) naively admitted that the case had caused a great sensation and that many people had been going about asking that evidence should be given.

The appellant was kept under observation in the Lahore Mental Hospital from the 29th of January to the 14th February last, and the Superintendent, Captain Lodge Patch, I. M. S. (D. W. 52) has given a definite opinion that he regarded the accused as then sane. The appellant's counsel cannot refute this evidence and therefore, suggests that the appellant was liable to temporary fits of insanity, possibly caused by taking charas; but, though the appellant told Captain Lodge Patch and other witnesses that he had been taking charas, there is no direct evidence as to who sold charas to the appellant or saw him smoking charas.

A very important point is that the police officers who saw Abdul Rashid on the afternoon of the crime not only say that the appellant appeared to them to be sane, but also that during the investigation none of the appellant's rela-

tives or the inhabitants of his mohalla ever suggested that he was insane: see the evidence of the Senior Superintendent, Deputy Superintendent and Inspector (P. Ws. 19, 20 and 21). Thus there are good grounds for regarding the whole of the defence evidence with suspicion; but if every word of it were true what would it prove? That the appellant was conceited, odd and irascible; that "his brain was not quite all right" in the words of D. W. 1; not that he was incapable of knowing that murder was wrong.

Appellant's counsel referred to no published judgment in support of his argument or to any work of repute, except to a single passage of Pope's Law of Lunacy, Second Edition, page 385, that

> that person only will be criminally responsible who, at the moment of committing a criminal act, is capable of remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment.

With this doctrine I entirely agree. The book immediately goes on to refer to the opinion of Judges in *Macnaghten's* case (1). Section 84 I. P. C., to which counsel made no reference throughout his arguments, is founded upon the Macnaghten rules and is in agreement with them.

I am of opinion that the appellant has wholly failed to discharge the onus of proving that when he committed the murder he was of unsound mind, much less that he was incapable of knowing the nature of the act or that he was doing what was wrong.

I would reject the appeal and confirm the sentence of death.

Broadway, J.—I agree.

D.D. *Appeal rejected.*

(1) [1843] 8 Scott. (N. R.) 595=1 Car. & K. 130=59 R. R. 85=10 Cl. & F. 200=8 E. R. 718=4 St. Tr. (N. S.) 847.

A. I. R. 1927 Lahore 570

BROADWAY, Ag. C. J., AND BHIDE, J.

Mt. Gopal Dai—Defendant—Appellant.

v.

Dhanna Mal and *another*—Plaintiffs—Respondents.

First Appeal No. 1469 of 1923, Decided on 23rd June 1927.

Limitation Act, Art. 97—Alienation by widow's alienee pending declaratory suit by reversioners—Alienor stipulating for refund of purchase-money with damages—Privy Council deciding in favour of reversioner—Widow subsequently dying and reversioners recovering possession by suit—Time for suit for refund of purchase money runs from date of dispossession and not from Privy Council decision—Limitation Act Art. 83.

Two widows sold some property to *S.* in 1888. On the 14th June 1897 two reversioners named *J* and *R* instituted a suit for a declaration to the effect that the sale by the widows should not affect their reversionary rights. The case went up to the Privy Council and was eventually decreed on the 11th May 1909. During the pendency of the suit by *J* and *R*, *S* sold a portion of the property to the present plaintiffs, in February 1898. In the sale-deed it was stipulated that if any other claimant came forward or the property went out of possession of the vendees, the vendor would be liable to refund the purchase-money with damages. On the same date a separate agreement was executed by *S* in favour of the vendees, in which the suit by *J* and *R* was specifically mentioned and to safeguard the vendees against the consequences of that or any other suit certain other property was hypothecated. The last surviving widow died on the 9th January 1919. On the 3rd May 1919, *R* instituted a suit for possession of the property sold by *S* to the plaintiffs. On the 30th July 1921, this suit was decreed. Possession of the property was taken on the 13th August 1921. A suit was then instituted by the plaintiffs against the widow of *S* on the 30th November 1921 on the basis of the stipulation as regards quiet possession and enjoyment in the sale-deed and the agreement referred to above for recovery of the purchase-money, arrears of rent and damages.

Held: that Art. 97 did not apply and that limitation did not commence to run till the vendees were actually dispossessed in the year 1921 and from the date of dispossession the suit was admittedly within time.

[P 570 C 2, P 571 C 1, P 573, C 2]

Kishan Dayal and *Jagan Nath Aggarwal*—for Appellant.

Sardha Ram and *Maya Das*—for Respondents.

Bhide, J.—The material facts of this case may be briefly stated as follows for the purposes of this appeal. Mt. Sarsuti and Mt. Puran Devi, two widows, sold some property known as Katra Choban in Delhi city to Shambhu Nath and two other persons on the 1st July 1888. Shambhu Nath subsequently purchased the shares of the latter and became sole owner. On the 14th June 1897, two reversioners named Jai Narain and Rup Narain instituted a suit for a declaration to the effect that the sale by the widows should not affect their reversionary rights. The case went up to the Privy Council and was eventually decreed on the 11th May 1909. During the pendency

of the suit by Jai Narain and Rup Narain, Shambhu Nath sold a portion of the property to Dhanna Mal and Sanwal Das, the present plaintiffs, for Rs. 18,560 on the 14th February 1898. In the sale-deed it was stipulated that if any other claimant came forward or the property went out of possession of the vendees, the vendor would be liable to refund the purchase-money with damages. On the same date a separate agreement was executed by Shambhu Nath in favour of the vendees, in which the suit by Jai Narain and Rup Narain was specifically mentioned, and to safeguard the vendees against the consequences of that or any other suit certain other property was hypothecated. Mt. Sarsuti, the last surviving widow, died on the 9th January 1919. On the 3rd May 1919, Rup Narain instituted a suit for possession of the property sold by Shambu Nath to the plaintiffs. On the 30th July 1921, this suit was decreed on payment of Rs. 38,144 as compensation. Rup Narain deposited the amount and obtained possession of the property on the 13th August 1921. The present suit was then instituted by the plaintiffs against, Mt. Gopal Devi, widow of Shambu Nath, on the 30th November 1921, on the basis of the stipulation as regards quiet possession and enjoyment in the sale-deed and the agreement referred to above, for recovery of the purchase-money, arrears of rent and damages, amounting in all to Rs. 20,119-14-0. The defendant put forward various pleas including limitation and acquiescence. The learned senior Subordinate Judge who tried the case held the suit to be within time and granted the plaintiffs a decree for Rs. 18,891. Future interest at 6 per cent. per annum from the date of suit till realization was also allowed on the purchase money, i. e. Rs. 18,560. From this decision the defendant has appealed.

The main point argued in the case was that of limitation. It was urged for the appellant that the suit was governed by Art. 97 Sch. 1, Indian Limitation Act, and that the starting point for limitation was the date of the Privy Council judgment of 1909 in the suit by the reversioners Jai Narain and Rup Narain, inasmuch as the judgment negatived the vendee's title and thus resulted in failure of consideration. It was further contended that, even if loss of possession furnished a fresh cause of action subsequently, the earlier cause of action must prevail, inasmuch as limitation, once it has begun to run cannot be subsequently interrupted. *Gaya Din* v. *Jhumman Lal* (1) and *Shib Dayal* v. *Maherban* (2) were relied upon in support of the latter contention.

The present suit, as already stated, is based on the covenant as regards quiet possession and enjoyment embodied in the sale-deed and also on the terms of the agreement which was executed along with the sale-deed with special reference to the suit by Jai Narain and Rup Narain. This agreement was really in the nature of an indemnity bond and provided that if the whole or part of the property went out of the possession of the vendees on a suit being brought by anybody or if the vendees were impleaded in any suit as defendant and had to pay the value of the property, the vendor was to be liable to them for repayment of the value of the property together with costs of the suit. There can be no doubt, according to the terms of both the documents, the vendees were entitled to a refund of the purchase-money in the event of loss of possession. This fact was not disputed on behalf of the appellant, but it was contended as regards the indemnity bond that it was to enure only for a limited period, namely up to the date of the decision of the Privy Council judgment of 1909, and that it was null and void after that date. This interpretation of the document, however, leads to an obviously absurd position. The material portion of the indemnity bond bearing on this point is as follows: *aur ba'd faisla muqaddama mazkura bala badalat akhiri vih zamanat nama babut zar kaladam wa be asar samjha jawega aur man muqir wapas lunga* (and after the decision of the above-mentioned suit by the final Court, this security bond with regard to the security money shall be considered null and void and ineffectual, and I will take it back). The words "above-mentioned suit" occurring in the above passage are ambiguous; for there are, at least, three different suits mentioned in the preceding portion of the document, namely first, the suit of Jai Narain and Rup Narain which was pend-

(1) [1915] 37 All. 400=28 I. C. 910=13 A.L.J. 510 (F.B.).
(2) A. I. R. 1923 All. 1=45 All. 27 (F.B.).

ing; secondly, a suit resulting in dispossession of the vendees from the property; and thirdly, a suit requiring them to repay the purchase-money a second time to another person. The intention of the parties evidently was to safeguard the vendees against the consequence of an adverse decision in these suits. Whichever suit may be taken to be referred to by the words "above-mentioned suit", it seems obvious that the object of the indemnity bond would have been frustrated altogether if the bond ceased to be in force as soon as the suit was finally decided; for dispossession or double payment, for which the vendees were to be indemnified according to the terms of the bond, would in the ordinary course take place after and not before the final decision of the suit. It seems to me that the intention of the parties probably was that the indemnity bond should become null and void if the suits referred to above were finally decided in favour of the vendor, but the intention has not been properly expressed owing to bad drafting. The interpretation sought by the appellant to be placed upon the terms of the document would defeat its object altogether, and I think it must be rejected on that account.

However, even if the interpretation of the appellant is accepted for the sake of argument and it is held that the indemnity bond ceased to have any effect after the Privy Council decision of the year 1909, the plaintiffs can still fall back upon the covenant of quiet possession included in the sale-deed itself. The indemnity bond only furnished an additional security to the vendees, but in no way abrogated or modified the terms of the sale-deed which were quite general and independent of the security bond. According to the terms of the sale-deed, the vendor undertook to refund the purchase money

> if by chance anyone comes forward as a claimant or objector in respect of the property sold, or if the whole or a part thereof goes out of the possession of the vendees on action being brought by anybody.

Now, the first part is obviously inapplicable to the suit of the reversioners, Jai Narain and Rup Narain, which was actually pending at the time. The second part is, however, quite general and would apply to dispossession resulting from that suit or any other suit. The vendees were not dispossessed till 1921, and if limitation is reckoned from the date of dispossession, the suit would admittedly be within time.

It was, however, contended on behalf of the appellant that the Privy Council judgment of 1909 in any case resulted in negation of the plaintiffs' title and, in consequence, failure of consideration, and that there arose thus a cause of action for which the limitation period is prescribed by Art. 97, Sch. 1, Indian Limitation Act. The following rulings were cited in support of this contention: *Bassu Kaur* v. *Dhum Singh* (3), *Amma Bibi* v. *Udit Narain Misra* (4), *Juscurn Boid* v. *Pirthichand Lal Choudhury* (5), and *Tapasi Mal* v. *Jhandoo* (6). Now, in the first place, it cannot be properly said that the vendees' title was negatived or that the consideration failed entirely on the date of the Privy Council decision. The suit decided by the Privy Council was merely for a declaration. The alienation was declared to be voidable at the option of the reversioners on the death of the widows. The last surviving widow did not die till the year 1919 and the vendees were certainly entitled to retain possession of the property till then. The property had, moreover, been improved and the reversioners could not have recovered possession without paying heavy compensation. There was thus a possibility of the reversioners not being able to take advantage at all of the declaratory decree. It was also likely that the vendor who had guaranteed quiet possession and enjoyment to the vendees might have come to terms with the reversioners. It is thus clear that the chances of the vendees losing possession of the property were remote and uncertain when the declaratory suit was decided by the Privy Council in the year 1909. Possession was certainly an important element of the consideration for the sale and this portion of the consideration did not fail till the year 1921. The learned counsel for the appellant has relied upon *Bassu Kaur* v. *Dhum Singh* (3), and *Amma Bibi* v. *Udit Narain Misra* (4), but the facts of these cases were quite different because

(3) [1889] 11 All. 47=15 I. A. 211=5 Sar. 250 (P.C.).
(4) [1909] 31 All 688=1 I. C. 890=36 I. A. 44 (P.C.).
(5) A. I. R. 1918 P. C. 151=46 Cal. 670=46 I. A. 52 (P.C.).
(6) [1921] 62 I. C. 953.

no question of possession was involved therein. In both these cases there was only an agreement to sell, and when specific performance on the basis of the agreement was refused by Courts, the failure of consideration was held to have taken place. In *Juscurn Boid* v. *Pirthichand Lal Choudhury* (5), which had also been relied upon, the decision proceeded on the special facts of the case which were somewhat peculiar. The suit was one for recovery of purchase-money on the sale of a patni taluq being set aside under the Bengal Patni Taluq Regulation 1819. Owing to the particular course which litigation had taken in that case, the applicability of Art. 97, Sch. 1, Limitation Act, was assumed for the purposes of the appeal but without affirming its correctness. The argument that the starting point of limitation should be taken as loss of possession was advanced, but the plea was treated as belated. Their Lordships, however, distinctly recognized that

> there may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run (ibid at page 679).

Their Lordships thus do not appear to have laid down any general rule governing cases of this description, and the ruling in *Juscurn Boid* v. *Pirthichand Lal Choaudhury* (5), has been distinguished on this ground by the Madras High Court and held to be inapplicable where a vendee has been put in physical possession and subsequently dispossessed: vide *H. M.K.V. Sankara Variar* v. *T. K. Ummar* (7) and *Venkanna* v. *Appalaswami* (8).

Some stress has also been laid on *Tapasi Mal* v. *Jhandoo*, a Single Bench ruling of this Court, which prima facie seems to be in the appellants' favour. The facts are, however, to some extent distinguishable as the vendees themselves had in that case sued for a declaration that they were owners of certain land belonging to a minor which had been sold to them and the suit had been dismissed on the ground that the sale was void. In the present case the vendees were not even parties to the suit decided by the Privy Council and the sale was not void but only voidable at the option of the reversioners on the death of the two widows who had effected the sale. The Single Bench decision purports to follow *Juscurn Boid* v. *Pirthichand Lal Choudhury* (5), but does not discuss it in detail, and the reservation that their Lordships make in respect of the circumstances in which limitation may run from loss of possession has not been noticed. The case, moreover, has not been published in any authorized report, and with all respect for the view of the learned Judge who decided the case, I do not think it can be accepted as an authority in the circumstances of the present case. I would accordingly hold that limitation did not commence to run till the vendees were actually dispossessed in the year 1921, and from the date of dispossession the suit is admittedly within time, as already noted.

The other grounds of appeal were not much pressed. It was urged that the plaintiffs had already realized large profits from the property during the period they have been in possession and that their silence after the Privy Council decision should be held to amount to acquiescence disentitling them to any relief. This contention has obviously no force. The vendees had paid a substantial sum for the property and were clearly entitled to its profits so long, at any rate, as they were entitled to retain possession. But for the suit of the reversioners they might have enjoyed the profits of the property in perpetuity. Their silence after the Privy Council decision also cannot be construed as tantamount to acquiescence. They were not only not bound to take any action immediately after that decision but could not have in fact even sued for any relief until they were actually dispossessed.

Lastly, it was urged that the plaintiffs should not have been, at any rate, allowed any interest; but the lower Court has allowed interest at the moderate rate of 6 per cent per annum on the purchase-money only from the date of the suit up to realization, and this seems reasonable enough in the circumstances. On the above findings I would reject the appeal with costs.

Broadway, Ag. C. J.—I concur.

R.K. *Appeal dismissed.*

(7) A. I. R. 1923 Mad. 46=46 Mad. 40.
(8) A. I. R. 1925 Mad. 749.

A. I. R. 1927 Lahore 574

AGHA HAIDAR, J.

Prem Singh and *another*—Defendants —Appellants.

v.

Mohammad Khurshid and *others*—Plaintiffs—Respondents.

Second Appeal No. 1979 of 1926, Decided on 9th May 1927, from the Prely. Decree of the Sr. Sub-J., Rawalpindi, D/- 6th January 1926.

(a) *Civil P. C., S.* 100—*Finding of fact based on evidence—High Court in second appeal cannot interfere.*

Findings of fact recorded by the lower appellate Court, even if erroneous, so long as they are based upon evidence, are binding in second appeal. [P 575 C 2]

(b) *Transfer of Property Act, S.* 91—*Mortgagor must show that the suit is within limitation.*

Unless a plaintiff in a redemption suit gives prima facie evidence that the suit is brought within limitation, he fails to show that he has a subsisting right to the property in suit or in other words he fails to prove his title. [P 576 C 1]

(c) *Civil P. C., O.* 41, *R.* 27—*Document in possession of a party cannot be allowed in evidence in second appeal.*

An unregistered document admitted to be all along in possession of a party, cannot be allowed in evidence in second appeal, merely because it is alleged that it was recently discovered: 31 *Bom.* 381 (*P. C.*), *Rel. on.* [P 577 C 1]

Faqir Chand and *Devi Dial*—for Appellants.

C. H. Oertel and *Ram Chand Manchanda*—for Respondents.

Judgment.—This appeal arises out of a suit for the redemption of a mortgage. The trial Court dismissed the plaintiffs' suit. The lower appellate Court allowed the appeal and decreed the plaintiffs' claim. The defendants have come up in appeal to this Court.

The plaintiffs came into Court on the allegation that their predecessors-in-title during the period of the second settlement, i. e., 1882-1885, had mortgaged the shop in suit to one Jowala Singh, the predecessor-in-title of the defendants, for a sum of Rs. 80 and that the mortgage was with possession with the further condition that the rent of the shop would be set off against interest. The repairs were to be executed by the mortgagee and the property was to be redeemed on payment of Rs. 80. The plaintiffs as the reversioners of the original mortgagors, therefore, sued the defendants for the redemption of the shop on payment of Rs. 80. The defendants denied the plaintiffs' title and pleaded that they were the owners of the said shop. They also pleaded that the shop was re-built by them at a cost of Rs. 200. The trial Court came to the conclusion that the plaintiffs may have been owners of the site under the shop, but that they had not been able to prove by any satisfactory evidence that they were owners of the shop and that it was mortgaged to Jowala Singh, the ancestor of the defendants. This finding was sufficient to defeat the plaintiffs' claim; but the learned Subordinate Judge recorded findings on some of the other issues and also held that the plaintiffs were the reversioners of the alleged original mortgagors. In the end he dismissed the suit. The plaintiffs went up in appeal to the lower appellate Court.

I may here mention a matter which was argued at considerable length before this Court in appeal. One of the plaintiffs in suit was Mahammad Ji. He died on the 15th August 1925, while the case was pending in the trial Court. An application was made on behalf of the plaintiffs to the Court for bringing Muhammad Saddiq the minor son and legal representative of Muhammad Ji, on the record as a plaintiff. This application was granted, the title of the suit was amended and the name of Muhammad Saddiq was substituted for that of Muhammad Ji. The name of Muhammad Saddiq also appeared in the array of the plaintiffs in the decree-sheet of the trial Court. Muhammad Saddiq being a minor, Muhammad Kurshed, plaintiff 1, was made his next friend. It happened that when the plaintiffs filed their appeal before the lower appellate Court, the name of Muhammad Ji was through some oversight retained as one of the plaintiffs-appellants and the minor Muhammad Saddiq, who had been brought on the record as the legal representative of Muhammad Ji, was lost sight of. As stated above, the lower appellate Court decreed the plaintiffs' suit, but the mistake was automatically repeated in the decree with the result that the name of Muhammad Ji, appeared in the decree-sheet, although

as stated above, Muhammad Ji had died about a year ago. When the defendants filed their appeal in this Court they naturally copied out the names of the respondents from the decree-sheet of the lower appellate Court, so that Muhammad Ji was once again impleaded as a plaintiff-respondent. An application was made afterwards by the defendants-appellants in this Court praying that Muhammad Saddiq's name may be brought on the record and the name of Muhammad Ji may be expunged. The learned counsel for the defendants, however, subsequently withdrew this application, so that we have the fact that Muhammad Ji, although he died long ago, is still arrayed as a party respondent in the appeal and Muhammad Saddiq, the son of Muhammad Ji, who had been brought on the record as the legal representative, is not before the Court.

The learnel Judge of the lower appellate Court after considering the evidence at length, arrived at the conclusion that the plaintiffs were the representatives of the original mortgagors and the defendants represented the mortgagee and that the plaintiffs could redeem their mortgage. He further found that, though the defendants could not prove that they had spent any sum on re-building the shop, the commissioner appointed by the lower Court reported that the price of the present building of the shop was Rs. 400. He accordingly gave the plaintiffs a decree conditional on their payment of a sum of Rs. 430 to the defendants. The plaintiffs have not challenged this finding either by filing a regular appeal or by putting in cross-objections under O. 41, R. 22, Civil P. C., so that no more need be said about it. The appeal was accordingly allowed by the lower appellate Court.

At the time of the argument the learned counsel for the appellants, Lala Fakir Chand, raised the plea that as no appeal was filed before the lower appellate Court on behalf of Muhammad Saddiq, the legal representative of the deceased, Muhammad Ji, therefore, the whole appeal abated. He did not cite any authority before this Court under which the whole appeal would abate under the circumstances. On behalf of the respondents it was argued that as Muhammad Saddiq was not made a party to the second appeal in this Court, therefore, the defendants' appeal must fail. No authority was cited for this view either. Eventually it was argued on behalf of the respondents that the appeal by the plaintiffs in the lower appellate Court may be taken to have been preferred under the provisions of O. 41, R. 4, Civil P. C. and that they were appealing just as much for themselves and on their own behalf as for Muhammad Saddiq, who was not impleaded as a plaintiff-appellant. On this Lala Fakir Chand, counsel for the appellants, said that this being the position taken up by the plaintiffs-respondents he is prepared to attack the decree as a whole irrespective of the fact that Muhammad Saddiq is not a party to the appeal. In my opinion this is the only solution of the difficulty that had arisen by the mistake of the parties. I, therefore, take it that the plaintiffs were appealing in the lower appellate Court on behalf of themselves as well as for Muhammad Saddiq, the minor legal representative of Muhammad Ji, and that the decree which they obtained in the lower appellate Court would ensure for the benefit of Muhammad Saddiq as well.

Now coming to the appeal itself, there are eight grounds of appeal. Grounds 1, 2, 3 and 7 were not pressed on behalf of the appellants in argument before this Court. Ground 6 is an argument and should not find a place in a properly drafted memorandum of appeal. Grounds 4 and 5 and the general ground 8 are really so many attempts to attack the finding of fact arrived at by the lower appellate Court on evidence. The learned Judge of the lower appellate Court has discussed the evidence on the record very thoroughly. Whether his appraisement of that evidence and the conclusions drawn from it are correct or erroneous, this Court in second appeal cannot express an opinion one way or the other and must accept them. According to a series of cases decided by their Lordships of the Privy Council it has been definitely settled that findings of fact, reported by the lower appellate Court, even if erroneous, so long as they are based upon evidence, are binding in second appeal upon the High Court.

The learned Judge of the lower appellate Court, in discussing the evidence of the parties, accepted the evidence of Muhammad Hussain and Abdul Rahman, witnesses for the plaintiffs, who deposed that Prem Singh admitted the factum of the mortgage before them when they went to ask him on behalf of the plaintiffs to redeem the mortgage some time in March 1926. He has found that the plaintiffs belong to the proprietary body of the village and are, therefore, entitled to the shamilat land on which the shop in suit is situated. He further finds that neither the defendants nor their ancestor Jowala Singh is entered as owner in possession of any building or vacant site in the khasra abadi of 1864. Finally, after a full discussion of the evidence on the record, he recorded the following findings:

> Considering the facts and evidence I hold that plaintiffs are owners of the shop and it was mortgaged to Jowala Singh, ancestor of the defendants, for Rs 80 about the year 1885.

This finding, in my opinion, is conclusive and plaintiffs cannot go behind it in second appeal.

Mr. Fakir Chand raised the plea that the plaintiffs have failed to prove the particular mortgage in suit and referred me to two cases, namely *Ram Chandra Apaji* v. *Balaji Bhaurav* (1), *Parmanand Misr* v. *Sahib Ali* (2). The Allahabad case was decided on the plea of limitation and there was a finding of fact recorded by the lower appellate Court to the effect that there was no prima facie evidence of a reliable character that any such mortgage as that alleged and relied upon by the plaintiff had been proved. It was rightly held by the High Court on this finding that unless a plaintiff in a redemption suit gave prima facie evidence that the suit is brought within limitation, he fails to show that he has a subsisting right to the property in suit; or' in other words, he fails to prove his title. This case has no application to the present case, because the plaintiffs came into Court alleging that the mortgage was made in favour of the predecessors-in-title of the defendant some time between 1880 and 1885, so that the suit which was brought well within sixty years was amply within time and no question of limitation arose. Furthermore, the finding of fact recorded by the lower appellate Court in that case was against the plaintiff-mortgagor, while in the present case it is in his favour.

The case reported as *Ram Chandra Apaji* v. *Balaji Bhaurav* (1) must be considered with regard to the particular facts of that case. This case was referred to in a very full and exhaustive judgment of the Bombay High Court by Mr. Justice Chandavarkar, who delivered the judgment of the Court *Bala* v. *Shiva* (3). This case was not quoted by any one of the parties before me. This was also a suit for redemption and the plaintiffs came into Court alleging that they were the representatives of one Rama, who was the original mortgagor. The defence was the denial of the mortgage and the plea of limitation. In the plaint in that suit the mortgage set up was stated to have been made above forty-five years ago and the lower appellate Court had held that the mortgage transaction was made in the year 1853, counting forty-five years backwards. It was held by the High Court in second appeal that it would be taking too literal and technical a view of the pleadings if it were understood to mean that the mortgage transaction was entered into in 1853, and that unless that was proved the plaintiff must fail. The learned Judges held that the real question before the parties was whether the defendants were the mortgagees and that the plaintiffs would be entitled to succeed if they proved that the land is still held by the defendants as such mortgagees without specifying the exact date of the mortgage. In the present case also the plaintiffs alleged that the mortgage was made some time between the years 1880 and 1885 and the finding of the lower appellate Court is that it was made about the year 1885. This being so, the plaintiffs have given prima facie evidence that they were the mortgagors and as such were entitled to reedem the mortgage. The onus was thus shifted on to the defendants to prove that they were the proprietors of the shop in suit. This onus they have failed to discharge in view of the finding of the lower appellate Court. This being so, I would affirm the decree of the lower appellate Court and dismiss the defendants' appeal with costs.

(1) [1885] 9 Bom. 137.
(2) [1889] 11 All. 438=(1889) A. W. N. 155.
(3) [1903] 27 Bom. 271=5 Bom. L. R. 85.

I may observe here to avoid any misunderstanding that in view of the position taken by the plaintiffs-respondents the decree which has been affirmed by me would enure for the benefit of Muhammad Saddiq, the minor son and legal representative of Muhammad Ji deceased, to the extent of the rights and interests of his father Muhammad Ji.

I may here mention that on behalf of the appellants an application was made asking this Court in second appeal to admit fresh documentary evidence. The affidavit filed along with the application in para. 2 says that the paper which is sought to be filed now was in the house of the defendants-appellant Prem Singh and has been discovered by him recently. In view of the law laid down by their Lordships of the Privy Council in *Kessowji Issur* v. *G. I. P. Ry. Co.* (4) I do not think I would be justified in admitting this piece of fresh evidence under O. 41, R. 27, Civil P. C. on an affidavit of of this kind. The document is unregistered and on the appellants' own showing had been all along in his house and in his custody and it is too late for him to try to place it on the record after the case had already been fought out in the two Courts below. I therefore decline to receive that document in evidence.

R. K. *Appeal dismissed.*

(4) [1907] 31 Bom. 381=34 I. A. 115=9 Bom. L. R. 671 (P. C.).

A. I. R. 1927 Lahore 577

ADDISON AND AGHA HAIDAR, JJ.

Allahabad Bank, Ltd., Lahore—Plaintiff—Appellant.

v.

Rattan Chand Chawala and *others* —Defendants—Respondents.

F. A. No. 725 of 1923, Decided on 25th April 1927, from the decree of the 1st Cl. Sub-Judge Lahore, D/- 2nd January 1923.

Negotiable Instruments Act, S. 37 — Hundi drawn by A in favour of B—B endorsing it in favour of a bank—B having overdrawn current account with bank—Amount of hundi credited in B's account immediately—Hundi dishonoured and B's account debited with its amount—There is no satisfaction of hundi—Both A and B are liable on it.

A bank which credits the customer with the amount of a cheque as soon as it is paid in to his credit is usually in the position of a holder in due course of the cheque and collects the same not for the customer, but for itself. [P 578 C 2]

The plaintiff, a bank, sued for recovery of certain amount on two hundis payable at sight, drawn by defendant 2 in favour of defendant 1, on a certain firm. They were endorsed to the bank by defendant 1, and were dishonoured by the drawee. Defendant 1 had a current account with the bank which was overdrawn; the hundis were paid in reduction of the overdraft and defendant 1 was at once allowed to draw against the credit balance thus established. After the hundis were dishonoured, the bank debited defendant 1's account with that amount and gave notice of dishonour.

Held: that the bank was the holder in due course of the hundis. It did not matter that the amount of the hundis was carried to the current account. It could not be said that there was a discharge by accord and satisfaction. When the hundis were returned unpaid. The bank, as an account transaction, simply showed in the pass book that defendant 1 was liable to the extent of the dishonoured hundis. This did not mean that the bank gave up its rights in the hundis as against either of the defendants. Nor was there any discharge by merger. Defendant 2 was liable on the hundis as principal debtor, while defendant 1 was liable as surety for the debt. [P 579 C 1, P 580 C 1]

Sardha Ram and *Partap Singh*—for Appellant.

M. C. Mahajan and *H. R. Mahajan*—for Respondents.

Addison, J.—The plaintiff bank sued for recovery of Rs. 6,677-9-3, principal and interest on two hundis payable at sight, drawn by defendant 2 in favour of defendant 1 on a Bombay firm. They were indorsed on the 21st June 1922 to the bank by defendant 1 and were dishonoured by the drawee, due notice of this being given to the defendants. Only defendant 1 defended the suit, his principal pleas being (1) that the hundis were given for collection only and that, though credit was at once given for them in the current account of defendant 1 with the bank, they had in fact nothing to do with that account; (2) that the bank later agreed to adjust them in the current account, this being done on the 18th July 1922, and that in this way they had merged in the current account, which was an overdraft account by agreement; and (3) that the hundis were discharged by the amount due on them being debited in the current account and pass book of defendant 1. It was urged that for these reasons there was no cause of action on the hundis though there was against defendant 1 alone on the overdrawn current account.

It might be mentioned that defendant 1 is now an insolvent though this was not the case when the suit was brought. The bank's case was that there was an indorsement of the hundis in their favour for consideration and that they were not given as collateral security against the overdrawn account. The trial Court held (1): that the hundis were not given to the bank for collection; (2) that the liability on the hundis had not merged into the general liability on the current account of defendant 1 with the bank; (3) but that by the bank's action in debiting the already overdrawn current account of defendant 1 with the amount of the hundis after they were dishonoured, they were virtually discharged as that was the same thing as the payment by defendant 1 of the sum debited. For reasons which need not be detailed the suit was not completely dismissed, but a decree was given for the small sum of Rs. 36-3-0 with future interest against the defendants. Against this decision the bank has appealed.

The current account of defendant 1 with the bank opened in May 1922. It remained a credit account till the 19th June, on which date it became a debit account to the extent of Rs. 4,969-4-0. This was due not to an agreement between the parties but to an oversight on the part of the bank. Two cheques for Rs. 8,712-11-4 drawn by defendant 1 were presented on the 13th June to the clearing bank which sent them to the plaintiff bank. The latter intimated to defendant 1 that his account was not in funds to that extent and it also intended to return the cheques unpaid to the clearing bank on account of certain irregularities in them so that they might again be presented after correction of the irregularities, by which time defendant 1 also might have placed his account in sufficient funds. The cheques were, however, mislaid and not returned to the clearing bank that day with the result that in accordance with the rules they were paid. With the consent of defendant 1 the bank debited his account with their amounts and in this way this account was overdrawn for the first time. The bank also honoured three very small cheques of defendant 1 the next day, i. e., on the 20th June, though his account was then overdrawn. It could not have refused to do so, seeing that the fact that it had been allowed to become overdrawn was due to the bank's own act. Thereafter, defendant 1 gave the bank two hundis on Jhelum and two on Abbottabad, the amounts of which were credited to his account at once before collection. This brought the debit balance down to Rs. 1,988-8-5. Defendant 1 indorsed the two suit hundis in favour of the bank which immediately, on the 21st June, gave him credit for their full amount, thereby changing the debit balance to a credit balance of Rs. 4,594-15-7. The same day defendant 1 was allowed to draw out on his own behalf Rs. 4,550 thus reducing the credit balance to Rs. 44-15-7. The hundis were not honoured and their amount was debited by the bank on the 18th July 1922 in the pass book of defendant 1. At that time his current account was already overdrawn.

It is clear from the course of these transactions that the hundis were given for collection. The amounts were credited at once to defendant 1, who in fact by means of this credit was able to draw out Rs. 4,550 cash. There can, therefore, be no question but that the bank was the holder in due course of the hundis. The authorities are quite clear on this point. In *Dey* v. *Mayo* (1) it is said:

> There is no doubt that a bank which credits the customer with the amount of a cheque as soon as it is paid in to his credit is usually in the position of a holder in due course of the cheque and collects the same not for the customer, but for itself.

In *Patoju Sanayya* v. *Sanyasi* (2) it was held by the Madras High Court that where from the terms of an indorsement on a promissory note no accountability can be inferred between the indorser and indorsee, it is not an indorsement for collection merely, and the holder alone can bring a suit on the note. In *ex-parte Richdale, In re Palmer* (3) it was held that when a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value, even

(1) [1920] 2 K. B. 346=89 L. J. K. B. 241=64 S. J. 240=122 L. T. 742=36 T. L. R. 217.
(2) [1914] 23 L. C. 545.
(3) [1882] 19 Ch. D. 409=51 L. J. Ch. 462=30 W. R. 262=46 L. T. 116.

though the customer's account is not overdrawn. In Halsbury's Laws of England, Vol. 1, p. 592, S. 1212, it is said that the position of a holder for value can be set up by the bank where cash has been given for the cheque over the counter; where the cheque is paid in reduction of an overdraft; and where the cheque is paid in on the express condition of being at once drawn against and is so drawn against. In the present case, the account was overdrawn, the hundis were paid in in reduction of the overdraft and not one by agreement; the customer was at once allowed to draw against the credit balance thus established, while the indorsement was a full one. In these circumstances there is no doubt that the bank was the holder in due course of the hundis. It does not matter that the amount of the hundis was carried to the current account. In the case of a customer of a bank that is the usual course: see Halsbury's Laws of England, Vol. 1, p. 629, S. 1270.

On behalf of the appellant it was argued that by merely adding the amount of the dishonoured hundis to the debit side of an already overdrawn account and by showing this debit in the pass book, the bank did not discharge the hundis. This was the only point found against the appellant by the trial Judge who held that this meant the same thing as the payment by defendant 1 of the amounts due on the hundis which were thus discharged by payment. This is obviously wrong as it cannot be said that there was a discharge by accord and satisfaction. There appears only to have been the one account, and when the hundis were returned unpaid, the bank, as an account transaction, simply showed in the pass book that defendant 1 was liable to the extent of the dishonoured hundis. This did not mean that the bank gave up its rights in the hundis as against either of the defendants. On behalf of the respondents it was argued that this was a discharge by merger, rather than by accord and satisfaction, and reference was made to Halsbury's Laws of England, Vol. 1, p. 31. It is stated there that a cause of action may be extinguished by merger, as when a person, who takes a security of a higher legal character than he already possesses extinguishes his remedies upon the existing cause of action, e. g., by taking a bond for a simple contract debt or recovering a judgment. But that obviously did not happen in the case before us. In fact the contention of the learned counsel for the respondents is that the bank gave up a good cause of action against two persons on a negotiable instrument by exchanging it for the unsecured liability of one of those persons only. The question of merger is one of fact and it is impossible to hold that there was a discharge by merger in the present case.

There are two letters of defendant 1 to the bank, dated the 5th July, stating that he will do his best to adjust his overdrawn account soon; and it is probable that the bank would not have sued on the hundis had the account been adjusted, as, by doing so, the bank would have been paid. But the bank never agreed to give up its rights in the hundis and in fact gave notice of suit on the two hundis to both defendants on the 18th July, i. e., on the same day as it debited their amounts in the pass-book of defendant 1. Another letter, Ex. D-2, was written by the agent of the bank on the same day to defendant 1, giving him two days more to settle the account before the suit would be brought, but it cannot be inferred from this letter that the bank's rights in the hundis were given up and that the bank only held defendant 1 liable on his current account, though it was prepared not to sue if that account was balanced by payment. There could be no more emphatic declaration by the bank that it treated the hundis as a debt and unpaid, than the facts: (1) that they gave notice of suit on the hundis to the defendants on the 18th July 1922, the date when the debit was made; and (2) that the bank did bring the present suit on the 31st July 1922: see in this connexion *Brown, Janson & Co.* v. *Cama & Co.* (4). I would therefore hold that there was no discharge by accord and satisfaction, or by merger, or in any other way.

A very similar case is *Ryder* v. *Willet* (5). A drew a bill on B and indorsed it to a bank where he had an account. B accepted the bill, but did not pay it. The Bank then entered it on the debit

(4) [1890] 6 T. L. R. 250.
(5) [1836] 7 C. & P. 608.

side of A's account. The state of A's account at the time of the entry and up to the action was against A. It was proved that the bank had, on former occasions, allowed A to overdraw his account, though there was no agreement to this effect. It was held that these facts did not prove a plea that the bank had received from A £100-6*s*-0*d* in satisfaction of the bill. That case is similar to the present except that this suit is against the drawer who stands in the same position as the acceptor did in the English case: see S. 37, Negotiable Instruments Act.

Besides, even if it could be held that the bank discharged defendant 1 from liability by debiting his already overdrawn account, that would not mean that defendant 2 who has not defended this suit was discharged. I have held that the bank was a holder in due course. That being so, the position between defendant 2 and the bank is that laid down in S. 37, Negotiable Instruments Act. Defendant 2 is liable on the hundis as principal debtor while defendant 1 is liable as surety for the debt. S. 135, Contract Act, has therefore no effect, while S. 62, Contract Act, does not apply as defendant 2 was not a party to the alleged novation. There thus could be no merger of the hundis, so far as defendant 2 is concerned, into the liability of defendant 1 on his current account: see in this connexion *Loader* v. *Chartered Bank of India, Australia & China* (6). Defendant 2 is obviously liable in any case.

The only other argument advanced was on behalf of the respondents to the effect that there was one current account and one liability on it and that the hundis merged in that account and thus the bank had not an independent right of suit on the hundis. Alternatively, it was contended that the giving of the hundis was a conditional payment towards the overdrawn balance and that when they were dishonoured, the bank had only the right to fall back on the original cause of action i. e., the overdrawn current account. This argument cannot stand and is answered by the preceding discussion. Once it has been held that the bank is the holder in due course, it follows that it has all the rights of such holders. This is clearly laid down at the foot of p. 592 of Halsbury's Laws of England, Vol. 1, S. 1212. Further, the case set up by defendant 1 is inconsistent with the above contention. He pleaded that the hundis were given for collection and had in fact nothing to do with his current account, though he received credit in that account for them. According to his pleadings it was only later that the bank agreed to adjust them in the current account and that, in this way, they merged in that account and were discharged. He has failed in that part of his case. It was also never the case of defendant 1 that these hundis were conditional payments towards the overdrawn current accounts. This contention of respondents' counsel must therefore fail.

I would accept the appeal, and decree the suit in full with costs throughout and future interest at 6 per cent per annum from date of suit till date of realization against both defendants.

Agha Haidar, J.—I concur.

G.B. *Appeal accepted.*

(6) [1913] 6 Bur. L. T. 171=21 I. C. 222.

A. I. R. 1927 Lahore 580

HARRISON, J.

Kishen Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 463 of 1927, Decided on 17th May 1927, from an order of the S. J., Hoshiarpur, D/- 4th January 1927.

Penal Code, Ss. 376 *and* 354—"*Attempt*" *defined*—*Penal Code, S.* 511.

Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. [P 581 C 2]

Where the accused stepped across from his own roof to that of his neighbour at night and caught hold of his daughter, got on to the charpoy with her, undid the string of her pyjama and was seen struggling with her when the neighbour's wife came up in answer to her daughter's cries, and he then ran away:

Held : that he had been rightly convicted under S. 376/511 : 47 *Cal.* 190 (*S. B.*), *Foll.* [P 581 C 2]

Abdul Aziz—for Petitioner.

Muhammad Rafi for *Government Advocate*—for the Crown.

Judgment.—This application has been admitted on the question whether the offence falls under S. 376/511 or S. 354, I. P. C., and as to sentence if the latter section be held to apply. The facts are very clear. The accused Kishen Singh, lambardar, took advantage of the absence of his neighbour and occupancy tenant Gangu to step across from his own roof to that of Gangu while Mt. Jaikar, the neighbour's daughter, was lying unprotected on her charpoy. This was at night. He caught hold of the girl, got on to the charpoy with her, undid the string of her pyjama and was seen struggling with her when Mt. Bholi came up in answer to her daughter's cries. He then ran away. On the facts he has been convicted under S. 376/511, I. P. C.

Counsel contends that the offence falls under S. 354, and has quoted *Muna* v. *Emperor* (1). Counsel for the Crown has in reply relied on *Jaimal* v. *Emperor* (2) which quotes *Ghasita* v. *Emperor* (3) and on *Emperor* v. *Chandkha Salabatkha* (4), *Ganesh Balvant* v. *Emperor* '5), *Emperor* v. *Mansing Daji Patil* (6) and *Shiamji* v. *Emperor* (7). All these authorities are unanimous as to what constitutes an "attempt" and although it is true, as pointed out by counsel for the petitioner, that none of them are cases of rape, the same principle applies. On page 1114 of Ratan Lal's Law of Crimes a quotation is given from *In the matter of "Amrita Bazar Patrika"* (8) which defines "attempt" in the clearest and most concise language.

> Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime ; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of its actual commission ; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

Judged by this test there can, I think, be no doubt whatever that the accused, who obviously intended to commit rape (the age of the girl is 15), did more than one definite act in part execution of his criminal design. Therefore, in my opinion, he has been rightly convicted under S. 376/511. The sentence is under the circumstances suitable. I dismiss the application for revision.

R.K. *Application dismissed.*

(1) [1912] 16 P.W.R. 1912 Cr.=15 I.C. 309=116 P.L.R. 1912.
(2) A.I.R. 1926 Lah. 147.
(3) [1919] 13 P.R. 1919 Cr.=51 I.C. 476=20 Cr. L.J. 492.
(4) [1913] 37 Bom. 553=20 I.C. 611=15 Bom. L.R. 564.
(5) [1910] 34 Bom. 378=5 I.C. 612=12 Bom. L.R. 21.
(6) [1913] 15 Bom. L.R. 568=20 I.C. 593=14 Cr. L.J. 433.
(7) A.I.R. 1922 Nag. 40.
(8) [1920] 47 Cal. 190=30 C.L.J. 289=54 I.C. 578=23 C.W.N. 1057 (S. B.).

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* A. I. R. 1927 Lahore 581

FFORDE, J.
on difference between
AGHA HAIDAR AND BROADWAY, JJ.

Barkati—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 18 of 1927, Decided on 20th May 1927, from an order of the S. J., Ferozepore, D/- 18th December 1926.

* (*a*) *Evidence Act, S.* 133 *and S.* 114, *Illus.* (*b*)—*Uncorroborated testimony of accomplice is not itself sufficient to base conviction on—There must be independent evidence to connect accused with the guilt—But corroborative evidence itself need not be sufficient to base conviction on—Independent evidence showing in material points that the story of the accomplice is true, is sufficient corroboration.*

Although under S. 133, Evidence Act, an accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of such accomplice, the rule of caution that such testimony should be supported by extrinsic evidence connecting the accused with the crime is now regarded as a rule of law, and although it is not illegal to convict a person on the uncorroborated testimony of an approver, the Courts in points of facts always insist upon the rule being followed. [P 589 C 2]

What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. [P 589 C 2]

The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged and it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative

evidence is evidence which shows or tends to show that the story of the accomplice, that the accused committed the crime, is true not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is snfficient if it is merely circumstantial evidence of his connexion with the crime. [P 589 C 2, P 590 C 1&2]

Corroborative evidence need not be sufficient in itself to base a conviction on. Confirmation of the story of an accomplice does not mean that there should be independent evidence of the accomplice's account of the crime itself. What the law clearly requires is that some relevant and material part of the approver's story incriminating the accused should have support from an independent source. This supplies a test of the truth of the accomplice's narrative as a whole by checking it in some relevant portion: *R.* v. *Baskerville*, (1916) 2 *K. B.* 658, *Foll.*

[P 590 C 1]

(b) Criminal Trial—Circumstantial evidence —Mere fact that accused was last seen with deceased together with motive for the crime is not sufficient to convict for murder.

The mere fact that an accused was last seen in the company of a man shortly prior to his murder, even coupled with a strong motive for that murder, is obviously not sufficient proof of guilt.

[P 590 C 1]

Devi Dayal—for Appellant.

Des Raj Sowheny—for the Crown.

Agha Haidar, J.—In this case Barkati has been convicted by the learned Sessions Judge of Ferozepore under S. 302, I. P. C., of the murder of one Narain Singh and has been sentenced to death. He has appealed and the record is also before the Court under S. 374, Criminal P. C., for the confirmation of the sentence of death.

The facts leading up to the motive for the crime are very brief and simple. Narain Singh had three sons: Kishen Singh, Bur Singh and Bishen Singh. He was displeased with two of them, i. e., Kishen Singh and Bishen Singh, and gave away the whole of his property to Anokh Singh, the son of Bishen Singh, his grandson, and Bur Singh, his third son. The result was that Bishen Singh and Kishen Singh were very much annoyed, and the story of the prosecution is that one of his sons named Kishen Singh brought about his death employing hired assassins. Originally six persons, Ujagar Singh, Barkati, Karam Singh, Kishen Singh, Mona Singh and Munshi were accused. One of them, Mona Singh, died during the committal proceedings and Kishen Singh, one of the sons of Narain Singh, has been absconding. Ujagar Singh and Karam Singh had been committed to the Court of Sessions on a charge under S. 302/120-B, I. P. C., of being concerned in a conspiracy to commit murder. They, however, have been acquitted by the learned Sessions Judge and we are now concerned in the appeal with Barkati only.

On the morning of the 22nd February 1926, a dead body was found lying on the railway line at mile 45 between Ghall and Moga railway stations by the guard of a passing train. The guard reported the matter to the station master of Dagru who telegraphed to the railway police about this gruesome find. The head constable, Zamir-ul-Hussain, went to the spot and was soon followed by Khwaja Haidar Ali Sub-Inspector, Railway police, who prepared the inquest report and the statement of injuries. The dead body was photographed and was subsequently sent to Moga mortuary for post mortem examination. It turned out to be the dead body of Narain Singh of Budh Singhwala who was a man of 60 or thereabouts. According to the medical evidence his throat had been cut with a sharp-edged instrument leaving a big gashing wound behind and his body seemed to have been placed afterwards on the railway track. When it was discovered, it was found to have been cut in twain by some passing train. The case was subsequently transferred from the railway police to the civil police and on the 11th May 1926, Sheikh Abdul Wahid, sub-inspector of Moga, took over the investigation. All the accused persons mentioned above were arrested. Munshi was arrested on 13th of May 1926, and remained in the police custody for about a month. On the 12th June he was tendered a pardon and made King's evidence. He made a long statement before Diwan Gokal Chand, Magistrate, and subsequently before the learned Judge. He says that Mona Singh, accused, introduced him to Karam Singh and Ujagar Singh who offered him a sum of Rs. 500, if he and Barkati would murder Narain Singh. I may observe here that it does not appear why, of all men in the world, Barkati's name should have been suggested as the possible accomplice of Munshi.

To go on with the approver's story: he says that he consulted Barkati, and the two agreed to do the deed. They shadowed the doomed man, and finally,

on the 21st February 1926, Kishen Singh, the son of Narain Singh, (absconding), informed Munshi that his father Narain Singh would attend the Court of the District Judge, Ferozepore, on the 22nd February 1926. Munshi says that he started with Barkati early in the morning of the 22nd and met at Gill Chet Ram who also had some business in Court at Ferozepore. Munshi, Barkati and Chet Ram drove together to the railway station at Moga where they took the train for Ferozepore, reaching there at 9 a. m. At Ferozepore they saw their victim Narain Singh in the precincts of the Court of the District Judge. They also met Chet Ram and susequently one Jallu who, however, did not notice Barkati. On the return journey they managed to join Narain Singh and started some conversation with him while waiting for the train in the passenger's shed at Ferozepore. Munshi insinuated himself into the confidence of Narain Singh and as Narain Singh was a litigious person and wellversed in the ways of litigation, he asked the advice of Narain Singh as to the best way of prosecuting some persons who had given evidence against him (Munshi) in a dacoity case. Munshi found Narain Singh quite agreeable and Narain Singh interested himself in the matter to this extent that he undertook to obtain copies of the necessary depositions of the witnesses against whom Munshi intended to start criminal proceedings.

At Ferozepure Munshi purchased three third class tickets for himself, Barkati and Narain Singh for Moga. It may, however, be mentioned that before leaving the railway station Barkati and Munshi met Bishen Singh who was also in the passengers' shed and afterwards Babu Lekh Singh on the platform at Ferozepore. Babu Lekh Singh was an overseer of the Canal Department and was known to Barkati and Munshi who exchanged greetings with him. While they were in the train they met one Anokh Singh, lambardar, who was relating to his fellow passengers how his brother had lost his life as a result of a lorry accident. They did not proceed on their journey to Moga, their original destination, but all three got down at Ghall railway station, four miles short of Moga, and proposed to walk to the village Dhanewala where Munshi said that he would borrow money and give it to Narain Singh so that the latter might secure the certified copies of the depositions of the witnesses in the dacoity case against whom he intended to proceed criminally. The approver's story goes on to say that the wayfarers, i. e., himself, Barkati and Narain Singh, delivered their tickets at Ghall. From Ghall all three resumed their journey on foot and when they had gone about a mile Munshi fired a revolver at Narain Singh, but did not hit him. After this Barkati struck Narain Singh on the head with a stick with the result that Narain Singh fell down in a heap. Then Barkati took Munshi's knife and inflicted a deep wound across Narain Singh's throat. Afterwards the murderers put the body across the railway line with the result already indicated. The murderers then went to a village called Singhanwala and tried to hire a conveyance from a tum-tum driver named Akbar (P. W. 15). They did not, however, succeed in getting the conveyance and somehow or other they reached their respective homes. This, briefly stated, is the story unfolded by the approver Munshi.

There is no direct evidence as to the actual murder and we have only the evidence of the approver. The evidence of an approver is always a difficult matter to deal with because an approver is invariably a man of the very lowest character who on his own admission is a criminal and a traitor to his colleagues. We have to see whether the evidence of the approver has been materially corroborated by other independent and reliable evidence. To begin with : we have the evidence of Chet Ram, and he says that he met Munshi and Barkati at the village Gill as they were going to Moga on their way to Ferozepore via Moga on the morning of 22nd of February 1926. He may, or may not have offered them tea to drink, though he says that he did. Most probably this offer of hospitality on the part of Chet Ram to these two Mussalmans is a mere piece of padding, but, however, a cup of tea would not affect the matter one way or the other. That Chet Ram had business in the Court at Ferozepore admits of no doubt because we have the testimony of judicial records that he had attended the Court at Ferozepore on the day in question. Chet Ram met the two accused in the compound of the

District Judge's Court on the same day at Ferozepore. Jallu (P. W. 8) also met Munshi in the Court compound at Ferozepore. The presence of Narain Singh in the Court of the District Judge at Ferozepore, on the 22nd February 1926, is also borne out by the judicial record which shows that on that date Narain Singh had attended the Court of the District Judge. Bishen Singh (P. W. 5) says that he saw Munshi, Barkati and Narain Singh at the Ferozepore railway station, and we have further testimony of a respectable man Babu Lekh Singh who met both Munshi and Barkati at the railway station at about 5-15 p. m, on the 22nd February 1926. This witness is a man of some position being a Government servant in the Canal Department and knew both Munshi and Barkati, and it is not likely that he is giving false evidence.

Anokh Singh, lambardar, who was the fellow passenger of Barkati, Munshi and Narain Singh, has given evidence to the effect that the three men got down at Ghall station and that Narain Singh, before leaving the compartment at Ghall, actually mentioned to him that he had to get sum at Dhanewala village. The approver Munshi says that he had heard Anokh Singh telling people in the train that his own brother had been run down and killed by a lorry, and we find that Anokh Singh in his evidence refers to his conversation. Anokh Singh cannot be called a mere casual witness seeing that we have the evidence of judicial records which prove beyond doubt that on the 22nd February 1926 Anokh Singh had to give evidence in some civil Court at Ferozepore.

The evidence of Muhammad Yasin, the station master of Ghall, is important only to the extent that he says that three third class railway tickets bearing consecutive Nos, 107544, 107545 and 107546, which were originally issued at Ferozepore for Moga, were collected at Ghall railway station at 7-15 p. m. on the 22nd February 1926. This shows that the owners of those railway tickets had broken their journey at a place four miles this side of Moga. The evidence as to the identification parade was rightly rejected by the learned Sessions Judge and it need not be looked into. I do not attach any importance to the discovery of the knife from Bishen Singh's (P. W. 5) possession and of the revolver from the possession of Indar. This knife, according to the approver, was used for cutting Narain Singh's throat and it was not recovered until the 19th May 1926; that is to say, six days after Munshi's arrest. The knife and the revolver, according to Munshi were his own property and certainly they do not in any way corroborate the approver's story as to the alleged participation of Barkati in the murder of Narain Singh.

As to the actual events which took place after Barkati, Munshi and Narain Singh alighted at the railway station at Ghall we are left absolutely in the dark. There is no corroborative evidence whatsoever of Munshi's story as regards the last scene of the grim tragedy, and we have nothing but the approver's word to go upon. The evidence corroborating the approver's story has brought us down to the railway station at Ghall and there it leaves us until on the morning of the 22nd February 1926, we find the dead body of Narain Singh on the railway line at mile 45/14 near the railway station Ghall Kalam, in a terribly mangled condition.

I have given the matter my most anxious thought and have been able to find out a reported case of the Allahabad high Court, *Chhidda* v. *Emperor* (1). I am fully aware that in cases of these descriptions where evidence has to be weighed and inferences have to be drawn from ascertained facts, reported cases are not of much value. Each case depends upon its own facts and circumstances. But it is difficult to find two cases bearing such a close resemblance as the case before me and the reported case. In that case one Ram Prasad met his death precisely in the way in which Narain Sigh seems to have been done to death. In the reported case, according to the prosecution Chhidda had taken Ram Prasad from his house in the evening after which he was never seen alive again. Early in the morning his dead body was found on the railway line not far from his village. The body had apparently been laid across the railway line, for it had been cut right into two by some passing train. The medical evidence showed that the deceased had probably been killed by a spear wound and the dead body had been afterwards

(1) A. I. R. 1922 All. 340.

placed on the railway track where it was discovered in the condition already mentioned. The learned Sessions Judge in that case convicted Chhidda of the murder of Ram Prasad and sentenced him to death. In appeal the case came up before a Bench consisting of two very experienced and learned Judges, Lindsay and Kanhaiya Lal, JJ. Their Lordships observed :

> On his findings the learned Judge was satisfied that no other course was open to him than to convict. In other words he found that it was proved that because Ram Prasad and Chhidda had been seen together at about 8 o'clock in the evening and because the dead body of Ram Prasad had been discovered the next morning and, further, that no explanation had been given by Chhidda regarding the death of Ram Prasad, therefore, Chhidda must be deemed to have taken part in the murder. We are not able to accept this conclusion. In the absence of other evidence, circumstantial or direct, tending to show that the accused was concerned in this crime, we think that he is entitled to an acquittal. . . . . We are not prepared to draw the conclusion that because the accused Chhidda was last seen in the company of Ram Prasad at about 8 o'clock at night, Chhidda must necessarily be considered to be one of the persons responsible for Ram Prasad's murder. We must, therefore, allow the appeal.

As already stated, the facts are exactly the same in the present case except that in the present case we have the statement of the approver as regards events which are alleged to have taken place after the party detrained at Ghall.

Now the question arises as to how far the evidence of the approver as regards the participation of the appellant Barkati is to be accepted. I regret to say that I have received no assistance from counsel appearing at the Bar on this part of the case. S. 133, Indian Evidence Act, is perfectly clear. It says :

> An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Along with this section must be read Ill. (b), S. 114, of the same Act. It runs as follows :

> That an accomplice is unworthy of credit, unless he is corroborated in material particulars.

The position is this : The evidence of the accomplice standing by itself without any corroboration, is admissible and legal evidence, but Courts of justice by way of precaution ordinarily refuse to act upon it unless there is material corroboration. Now that the crucial point is what is meant by material corroboration. Is it sufficient to treat events which lead only up to a certain point and stop short of the curtain which at a certain stage rings down upon a particular crime, as regards which there is no evidence except the approver's statement or whether we must try to penetrate through that curtain in order to see if there is material corroboration fixing the guilt upon the accused and connecting him unmistakably with the crime. I do not mean for one moment that there should be direct and independent evidence of the actual commission of the crime by the accused apart from the testimony of the approver, for if this were the law the testimony of the approver would be absolutely unnecessary. What I mean is this : that the posecution must show that, besides the bare words of the approver as regards the commission of the crime, there is some other evidence indicating or irresistibly leading to the inference that the accused was somehow or other connected with the crime and thus fixing the liability of the same upon him.

In England there is an ever-growing tendency to insist that the evidence of an accomplice must be corroborated. In Archbold's Criminal Pleading (25th Edition, 441), it is said that

> It is now fully recognised to be an established practice virtually equivalent to a rule of law, to require corroboration of the evidence of an accomplice by independent evidence on some material particular going to the offence itself and implicating the accused.

Vide also Taylor on Evidence (10th Edition) 967. The best and the most up to-date exposition of the law on the subject is, however, contained in a judgment of the Court of criminal appeal in *R.* v. *Baskerville* (2). It is difficult to imagine a combination of a more eminent legal talent than that represented by the learned Judges who presided over the Court of criminal appeal in this case. In the case defore the Court of criminal appeal it was found that the story of the accomplice had been amply corroborated and the conviction was maintained, but, having regard to the difficulty of reconciling the case law on the subject and the general importance of restating the law applicable to corroboration of the evidence of the accomplice, the learned Judges discussed the matter

(2) [1916] 2 K. B. 658=86 L. J. K. B. 28=60 S. J. 696=115 L. T. 453=80 J. P. 446=25 Cox. C. C. 524.

very thoroughly in order to settle the conflict of judicial opinion once and for all so far, at any rate, as England was concerned. They very clearly say that in cases where the 'accomplice or approver gives evidence it is the duty of the Judge always to warn the jury that it would be unsafe to base a conviction upon the sole testimony of an approver unless there is material corroboration. The Court of appeal, after examining the authorities on the subject, came to the conclusion

that the better opinion of the law upon this point is that stated in *R.* v. *Stubbs* (3), by Parke, B., namely that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime .....

In *R.* v. *Wilkes* (4), Alderson, B., said: "The confirmation which I always advised juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony. but, I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence." In *R.* v. *Farlar* (5), Lord Abinger, C. B., said: "It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect so the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all.....It would not at all tend to show that the party accused participated in it." In R. v. *Dyke* (6), Gurney, B., said: "although, in some instances, it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction."

The Court of criminal appeal further observed:

These cases lead to the view expressed latter by Parke, B., in *R.* v. *Stubbs* (3), and show that in his time, although there had been doubt in the past, the law, as formulated by him, was accepted as the correct opinion, and continued to be the law to the time of the passing of the Criminal Appeal Act, and in our judgment to the present day. We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.....Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connexion with the crime.

Of course it would be highly hazardous for a Court of justice to formulate the sort of evidence which would be considered as amounting to sufficient corroboration of the approver's story. The judgment then goes on to say:

In R. v. *Everest* (7) "the rule has long been established that the Judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused."

The Court, however, pointed out as regards this extract that

we think "tell the jury to acquit" should read "warn the jury of the danger of convicting."

The law in *R.* v. *Everest* (7), was approved with slight modification by the Court as regards corroboration. In conclusion their Lordships observed:

It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused, but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused.

Now applying the law as enunciated in *R.* v. *Baskerville* (2) all that I find is that Narain Singh was seen in the company of the approver Munshi and Barkati late in the evening of the 22nd February 1926. As to the rest there is no corroboration of the approver's story which in any way connects Barkati with the perpetration of the crime. According to the evidence of the approver, two unnatural sons of Narain Singh were his bitter enemies and one of them, Kishen Singh, is absconding. It is not the business of the Court to spectulate possible theories in support either of the prosecution or

(3) [1855] Dears 555=25 L. J. M. C. 16=7 Cox. C. C. 48=4 W. R. 85=1 Jur. N. S. 1115.
(4) [1836] 7 C. & P. 272.
(5) [1838] 8 C. & P. 106.
(6) [1838] 8 C. & P. 261.
(7) [1909] 2 Cr. App. R. 130=73 J. P. 269.

of the defence, but it may be that Munshi had taken Barkati about on the fateful day of the 22nd February 1926, as a sort of scapegoat or blind while the murder was committed by Munshi along with some other person or persons who joined Munshi and Narain Singh as they started on their tramp at night on their supposed errand to the village Dhanewala. I would feel safe if I drew the same inference from the facts and circumstances of the present case as the learned Judges of the Allahabad High Court drew in the case before them after treating the solitary and uncorroborated testimony of the approver Munshi as regards Barkati's participation in the crime as wholly insufficient to base the conviction of the appellant upon it. After all the case for the prosecution is perhaps on the border line and I better leave it there without taking the risk of a leap in the dark. The case at best is a doubtful one and I give Barkati the benefit of doubt.

Under these circumstances I would accept this appeal, set aside the conviction and sentence passed upon Barkati and direct that he may be released forthwith.

Broadway, J.—I have had the advantage of reading the judgment of my brother Agha Haidar, and, as it gives the facts of this case in great detail, it is not necessary for me to recapitulate them.

The case for the prosecution rests on the statement of the approver, Munshi, supported by corroboration on certain points and, in my judgment, it has been clearly established by independent and disinterested evidence :

(1) that Munshi and Barkati were seen together by Chet Ram at about 3-30 a. m. at Gill on the 22nd February 1926, and travelled with him in the same tum-tum as far as Moga, and then in the same train, though not in the same compartment, to Ferozepore. I see nothing strange in Chet Ram offering them a cup of tea before they left for Moga. (2) That they were again seen together by Chet Ram at 4 p. m. on the same day in the District Court, Ferozepore. (3) That Munshi was seen by Jallu (P. W. 8) in the Munsif's Court at about 10 a. m. on that day. (4) That Narain Singh, deceased, was in the District Court at Ferozepore on the day in question where he had business in the Court of the District Judge. (5) That Bishen Singh (P. W. 10) saw Narain Singh and Munshi, both of whom he knew, with a third man on the evening of the 22nd February 1926, at the Ferozepore Cantonment railway station. (6) That Munshi and Barkati were seen together at the same station at about the same time by Lekh Singh (P. W. 7), canal overseer. This witness knew both of these men before. (7) That Narain Singh travelled in the same compartment from Ferozepore with Anokh Singh (P. W. 6) on the evening of that day and had two companions with him. That Munshi was one of these two is evidenced by the fact that he refers correctly to the subject-matter of Anokh Singh's conversation during the journey. (8) That Narain Singh and his two companions alighted at Ghal Kalan railway station, and Narain Singh told Anokh Singh that he had business with his companions at Dhanewala where he had to get some money. (9) That on the evening the station master of Ghall Kalan, Muhammad Yasin (P. W. 9), collected three "irregular" tickets from passengers alighting at that station from the train from which Narain Singh and his companions got out. These tickets were "irregular" in that they were from Ferozepore to Moga, a station a few miles beyond Ghal Kalan. The numbers of these tickets were 107544, 107545 and 107546, and the fact that they were consecutively numbered affords material corroboration of Munshi's statement that he had taken three tickets for Moga at Ferozepore for himself and his two companions.

There is further evidence corroborating Munshi's account of his subsequent movement ; but this evidence does not directly affect Barkati. There is, however, no reason why Munshi should have falsely implicated Barkati. The corpse of Narain Singh was found on the railway line between Ghall and Moga on the following morning.

I understand that my brother Agha Haidar accepts the evidence of the independent and disinterested witnesses on these points and finds proved that Munshi and Barkati were together during the day of the 22nd February 1926, and travelled from Ferozepore to Ghal Kalan in the same compartment as Narain

Singh and that they with Narain Singh left the train together at Ghall. He finds, however, that this corroboration is not sufficient as it does not take the case up to the actual murder. I am not unaware that it has been repeatedly laid down by all the High Courts in this country as well as the Courts in England that before the statement of an accomplice can be acted upon it must be corroborated in material particulars.

I regret, however, that I am unable to agree with the view expressed by my brother in this case. In my judgment the prosecution evidence has clearly connected Barkati with the murder of Narain Singh and that the points enumerated above as supporting Munshi's consistent accounts of the whole transaction are sufficient in point of fact and in law to warrant the conclusions arrived at unanimously by the four assessors and the learned Sessions Judge. In my judgment the conviction is correct, and I would dismiss the appeal and confirm the sentence of death.

The case will now be laid before the learned Chief Justice for further orders.

Fforde, J.—The appellant Barkati has been convicted by the learned Sessions Judge, under the provisions of S. 302 of Indian Penal Code, for having taken part in the murder of Narain Singh on the 22nd February 1926, and has been sentenced to death. The learned Sessions Judge's finding was in agreement with the unanimous view of the four assessors who assisted him at the trial. The appeal to this Court was heard in the first instance by Broadway, J., and Agha Haidar, J., who have differed on the question whether the conviction for murder should be confirmed or not. Broadway, J., was satisfied that the guilt of the appellant had been established beyond any possibility of doubt; while Agha Haidar, J., was of opinion that the case was at best a doubtful one and he accordingly gave the appellant the benefit of the doubt. The matter is now before me under the provisions of S. 429, Criminal P. C. to decide which of these views should prevail.

The case against the appellant depended mainly upon the evidence of an approver named Munshi, and the only question upon which the learned appellate Judges disagreed was whether or not there was sufficient corroboration of the approver's story to justify the Court in accepting that story as conclusive proof of guilt. The facts are very fully set out in the judgment of Agha Haidar, J., and I need only refer to so much of the evidence as is relied upon by the prosecution as corroborating the evidence of the approver.

The prosecution case is that the approver had been hired by one Kishen Singh to murder the deceased, owing to the fact that the latter had annoyed Kishen Singh (who is the son of the deceased) by the manner in which he had disposed of his property in his Will. The approver in turn persuaded the appellant to help him in this enterprise in consideration of being given a portion of the payment for the crime. After several attempts to find a suitable opportunity for carrying out their design the assassins received information that their victim had to attend the Court of the District Judge at Ferozepore on the 22nd February 1926. They thereupon arranged to go to Ferozepore with a view to carrying out their project. They left their village of Kotla Mehr Singhwala on the night of the 21st February 1926 and proceeded to Moga, the approver taking with him a loaded revolver and a knife, the appellant armed himself with a stick. At a village called Gill on the way to Moga the confederates met one Chet Ram (P. W. No. 4) who told them that he also was going to Ferozepore, and invited them to take a cup of tea with him which they did. Having partaken of this refreshment all three drove in a tum-tum to Moga and from Moga they travelled in the same train, though not in the same compartment, to Ferozepore. At Ferozepore Chet Ram saw them again near the District Court and had some conversation with them. Jallu (P. W. 8) also saw the approver at the Munsif's Court at about 10 a. m. and had a conversation with him. At Ferozepore the two conspirators found Narain Singh and shadowed him until he had concluded his business and set out for the cantonment station to catch the afternoon train for Moga. At the station they entered into conversation with him, in the course of which the approver asked his help and advice in certain criminal proceedings which he stated that he contemplated taking against certain persons.

At the request of Narain Singh the approver then bought three tickets to

Moga: one for himself, one for Narain Singh and one for the appellant. At the ticket office of the station the approver and the appellant met Lekh Singh (P. W. 7) an overseer in the Canal Department and exchanged greetings with him. Narain Singh, the appellant, and the approver, then embarked in the same train for Moga, occupying the same compartment. They were seen to enter this train by Bishen Singh (P. W. 10), who knew Narain Singh and the approver and was also able to identify the appellant as being one of the companions of these two on that occasion. In that compartment was a certain Anokh Singh (P. W. 6) who happened to know Narain Singh and was told by the latter that he had some business with his two companions at Dhanewala and intended getting out of the train at Ghall. On arrival at Ghall the two conspirators and their victim got out of the train and gave up their tickets. Three railway tickets from Ferozepore cantonment to Moga, bearing consecutive numbers have been proved by the station master at Ghall to have been handed in at Ghall railway station that evening. The trio then proceeded in the direction of Dhanewala walking along the railway line. After they had proceeded for about a mile and a half the approver fired his revolver at Narain Singh, who was walking in front of the two, but missed him. Thereupon the appellant struck and felled him with his stick, then cut his victim's throat and rifled his pockets, after which the two confederates placed the body on the railway line where it was discovered the following morning.

This story is given in detail in the evidence of the approver, and has been confirmed in some particulars by the evidence of the witnesses whose names I have mentioned. The evidence of these witnesses has been accepted both by the trial Judge and by the Judges who first heard this appeal. The witnesses are entirely disinterested and there was no reason whatsoever to disbelieve them. The question is whether their evidence supplies such corroboration of the approver's story as the law requires.

Although under S. 133, Evidence Act, an accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of such accomplice, the rule of caution that such testimony should be supported by extrinisic evidence connecting the accused with the crime—which Judges have always acted upon in dealing with the evidence of an accomplice—is now regarded as a rule of law; and although it is not illegal to convict a person on the uncorroborated testimony of an approver, the Courts in points of facts always insist upon the rule being followed. Whatever doubt there may have been prior to 1916 regarding the need for corroborative evidence and the nature of such evidence, the matter was finally concluded by the judgment of the Court of Criminal Appeal in that year in *R.* v. *Baskerville* (2), where all the leading authorities were reviewed and the principles to be observed were enunciated in the clearest possible terms. At page 665 of his judgment Lord Reading, L. C. J., expressed himself as follows:

> The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

And at page 667 the view of the Court is summed up in these words:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the Statute 'implicates the accused', compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is

sufficient if it is merely circumstantial evidence of his connexion with the crime.

Applying these principles to the present case the question to be determined is whether the independent evidence of the association of the appellant with the approver and the murdered man on the day of the murder is sufficient circumstantial evidence to connect the appellant with the crime. The story of the approver, that the appellant accompanied him to Ferozepore in search of Narain Singh, that he travelled with the approver and Narain Singh to Ghall in the same compartment, that they alighted together at Ghall station, and that after that Narain Singh was never seen alive again, has been beyond all question corroborated by a chain of testimony. It can hardly be disputed that this evidence of association of the appellant, the approver and the murdered man shortly prior to the murder is relevant and highly significant. The question is: Does this evidence sufficiently corroborate the approver's story? That is to say: Does it "affect the accused by connecting or tending to connect him with the crime?"

In *R* v. *Baskerville* (2) there was no direct evidence of the commission of the offence in question apart from the evidence of accomplices. The evidence of corroboration relied upon was a letter written by the accused and the conduct of the accused himself, prior to the commission of the offence: evidence quite insufficient in itself to support a conviction. In the present case, also, the independent evidence standing by itself is obviously quite insufficient to found a conviction. The mere fact that an accused was last seen in the company of a man shortly prior to his murder, even coupled with a strong motive for that murder, is obviously not sufficient proof of guilt. In *Chhidda* v. *Emperor* (1) cited by Agha Haidar, J., all that was decided was that evidence of the general unpopularity of an accused, coupled with the fact that he was seen in the company of a person on the evening before the latter's death, added to the fact that no explanation is given by the accused regarding the death, was not enough to justify a conviction. There was no approver in that case, and the only similarity that I can find between that case and the present one is that in each instance the body of the murdered man had been found on a railway line, and had been cut in two by a passing train, a not uncommon feature of murders in this province.

I gather from the reliance placed upon that decision by the learned Judge, that his view was that unless corroborative evidence is sufficient in itself to base a conviction it is insufficient to confirm the evidence of the approver. If that be the view taken, with all due respect to the learned Judge I find myself unable to agree with it. All that the law requires is that an accomplice's story be corroborated by independent testimony proceeding from a source other than the approver and that such testimony should tend to implicate the accused. As has been repeatedly pointed out, confirmation of the story of an accomplice does not mean that there should be independent evidence of the accomplice's account of the crime itself. It is obvious that murder by a hired assassin is usually planned with a view to avoiding detection, and it is only by the merest chance that independent evidence of the actual crime is ever forthcoming. If such evidence were to be had the accomplice's evidence would be unnecessary. What the law clearly requires is that some relevant and material part of the approver's story incriminating the accused should have support from an independent source. This supplies a test of the truth of the accomplice's narrative as a whole by checking it in some relevant portion.

Such a test has been applied in the present case. The approver's narrative of the crime has, in my opinion, been corroborated in particulars "tending to connect" the appellant with that crime. I, therefore, agree with Broadway, J., that the appellant has been rightly convicted and I accordingly dismiss his appeal and confirm the sentence of death.

G.B. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 590

DALIP SINGH, J.

Raj Paul—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 286 of 1927, Decided on 4th May 1927, from the order of the S.-J., Lahore, D/- 7th February 1927.

* *Penal Code, S. 153-A—Criticism on deceased religious leaders is not punishable.*

Section 153-A was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polemics against deceased religious leaders however scurrilous and in bad taste such attacks might be. [P 592 C 1]

G. C. Narang, L. Badri Das and *L. Ram Lal Anand*—for Petitioner.

Govt. Advocate—for the Crown.

Judgment.—The petitioner in this case has been convicted under S. 153A, I. P. C., and sentenced to six months rigorous imprisonment in default.

In revision it has been urged that the facts found do not constitute an offence within the meaning of S. 153A. It has been contended firstly that the word "classes" does not include religious denominations but means "races". I am unable to accept this contention for which no authority has been cited and which would restrict the meaning of the word "classes" in a way not warranted by anything within the section itself.

It is further urged that in any case criticizm or satire on a religious teacher is not within the purview of the section.

The trial Court found that the accused had no other intention:

> Except to make a wanton attack upon the Prophet of Islam, to hold him up to ridicule and contempt, to ridicule his religion and thus to wound the feelings of his followers.

and it held that if this was the intention of the accused the Court had no doubt that his act fell within the purview of S. 153A.

The learned Sessions Judge on appeal held that the pamphlet, read as a whole:

> was intentionally offensive, scurrilous, and wounding to the religious feelings of the Mahomedan community, and that it was undoubtedly malicious in tone and intention and that in the case of this publication the intention was obviously to wound and insult the feelings of a particular community.

Counsel for the petitioner has contended that the pamphlet does not show any such intention and that it was only meant to show the evils of polygamy and marriage between persons of disparate age. I have no hesitation in rejecting this explanation of the pamphlet. It undoubtedly is nothing more or less than a scurrilous satire on the founder of the Muslim religion, but I cannot find anything in it which shows that it was meant to attack the Mahomedan religion as such or to hold up Mahomedans as objects worthy of enmity or hatred. On the contrary the pamphlet expressly says the people should do as Mahomad advised but should not act as Mahomed himself acted. The tone of the pamphlet as a whole is undoubtedly malicious and likely to wound the religious feelings of the Muslim community if it did not incur their even more justifiable contempt. The question however, to be decided is whether a malicious satire on the personal life of religious teacher is within the purview of S. 153-A. The evidence of the president of the meeting which condemned the pamphlet shows that the anger of the Mahomedans was aroused against the author of the pamphlet which, of course, is the only reasonable result of the publication of such a book. It may be noted that the accused himself is not the author of the pamphlet but he is admittedly its publisher. About four copies of the book appear to have been sold to Mussalmans and the rest have been sold to various Arya Samajist booksellers or individuals belonging to that denomination. The learned Government Advocate has relied on *Emperor* v. *Rahimtalli* (1), and on Gour's Penal Code, Vol. 1, p. 894 and certain remarks in *Sithal Prasad* v. *Emperor* (2). He has contended, firstly, that a satire on the founder of a religion necessarily implies satire on the followers of that religion. In my opinion that is not necessarily so.

Secondly, the learned Government advocate has formulated the proposition that satire on a religious leader by some one not his follower is within 153A, if there is something to show that he is satirizing the religious leader because he belongs to another community.

He has argued thirdly that in this particular case words defamatory to the Mahomadans as a class are used, but I have not been able to find any such words.

Fourthly, he has contended that, at any rate, feelings of contempt for Muslims would be aroused among the Hindu readers of this pamphlet. This aspect of the case, he admits, was not considered in the Courts below at all.

In reply counsel for the petitioner contends that "contempt" is not the same

(1) [1920] 22 Bom. L. R. 166.
(2) [1916] 43 Cal. 591=23 C.L.J. 105=24 I.C. 974=20 C.W.N. 199.

as "hatred" or "enmity and that the words in S. 124A., I. P. C., are wider than the words used in S. 153A.

The learned Government advocate further contended that in view of the tension between Hindus and Muslims and the fact that the Mahomdan community is more fanatical on the question of religion than other communities a satire on the founder of the Muslim religion is more likely to promote hatred and enmity between the masses than a satire on the founder of another religion, e. g. Christianity. I am unable to accept the argument that the ignorance or fanaticism of a particular community should determine the nature of an act. It may aggravate the offence in certain cases, but it cannot be held that the words used about the founder of one religious creed might not come within the purview of S. 153A, and words used about the founder of another religious creed might come within that purview because of the known fact that one community will resent such words more actively than the other. The nature of the act, namely whether it is an offence or not, cannot be determined by the reaction of the particular class.

As regards the argument that satire on the founder of a religion is something to show that he is so acting because he belongs to another community, it seems to me that nobody who believes in a religious teacher will satirize him. It would follow, therefore, that wherever there is a satire on a religious leader and it is impossible to determine to which community the author belongs then the feelings of his followers will be roused against all who are not followers of that particular creed. I cannot consider that S. 153A was meant to be used in so wide a meaning. It seems to me that that section was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polemics against deceased religious leaders however scurrilous and in bad taste such attacks might be. For instance, if the fact that Mussalmans resent attacks on their Prophet, was to be the measure of whether S. 153A applied or not then an historical work in which the life of the prophet was considered and judgment passed on his character by a serious historian might come within the definition of S. 153A I am unable to hold that S. 153 A was meant or was intended to prevent all adverse discussions of the life and character of a deceased religious leader. Now this particular pamphlet discusses the matter in a way which, as I have already stated, can only arouse the contempt of all decent persons of whatever community, might well wound the religious feelings of certain Mussalmans, but I cannot hold that it would necessarily promote feelings of enmity and hatred between different classes of His Majesty's subjects. That might be the result, but, as I have endeavoured to show, that cannot be made the test of the section. The learned Government advocate admits that there is no other section which would cover the particular case. *Emperor* v. *Rahimtalli* (1) is a case under S. 153 and there the libel was on a living person and the pamphlet was deliberately circulated among the followers of that person, and therefore might well have come within the purview of the S. 153. It seems to me that a clause might well have been added to S. 297 by which the publication of pamphlets published with the intention of wounding the religious feelings of any person or of insulting the religion of any person might be made criminal.

I can only say, that, speaking for myself, I regret the absence of such clause, but I am unable to hold that this particular case comes within the purview of S. 153A. I, therefore, reluctantly accept the revision and acquit the petitioner.

D.D. *Revision accepted.*

A. I. R. 1927 Lahore 592

JAI LAL, J.

Sher Mohammad — Plaintiff — Petitioner.

v.

Mian Ahmad and *another* — Respondents.

C. R. P. No. 839 of 1926, Decided on 7th April 1927, from an order of the Dist. Judge, Shahpur, D/- 1st July 1926.

Court-fees Act, S. 13 — Dismissal of suit on inadmissibility of document is on a preliminary point—Civil P. C., O. 41, R. 23.

A certificate under S. 13, Court-fees Act should be granted when a suit dismissed on the

ground that a document relied on is inadmissible, is remanded as the remand is under O. 41, R. 23. [P 593 C 1]

M. L. Puri—for Petitioner.

Judgment.—The suit was for possession of immovable property. The plaintiff relied on an alleged agreement to sell in his favour in support of his claim.

The trial Court dismissed the suit holding that the agreement was inadmissible in evidence for want of registration. The District Judge held that the document was admissible and remanded the case to the trial Court for decision on the merits but omitted to pass an order for the refund of the Court-fee stamp as required by S. 13, Court-fees Act. On an application for the refund of the Court-fees by the appellant the learned Judge held that the remand was not under O. 41, R. 23 and declined to grant the refund.

It appears to me that the remand in this case was clearly under O. 41, R. 23 as the trial Court had decided the suit on a preliminary point, i. e., the want of admissibility of the document relied upon by the plaintiff and had not decided the other issues in the case. I accept this petition and direct the District Judge to refund to the petitioner the Court-fee paid by him on the memorandum of appeal. No order as to costs.

D.D. *Petition accepted.*

A. I. R. 1927 Lahore 593

FFORDE AND ADDISON, JJ.

Labha Ram and *another*—Defendants—Appellants.

v.

Raman—Plaintiff—Respondent.

F. A. No. 1172 of 1921, Decided on 9th May 1927, from a decree of the Sr. Sub-Judge, Gujranwala, D/- 31st March, 1921.

Custom (Punjab)—Sansi Jats of Gujranwala—No custom exists to adopt a daughter's son.

There is no special custom among Sansi Jats of the Gujranwala tahsil by which a daughter's son can be adopted unless he is a collateral or is of the same got as the adopter. [P 593 C 2]

Jagan Nath Aggarwal and *Basheshar Nath*—for Appellants.

Moti Sagar and *Mehr Chand*—for Respondent.

Fforde, J.—The plaintiff brought this suit for a declaration that the adoption of the defendant Labha Ram by his maternal grandfather Devi Ditta, is not valid and shall not affect the plaintiff's reversionary interests in the lands which Labha Ram would succeed to were his adoption valid in law. The trial Court has held that the adoption is not valid.

The defendant, in order to show that this adoption is sanctioned by the special custom of Sansi Jats of the Gujranwala tahsil, to which the parties belong, has produced a certain number of witnesses who have given evidence of succession of daughter's sons who had been similarly adopted. But none of these alleged instances are of the tribe to which the parties belong, with the exception of two which are based on hearsay. The plaintiff, on the other hand, relies on the riwaj-i-am of the Gujranwala district of 1914, and on the riwaj-i-am of the Tahsil and district of Gujranwala of 1892. In both these records, under the question "can a maternal grandfather adopt his daughter's son" the answer is: Only if the person adopted is a collateral or is of the same got as the adoptor.' In the present case the person adopted is not a collateral nor is he of the same got as the person who adopted him. The entry in the riwaj-i-am is, therefore, against the custom sought to be established. No attempt has been made to attack the value of these public records and, accordingly, following the decision of a division bench of this Court in *Labh Singh* v. *Mango* (1), we are bound to hold that the special custom relied upon by the defendant has not been established. This was the only issue which it is necessary to try in the present suit.

This case, however, was remanded to the trial Court for decision as to whether the lands left by Devi Ditta were ancestral or self-acquired. It is now agreed that it is not necessary to determine this issue in the present suit, and accordingly, I do not think that we should express any view as to the correctness or otherwise of the trial Judge's decision upon the nature of these lands. Should it become necessary to have that matter determined in subsequent proceedings it will be open to the parties to contest this question. Mr. Jagan Nath has also

(1) A.I.R. 1927 Lah. 241=8 Lah. 281.

asked us for a decision as to whether or not the document of adoption may not operate as a testamentary disposition in favour of Labha Ram as persona designata. This again is an issue which does not properly arise in the present suit, as it was neither pleaded nor tried. In my judgment we cannot consider this question but leave it to be determined if and when the matter requires judicial decision.

Agreeing with the trial Court that the adoption is not valid by custom I would dismiss the appeal with costs. The parties to bear their own costs of the remand proceedings.

Addison, J.—I agree.

R.K. *Appeal dismissed.*

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* * A. I. R. 1927 Lahore 594

BROADWAY AND SKEMP, JJ.

Devi Sharan Sharma and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Trials Nos. 2 and 3 of 1927, Decided on 6th August 1927.

* * (*a*) *Penal Code, S. 153-A—Intention of writer, policy of the journal, class of readers and state of communities to be affected should be considered—Intention is to be gathered internally as well as externally—Antecedents of writer may be considered in awarding punishment.*

Section 153-A, I. P. C. does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. The intention is to be collected, in most cases, from the internal evidence of the words themselves, but there is no authority for saying that other evidence cannot be looked at. The explanation shows quite conclusively that in any matter on which other evidence could assist, it may be taken. It is permissible to examine the general policy of the paper and also take into consideration the persons for whom it was written and the state of feeling between the two communities at the time of publication : *A. I. R.* 1926 *Cal.* 1133, *Appr. and Fcll.* [P 598 C 1 & 2]

The fact that the writer had previously published matter which necessitated warnings from Government on three separate occasions would justify the award of substantial punishment. [P 601 C 2]

* * (*b*) *Penal Code, S. 153-A—Hatred and enmity need not be reciprocal.*

There is no authority for the contention that the object of S. 153-A is to prevent the promotion of hatred and enmity between classes and that this hatred and enmity should be reciprocal and not merely unilateral. [P 599 C 2]

* * (*c*) *Penal Code, S. 153-A—Explanation—Strong comment on a religion or its founder to induce persons to change religion may be permitted.*

It is possible to conceive the writing of a reasoned, critical and strong attack on a religion or its founder, written by way of comment on that religion or on its founder with a view to induce persons to forsake that religion for another, which might fall within the explanation, for the reason that though there may be a tendency in the language employed to promote hatred or enmity, the language used did not of necessity convey that intention or where the writer has been able to prove by evidence that that was not his intention even in part ; but a scurrilous and vituperative attack on a religion or on its founder would require a considerable amount of explanation to take it out of the substantive part of S. 153-A and bring it within the four corners of the explanation. Though any criticizm of a religious leader, whether dead or alive, may not fall within the ambit of S. 153-A the writing of a scurrilous and foul attack on such a religious leader would prima facie fall under the said section. [P 601 C 1]

Puri—for the Accused.

Mohamed Shafi—for the Crown.

Broadway, J.—In the middle of April 1927, a monthly vernacular journal entitled the "Risala-i-Vartman" made its appearance in Amritsar for the first time.

The declared printer and publisher of this journal was one Gian Chand Pathak who was also shown as editor on the front page of the journal itself. The journal was to be printed at the Aftab Electric Press situated in the Hall Bazar in Amritsar.

The second number of this journal appeared about the 14th or 15th of May 1927 and towards the end of that month there was considerable excitement among the Muslims of Amritsar in connexion with an article appearing in that number under the heading "Sair-i-Dozakh" or a "Trip to Hell," the author of which was said to be one Devi Sharan Sharma.

Towards the end of May or very early in June a poster made its appearance in Amritsar. It is said to have been sent by the mirza of Qadian and, to have drawn attention to certain portions of this article and still further excited the Muslims.

On the 4th June 1927 the attention of Mr. Hamilton-Harding, Superintendent of Police, Amritsar, was drawn to this article and issue by the Deputy Superintendent of Police, Mir Faiz-ul-Hassan. Mr. Hamilton-Harding, after hearing the article read out, considered it necessary to bring it to the notice of the Deputy Commissioner, and took it across to that officer. The Deputy Commissioner also took a serious view of the article and at once got into telephonic communication with the Punjab Government, and as a result of the conversation that ensued took steps to proscribe the journal under S. 99-A, Criminal P. C. and issued a search warrant.

A copy of this journal was obtained and forwarded to the Punjab Government at Simla, and on the 6th June 1927, the Deputy Commissioner received telegraphic orders directing the prosecution, under S. 153-A, I. P. C., of the persons responsible for the writing and publication of this article.

Warrants were at once issued and Gian Chand Pathak was arrested on the evening of the 6th and Devi Sharan Sharma on the 7th June. As soon as written orders were received from Simla, two complaints were filed by the Superintendent of Police, one against Gian Chand Pathak as the editor, publisher and printer, and the other against Devi Sharan Sharma as the author of the particular article.

On the evening of the 6th June a meeting was held in Khair Din's mosque which was attended by a large number of Mahomedans at which this article was condemned.

The two cases were taken up by the District Magistrate of Amritsar who recorded the statements of a certain number of witnesses. On the 1st July, however, applications were filed on behalf of the Crown asking for the transfer of these two cases for trial in this Court. These applications were supported by an affidavit sworn by the Deputy Commissioner of Lahore, and, having regard to the circumstances disclosed by that affidavit it was considered advisable to grant the applications and the two cases were commenced in this Court on the 15th July. The evidence in the two cases is practically the same. The trials, however, have been kept separate. As, however, both counsel for the Crown and for the two accused have argued the two cases together, this judgment will deal with, and dispose of, both the cases.

Charges were framed in both the cases on the 18th July 1927. Both the accused pleaded "not guilty" and practically all the prosecution witnesses were recalled for cross-examination in both the cases. At the conclusion of the cross-examination of the prosecution witnesses each of the two accused was further examined and Gian Chand Pathak filed a written statement. Devi Sharan Sharma said that he would file a written statement but has not thought fit to do so.

Gian Chand denied all knowledge of the article and stated in Court that he was absent from Amritsar when this particular number of the journal was prepared and issued.

Devi Sharan Sharma admitted having written the article in question, but stated that he had written it in Hindi using Hindi names, which, however, meant the same thing, and had then put the article written in Hindi in the letter-box of the "Risala-i-Vartman." He explained that he had written the article in Hindi as he had been told that the paper, that is, "Vartman," was in support of the Arya movement and that part of it would be written in Hindi. Although both the accused summoned witnesses in their defence, none were ultimately produced.

The first point for determination is whether the two accused or either of them can be held responsible for this article.

Gian Chand Pathak is the admitted editor, publisher and printer of the "Risala-i-Vartman" and is, in law clearly responsible for its contents. His statement that he was absent from Amritsar when this number was printed and issued is not supported by any evidence, and having regard to the fact that it was a monthly journal newly started, and that this May number was only the second number issued, his absence is highly improbable.

Against his bare assertion of his absence there is the evidence of P. W. 12 Habibullah and P. W. 13 Shah Mohamed who are two caligraphists who between them "copied" the matter appearing in this number and prepared it for the lithographic stone. They both swear that Gian Chand and Devi Sharan

Sharma together brought the original manuscript to them to be copied. P. W. 13 Shah Mohamed is not possessed of very much intelligence and has only passed the entrance examination. That he copied this article and other portions of this issue is not denied by Gian Chand whose statement is to the effect that the original of this article was given to Shah Mohamed to be copied by his (Gian Chand's) office while he himself was away. There is, therefore, no reason to doubt this witness's statement when he says that the original of this article was given to him to be copied by Gian Chand.

The statement of P. W. 12 Habibullah is still more emphatic. He says that he copied practically the whole of the April number of the "Risala-i-Vartman" and the first 16 pages and page 34 of the May number of this journal. With regard to this particular article he says that the original of it was brought to him by Gian Chand and Devi Sharan Sharma to be copied out, that he glanced over it and refused to copy it as he considered it insulting, and told them that he would not copy it as it was an attack on his religion. There is no reason to doubt the truth of this witness' statement.

In addition to the statements of these two witnesses there is the evidence of P. W. 4 Mohamed Abdullah, who is employed in the Aftab Barqi Press, where this journal was printed. This witness's duty was to see that the lithographic stones were correctly prepared. In his cross-examination after the charge he stated that about the 14th of the month, some six weeks before the date of his evidence, that is somewhere about the 14th May, Gian Chand brought a copy of this journal to his press to be printed. As Gian Chand brought it after 4 o'clock when the press closes, at first the witness refused to print it. Gian Chand, however, said that he wanted it to be printed urgently as the paper was to be issued the next day. On account of this urgency the journal was printed.

I am unable to see any reason for doubting the veracity of these three witnesses, and have no hesitation in holding that Gian Chand's statement that he was absent from Amritsar when this May number was printed and issued is entirely false. In my judgment it has been established that Gian Chand took an active part in the publication not only of the May number of the "Vartman" alone, but of this particular article, and I regard the evidence of P. W. 12 Habibullah as true.

Devi Sharan Sharma is admittedly the author of this article. His statement is that he wrote it in Hindi and put it into the letter box of the office of the "Risala-i-Vartman" and never saw the article again till he read it in Court. There is no evidence in support of this statement that it was written in Hindi, and having regard to the fact that he admits knowing Urdu, and further admits that he wrote in Urdu an article for the June number, the original of which was produced in Court by P. W. 8 Habibullah, I have no hesitation in holding that his statement is false. P. W. 8 Habibullah, who is the same witness as P. W. 12 in the case against Gian Chand, stated very positively that the manuscript for the whole of the April issue was brought to him to be copied by Gian Chand Pathak and Devi Sharan Sharma and that the same two persons came together when they brought him the original material to be copied for the May issue. He has further sworn that when he read the title of this particular article "Sair-i-Dozakh," his suspicions were aroused and he read the article. On reading it he became angry and returned it to the two men saying that he would not copy it, whereupon Devi Sharma said to him:

> I am the author; I have written this Mazmun; I am responsible; copy it why are you afraid.

In my judgment the evidence of this witness is enough to prove that Devi Sharan Sharma took an active part in the publication of this article of which he is admittedly the author. The statement of this witness is further supported by P. W. 10 Shah Mohammad, who undoubtedly copies this article not only for Gian Chand but for Devi Sharan Sharma. He is positive that the manuscript of this article was brought to him by both Gian Chand and Devi Sharan Sharma in the first week of May, the article being included in the other matter which was given to him to copy.

There are two other witnesses namely P. W. 18 Sheikh Muhammad Sikandar and P. W. 15 Lal Din, who were

produced by the prosecution to prove that Devi Sharan Sharma had published this particular article. It is not necessary to discuss the evidence of these two witnesses as in my opinion they are both wholly unworthy of credence. That Sheikh Muhammad Sikandar knew Devi Sharan Sharma is possible, but the statement made by him as to his conversations with the accused is in my opinion utterly false. Relying on the evidence given by Habibullah and Shah Muhammad I hold that Devi Sharan Sharma was responsible for the writing and publication of this particular article.

I next turn to the article itself. It is not necessary nor advisable to set it out at length as to do so would tend to give it further publicity. Suffice it to say, that it purported to be a dream in which the writer was borne to heaven where he was given a mysterious animal to ride and on its back he visited paradise and hell. In the latter place he professed to have seen certain historical Muslims surrounded by a large number of other Muslims and held certain coversations with them.

The article is in extremely bad taste, scurrilous in nature and is a disgusting satire on certain incidents in the life of the holy prophet of Islam.

The next question is whether this article falls within the purview of S. 153-A, I. P. C. The section is as follows:

> Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both.

The case for the prosecution is that the two accused wrote and published this article with the intention of promoting hatred and enmity between the Muslims generally and those members of the Arya Samaj and Hindu Sabha who approved of, and were responsible for, the Shudhi and Sangathan movements, and who, it was contended, were believed to be behind these two accused. It was urged that while the said movements were in themselves praiseworthy the methods adopted by certain members in promoting them were objectionable and had already strained the relations between the two communities or classes and that this article had created a great stir in Amritsar and elsewhere and the relations between Muslims and such Hindus had become still more strained. It was further contended that the intention of the accused could be deduced from: (1) the nature of the article; (2) the policy of the paper in which it was published; (3) the class of persons whom it was sought to reach; (4) the fact that it was published at a time when the relations between the two communities were strained; and (5) the antecedents of the accused.

On the other hand, it was contended by Mr. Puri for the two accused that intention was an essential ingredient of the offence against which this section was aimed and that: (1) the article in question produced no feelings of any kind; (2) the article certainly did not produce "hatred" or "enmity"; (3) the article did not produce any feelings such as are contemplated by the section, as the hatred or enmity sought to be promoted must be reciprocal, that is the Muslims must have hatred or enmity against Hindus and Hindus against Muslims; (4) while intention could be gathered from the words themselves, the words should be ignored if it is sought to prove it by other evidence; and (5) that the words themselves did not show any such intention. He further contended that there was not a tittle of evidence on the record connecting either the Arya Samaj or Hindu Sabha with the two accused or with the publication of this article.

As to the last contention I may say at once that there is no evidence of any sort showing that the promoters of the Shudhi and Sangathan movements were in any way connected with the two accused or with this article, and if it was the intention of the prosecution to prove any such connexion they have failed.

At the same time I do not think that this fact really affects the case for the Crown. Gian Chand is indeed a member of the Arya Samaj and Devi Sharan Sharma an Arya Samaji by conviction though not actually a member. The evidence on the record shows that these two accused took an active part in certain of the proceedings of the local Arya Samaj. The "Risala-i-Vartman" itself states that its object was to

promote Shudhi and Sangathan and in these circumstances it cannot be regarded as surprising if the Muslims of Amritsar came to the conclusion that this article had the approval of the Arya Samaj and Hindu Sabha, more especially as since its publication one Hindu gentleman alone publicly condemned it.

Before proceeding further I would state that I have carefully studied the cases shown in the list appended to the judgment, some of which were cited at the bar, but do not think it necessary to discuss them, as I am in full accord with the following exposition of S. 153-A, I. P. C., given by Rankin, J., in *P. K. Chakarvarti* v. *Emperor* (1).

It is settled law that S. 153-A, I. P. C., does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. It is quite true that whether or not the promoting of enmity is the intention is to be collected in most cases, from the internal evidence of the words themselves, but I know of no authority for saying that other evidence cannot be looked at, and it appears to me that the explanation shows quite conclusively that in any matter on which other evidence could assist it may be taken. The learned Chief Presidency Magistrate has himself pointed out that, even on the question of likelihood to promote ill-feelings the facts and circumstances of the time must be taken into account and something must be known of the kind of people to whom the words are addressed. Although other evidence is not excluded it is true that from the nature of the case, the internal evidence of the words used and the meaning of the words used will very generally be decisive of the question whether or not the Court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared; also, if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words "used": *In re Amrita Bazar Patrika Press* (2). But the words used and their true meaning are never more than evidence of intention, and it is the real intention of the accused that is the test. *Joy Chandra Sarkar* v. *Emperor* (3); *In re Amrita Bazar Patrika Press* (2); *Besant* v. *Advocate-General of Madras* (4). I cannot assent to any doctrine of "constructive intention" such as the Magistrate has in this case adopted.

The learned counsel for the Crown is, therefore, in my opinion, right in saying that "intention" can be deduced from the internal evidence of the words used by the writer. I think too that it is permissible to examine the general policy of the paper and also take into consideration the persons for whom it was written and the state of feeling between the two communities at the time of publication.

A reference to the article itself to my mind clearly shows that the words employed are such as would in the ordinary course create hatred and enmity in the minds of the Muslims against that class of Hindus whom the said Muslims hold responsible for this particular article.

There is ample evidence on the record to show that the relations between Hindus and Mahomedans in Amritsar had been strained for a considerable time. The evidence of Mr. Hamilton-Harding, Sheikh Abdul Aziz and Deputy Superintendent of Police Mir Faiz-ul-Hassan is in my opinion sufficient to establish this fact. Their evidence, moreover is supported by the statements of P. W. 7 Maulvi Sana-Ullah, P. W. 8, Hissam-ud-Din, P. W. 9., Ali Bakhsh, P. W. 11 Muhammad Yaqub and P. W. 12 Daud Ghaznavi, although possibly these non-official witnesses have expressed themselves somewhat strongly. A reference to the May number of the "Risala-i-Vartman" shows clearly that

(1) A. I. R. 1926 Cal. 1133=54 Cal. 59.

(2) [1920] 47 Cal. 190 = 54 I. C. 578 = 21 Cr. L. J. 93.

(3) [1910] 38 Cal. 214 = 10 I. C. 948 = 12 Cr. L. J. 348.

(4) A. I. R. 1919 P. C. 31 = 43 Mad. 146 = 46 I. A. 176 (P. C.).

the object of this journal was to support the Shudhi and Sangathan movements. This of course does not amount to evidence establishing that the promoters of these two movements had anything to do with this publication, but it is evidence to show the intention with which this particular journal was started and its general policy. When words used in an article are likely to produce hatred they must be presumed to have been intended to have that effect unless the contrary is shown, and in the present case, having regard to the fact that the words used in this article clearly tend to promote hatred and enmity between Hindus and Mahomedans as a class, it is for the accused to show that his intention was other than the ordinary one deducible from the actual words used.

Mr. Puri's first contention that this article failed to produce any feelings at all appears to me to be untenable. He contended that admittedly in Amritsar for some time past religious debates had been held, that a large concourse of people had been present at them, and that although there were various Islamic institutions (at least six being referred to in the evidence), there was no evidence to show that prior to the 4th of June 1927, any exception had been taken to this article. He referred to the evidence of P. W. 7 Maulvi Sana-Ullah, who stated that he read this article somewhere about the 27th of May but that he had not referred to it in any way whatever in his own periodical, the "Ahl-i-Hadis." Finally, he contended that nobody would have taken any exception to this article had it not been for the part played by the mirza of Qadian in sending a poster to Amritsar which contained extracts from this article and was described by the police witnesses as highly inflammatory. A copy of the poster has not been brought on to the record and therefore its contents are not known. In the opinion of the Superintendent of Police it was inflammatory and it appears that it was proscribed. At the same time there is ample evidence on the record to show that towards the end of May and before this poster was distributed in Amritsar the Mahomedans had noticed this article and had become excited over it, and I must therefore hold that the publication of this article did produce a certain amount of excitement.

It was next contended by Mr. Puri that even if feelings had been excited they were not feelings of hatred and enmity. In this connexion he pointed out that P. W. 7 Maulvi Sana Ullah stated that on reading this article he was deeply wounded and felt indignation. Similarly P. W. 9 Ali Bakhsh said that it created indignation in his mind, while P. W. 15 Muhammad Yakub felt upset and P. W 16 Daud Ghaznavi received a shock, Ahmad Hassan (P. W. 17) feeling resentment and anger. The only witness who actually used the word "hatred" is P. W. 8 Hissam-ud-Din and Mr. Puri urged that the feelings aroused in him really amounted to a murderous desire which might possibly fall within the ambit of S. 505 (c), I. P. C., but not within the purview of S. 153-A. With this view I am unable to agree. I have carefully studied the evidence of all these witnesses and after allowing for a certain amount of exaggeration and strong language, it seems to me that the feelings aroused in their mind on reading this article were feelings which may properly be held to fall within the meaning of "hatred" and "enmity" as those words are used in S. 153-A.

The next contention of the learned counsel was that there was no evidence on the record to show that any Hindus had read the article and as a result of reading it felt hatred and enmity towards Musalmans. He contended that the object of S. 153-A was to prevent the promotion of hatred and enmity between classes and that this hatred and enmity should be reciprocal and not merely unilateral. No authority was cited for this proposition and I have not been able to find any.

It was next urged that any feelings that might have been aroused on reading this article should have been directed against the writer and confined to him and that the evidence on the record only shows that, so far as the witnesses were concerned, they had reason only to hate Devi Sharan Sharma. It was further pointed out that the resolution passed at the meeting in Khair Din's mosque on the 6th June 1927, condemned the article and its writer and made no reference to the Arya Samaj or to the Hindu

Sabha. The evidence of the witnesses however, shows that although, as a result of the addresses made at this meeting the resolution that was passed condemned the article, the speeches themselves were directed against not only the writer and the editor, but also against those who were looked upon by the Mahomedans as being responsible for and as being behind the author of this attack.

It was next urged that the attack, assuming it to have been made on the Prophet Mahomed, was confined to him in his individual capacity and not as an attack on a class. Having regard to the picture painted in this article it seems to me that there is really no force in this contention. The holy Prophet is depicted as being in hell suffering extreme torture; around him are his wives similarly situated, while around them all there are others beyond number, all in the same state of suffering. In my judgment the article deals with the Prophet Mahomed not as an individual but as the founder of Islam, and attempts to emphasize the futility of the Prophet's claims as the "intercessor" for his followers. Mr. Puri's references to the "Life of Mahomed" by Sir William Muir and Dante's "Inferno" appear to me to be utterly valueless. It is in my opinion ludicrous to compare such works with a scurrilous article like the one under consideration. It seems to me that to depict the founder of Islam with his wives and numerous followers in hell undergoing the tortures of the damned was bound to inflame the minds of Mussalmans in general against the writer of the article and that class who rightly or wrongly were believed by them to be behind him.

It was further contended that it had been admitted that the Shudhi and Sangthan movements were not objected to by Muslims any more than were the corresponding movements of Tabligh and Tanzim carried on by the Muslims, objected to by the Hindus, and that in order to convert a man from one religion to another it was inevitable that the good points of the latter and the bad points of the former would be canvassed and that this would necessarily tend to create a certain amount of ill-feeling. In other words the learned counsel endeavoured to suggest that this article was nothing more than a proper and legitimate attempt at doing "missionary" work. This brings me to a consideration of *In re Pt. Kali Charan Sharma* v. *King-Emperor* (5), decided by a special bench consisting of three Judges of the Allahabad High Court, a case relied on by the learned counsel for the Crown and criticized adversely by Mr. Puri. That case dealt with a book entitled "Bichitra Jewan" which had been declared forfeit by the local Government under S. 99-A, Criminal P. C., on the ground that it contained matter, the publication of which was punishable under S. 153-A.

The writer had under S. 99-B, Criminal P. C. moved the High Court to have the order of forfeiture set aside. It thus became necessary for the Special Bench to decide whether by the publication of this book the provisions of S. 153-A had been contravened. The writer of that book urged before the special bench inter alia (1) that he had written the book in a spirit of fair and honest criticizm; and (2) as a preacher of the Arya Samaj his propaganda was mainly confined to the reclamation of Hindus from other religions and especially from Islam.

I mention these contentions because they are what have been urged before us by Mr. Puri in connexion with the article now under consideration. As to the contention that the article was written as legitimate "missionary" work, the first point to note is that the two accused have not themselves advanced such a claim—a claim that was specifically advanced by the writer of the "Bichitra Jewan." It was held there that it was not possible

> to assent to the proposition that there is no limit to the license permitted to a missionary in the advocacy of the merits of his own religion

and that

> while it must be recognised that in countries where there is religious freedom a certain latitude must of necessity be conceded in respect of the free expression of religious opinion together with a certain measure of liberty to criticize the religious beliefs of others,

it was

> contrary to all reason to imagine that liberty to criticise includes a license to resort

to vile and abusive language. After giving full weight to Mr. Puri's criticizm I find myself in agreement with the views above expressed and must hold

(5) A. I. R. 1927 All. 649.

that the article "Sair-i-Dozakh" cannot be regarded as merely an attempt at "missionary" work on the part of the two accused before us.

The further contention that it was such fair criticism as fell within the explanation to S. 153-A also appears to me to be untenable. The explanation is as follows:

> It does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of Her Majesty's subjects.

As pointed out by Mr. Justice Rankin in *Chakravarti* v. *Emperor* (at p. 65):

> In this explanation we have what the Judicial Committee has called "a delicate balancing" of two important political considerations

and further that

> in applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony: vide *Besant* v. *Advocate-General of Madras*.

It is possible to conceive the writing of a reasoned, critical and strong attack on a religion or its founder, written by way of comment on that religion or on its founder with a view to induce persons to forsake that religion, for another, which might fall within the explanation for the reason that though there may be a tendency in the language employed to promote hatred or enmity the language used did not of necessity convey that intention or where the writer has been able to prove by evidence that that was not his intention even in part.

At the same time a scurrilous and vituperative attack on a religion or on its founder (and it seems to me difficult to distinguish an attack on the founder of a religion from an attack on the religion founded by him) would require a considerable amount of explanation to take it out of the substantive part of S. 153A and bring it within the four corners of the explanation.

While therefore I am not prepared to accept the contention of the learned counsel for the Crown that any criticizm of a religious leader, whether dead or alive, falls within the ambit of S. 153A, I. P. C. I would hold that the writing of a scurrilous and foul attack on such a religious leader would prima facie fail under the said section.

In the present case reference to the explanation and to the article in question clearly shows that the latter does not come within the former.

Turning then to the exposition of S. 153A by Rankin, J., which I have adopted, I would hold that in writing and publishing this article the two accused have brought themselves within the purview of that section and are guilty of the offence made punishable thereby.

There remains the question of sentence. Sir Muhammad Shafi urged that it should be deterrent. Mr. Puri strenuously contended that it should be nominal. He pointed out that P. W. Abdul Aziz had definitely stated that the tension between the two communities was due to the activities of both in connexion with the rival movements of Shudhi and Sangathan on the one hand and the Tabligh and Tanzim on the other and had also stated, that, what counsel termed the "gutter press" of both communities had been equally aggressive, the aggressiveness having greatly increased within the last few months. He urged that as the Muslims had not been proceeded against by Government, the accused drew two conclusions: (1) that scurrilous writings of this nature were not regarded as offences and; (2) that the penal provisions regarding such writings were meant for Hindus alone, and therefore as private persons could not take action under S. 153-A they were driven in desperation, to retort in this manner.

I can only conclude that action was not taken by Government in connexion with the writing referred to by Mr. Puri viz., the "journey from Delhi to Adamabad (nowhere) and the "Unisiwin saddi ka Maha Rishi" because they were not considered by Government to have transgressed the law.

It is in evidence that Devi Sharan Sharma had been the editor of a periodical called the "Satya Dharam Parcharak" which published matter in the early part of this year which necessitated warnings from Government on three separate occasions, on the last of which on the 19th March he was told that a repetition of such publications would result in proceedings being taken against him. Immediately after the last warning he ceased to edit that paper, another person declaring himself the

printer and publisher on the 8th April, while the present journal was started by declarations on the part of Gian Chand on the 28th March. In these circumstances I am of opinion that this article was written and published by Devi Sharan Sharma with the deliberate intention of promoting hatred and enmity between Muslims and Hindus, and therefore consider that substantial punishment should be awarded to him. I would, therefore, sentence him to rigorous imprisonment for one year and payment of a fine of Rs. 500 or in default further rigorous imprisonment for a period of six months.

The case of Gian Chand Pathak is on a somewhat different footing. He is the declared printer and publisher of the "Risala-i-Vartman" and is also the editor. Further it is in evidence that he took a personal interest in the publication of this article. At the same time I do not think that the part he played in connexion with the publication of this article calls for such severe punishment, and would therefore sentence him to rigorous imprisonment for a period of six months and payment of a fine of Rs. 250 or in default further rigorous imprisonment for three months.

Skemp, J.—I concur.

D.D. *Accused convicted.*

LIST OF CASES REFERRED TO

P. K. Chakravarti v. *Emperor* (1), *In re Amrita Bazar Patrika Press Ltd.* (2), *Joy Chandra Sarkar* v. *Emperor*, (3), *Besant* v. *Advocate-General of Madras* (4), *Kali Charan Sharma* v. *King-Emperor* (5), *Jaswant Rai* v. *King-Emperor* (6), *Habib, in the matter of* (7), *Ram Saran Dat* v. *Emperor* (8), *Crown* v. *Raj Pal* (9), *Emperor* v. *P. N. Mitter* (10), *In re Mahomed Ali* (11), *Sital Parsad* v. *Emperor* (12), *Queen-Empress* v. *Bal Gangadhar Tilak* (13), *Emperor* v. *B. B. Bhopatkar* (14), *Emperor* v. *Bal Gangadhar Tilak* (15), *Emperor* v. *V. S. Khare* (16), *Emperor* v. *R.M. Mulla* (17), *G. H. Rao* v. *King-Emperor* (18), *Queen-Empress* v. *Girdhari Lal* (19), *Queen-Empress* v. *Amba Parshad* (20), *Kali Charan Sharma* v. *King-Emperor* (21), *U. Damadaya* v. *Emperor* (22), *Emperor* v. *Nabi Bux* (23), *Deshbhandu Gupta* v. *Emperor* (24), *Jiwan Singh* v. *Emperor* (25), *Nageshvar Prasad Sharma* v. *Emperor* (26), *Hemendra Prasad Ghose* v. *Emperor* (27).

(6) [1907] 10 P. R. 1907 Cr. 14 P. W. R. 1907.
(7) A. I. R. 1926 Lah. 1=6 Lah. 528 (S. B.).
(8) A. I. R. 1925 Lah. 298.
(9) A. I. R. 1926 Lah. 195=7 Lah. 15.
(10) [1908] 35 Cal. 945.
(11) [1914] 41 Cal. 466=20 I. C. 977=18 C. W. N. 1.
(12) [1916] 43 Cal. 591=23 C. L. J. 105=34 I. C. 974=20 C. W. N. 199.
(13) [1898] 22 Bom. 112.
(14) [1906] 30 Bom. 421=8 Bom. L. R. 421=4 Cr. L. J. 1.
(15) [1908] 10 Bom. L. R. 848.
(16) [1909] 11 Bom. L. R. 743=3 I. C. 776=10 Cr. L. J. 379.
(17) [1920] 22 Bom. L. R. 166.
(18) [1909] 32 Mad. 338=2 I. C. 193=9 Cr. L. J. 506.
(19) [1886] 8 All. 653=(1886) A. W. N. 264.
(20) [1898] 20 All. 55=(1898) A. W. N. 1 (F. B.).
(21) A. I. R. 1927 All. 1.
(22) A. I. R. 1923 Rang. 212=1 Rang. 201.
(23) A. I. R. 1925 Sind 59=17 S. L. R. 341.
(24) A. I. R. 1924 Lah. 502.
(25) A. I. R. 1925 Lah. 16.
(26) A. I. R. 1925 Patna 99.
(27) A. I. R. 1927 Cal. 215.

* A. I. R. 1927 Lahore 602

TEK CHAND AND AGHA HAIDAR, JJ.

Duni Chand—Plaintiff—Appellant.

v.

Mota Singh and *another*—Defendants—Respondents.

S. A. No. 2070 of 1923, Decided on 28th June 1927, from the decree of the Dist., Judge, Ludhiana, D/- 10th May 1923.

(a) *Civil P. C., O. 9, R. 13—Party absent when compromise arrived at by other parties—No separate suit lies to set aside the decree unless there is fraud—Civil P. C., O. 23, R. 3.*

A fresh suit does not lie to set aside a decree passed on a compromise, on the mere ground that the plaintiffs who were sui juris were not the consenting parties to the compromise. The proper remedy to impeach a decree is by an appropriate proceeding taken in the suit in which the decree was passed, e. g., an application under O. 9, R. 13, Civil P. C., to set aside the ex-parte decree or an application for review, or an appeal to the superior Court. But if the decree is not tainted with fraud, no suit lies to set it aside : 1 *Lah.* 344, *Foll.*

[P 603 C 2 ; P 504 C 1]

* (b) *Decree—Setting aside—Fraud must be defined on the face of decree—Irregularity or overstatement of claim is not fraud.*

The fraud which should be established, before a decree passed by a Court of competent jurisdiction could be set aside in a separate action, must be fraud which can be explained and defined

upon the face of a decree and mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree. *Patch* v. *Ward* (1896) *L. R. 3 Ch.* 203, *Rel. on.* [P 604 C 2]

* (c) *Decree—Setting aside—Fraud—Relief as to, is discretionary—Plaintiff must prove himself to be free from fault throughout.*

The power of a Court to set aside a judgment on the ground of fraud is discretionary and the party who wants a judgment to be vacated must show reasons why he did not assert and enforce his rights at the proper time. He must explain the whole course of his conduct throughout the previous litigation and must free himself from all imputation; 38 *Mad.* 203, *Rel. on.* [P 604 C 2, P 605 C 1]

M. Sleem—for Appellant.

Bishan Narain—for Respondents.

Tek Chand, J.—Mota Singh, defendant respondent instituted a suit for possession by way of pre-emption of a vacant site which had been purchased jointly by two brothers, Achhru Ram and Duni Chand. On the 26th April 1921, all the parties, viz. Mota Singh pre-emptor and Achhru Ram and Duni Chand vendees, were present in Court. A compromise was mooted and at the joint request of the parties the case was adjourned to the next day to have the compromise written out and filed in Court. On the 27th of April 1922, Mota Singh pre-emptor and Achhru Ram, one of the vendees, only appeared, Duni Chand being absent. An application embodying the terms of the compromise and signed by Mota Singh and Achhru Ram was filed praying that a decree be passed in favour of Mota Singh against the vendees on payment of Rs. 525 on or before the 12th of May 1922. It was stated in the application that Duni Chand was absent, but that his brother Achhru Ram undertook responsibility on his behalf. The court accepted the compromise and passed a decree in accordance with its terms against both Achhru Ram and Duni Chand. As agreed, the sum of Rs. 525 was deposited in Court by Moto Singh pre-emptor on the 10th of April and was duly withdrawn by Achhru Ram, one of the vendees.

Two days later, on the 12th May, 1922, the other vendee Duni Chand filed an application under S. 141, Civil P. C., stating that he had not authorized Achhru Ram to file the compromise on his behalf, that he was not bound by it and that the decree passed against him be set aside. This application was rejected as being incompetent.

On the 19th of December 1922, Duni Chand instituted the present suit for a declaration that the compromise dated the 27th April 1922, and the decree passed thereon were obtained "without his consent and authority, fraudulently and unlawfully" and was ineffectual against him. The trial Court dismissed the suit holding that Achhru Ram was not a member of a joint Hindu family with the plaintiff and he had not been authorized by the latter to act on his behalf, but the plaintiff had failed to prove that any fraud had been committed on him or on the Court, and that, on the other hand, the conduct of the plaintiff in absenting himself on the 27th and keeping quiet till the money had been withdrawn by his brother was fraudulent. On appeal the District Judge, affirmed the decree of the trial Court holding that the suit was not maintainable, but the plaintiff's proper remedy was to have the decree set aside under O. 9, R. 13, or to prefer an appeal or an application for review.

Duni Chand, plaintiff, has come up in second appeal to this Court and two points have been urged on his behalf by Mr. Sleem. In the first place it is contended that on the findings of the Court below fraud on the part of the defendant is established; and secondly, that even if the lower Courts are right in holding that fraud is not proved, the suit is still maintainable as the compromise had not been authorized by Duni Chand appellant and is not binding upon him.

In answer to the second of these contentions, reference may be made to a division bench decision of this Court in *Jhanda Singh* v. *Mt. Lachhmi* (1), where, under somewhat similar circumstances, it was held that a fresh suit does not lie to set aside a decree passed on a compromise, on the mere ground that the plaintiffs who were sui juris were not the consenting parties to the compromise. The following observations of the learned Chief Justice, who delivered the judgment of the Court in that case, may be usefully referred to:

It is further contended that the plaintiffs were not present at the time when the compromise

(1) [1920] 1 Lah. 344=68 P. L. R. 1920=56 I.C. 878=22 P.W.R. 1920.

was arrived at and did not give their consent to the terms of the compromise. The decree was consequently ex parte so far as they were concerned and should not adversely affect their interests in the estate. The simple answer to this contention is that the proper remedy to impeach a decree is by an appropriate proceeding taken in the suit in which the decree was passed e. g., an application under O. 9, R. 13, Civil P. C., to set aside the ex-parte decree, or an application for review, or an appeal to the superior Court. But if the decree is not tainted with fraud, no suit lies to set it aside *vide inter alia Sadho Missar* v. *Golab Singh* (2).

I am not unmindful of the rulings of the other High Courts based on the dictum of Vaughan Williams, J., in *Huddersfield Banking Co.* v. *Lister* (3), which are not in strict accord with this decision, see *Sarbesh Chandra Basu* v. *Hari Dayal* (4), *Kshetra Moni Dasi* v. *Amodini Dasi* (5), and *Shami Nath* v. *Ramjas* (6); but the facts of those cases were distinguishable and in any case, having regard to the finding that the plaintiff's own conduct has not been above board in this case, I do not think it necessary to discuss this point any further.

Mr. Sleem for the appellant relies on *Ashootosh Chandra* v. *Tara Prosonno Rai* (7), *Surendra Nath* v. *Hemangini Dasi* (8) *Manohar Lal* v. *Jadunath* (9); but none of these cases is in point. In each of them, the plaintiffs were minors at the time when the compromise in the previous litigation was filed in Court and the requirements of O. 32, R. 7 or the corresponding sections of the former Code had not been fulfilled. It is well known that the case of a minor plaintiff stands on an entirely different footing and such cases have no bearing on the question before us. I must, therefore, hold that Duni Chand plaintiff could maintain the present suit only on the ground that the compromise or the decree based thereon was obtained by fraud.

Coming now to the first point, it is urged that the facts found by the lower Court amount to fraud, but I am unable to accept this contention also. In the application embodying the terms of the compromise, all the facts were clearly and correctly stated and nothing was concealed either from the opposite party or the Court. It was specifically mentioned that Duni Chand plaintiff was not present at the time and Achhru Ram undertook responsibility for him. In ascertaining what should be established before a decree passed by a Court of competent jurisdiction could be set aside in a separate action on the ground of fraud, it is necessary to keep, in view the following remarks of Cairns, L. J., in *Patch* v. *Ward* (10).

> Now it is necessary to bear in mind what is meant, and what must be meant by fraud, when it is said that you may impeach a decree, signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject. *The Duchess of Kingston's* case (11), where the Judges being consulted by the House of Lords replied to one of the questions; Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal. The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it, the malus animus, the mala mans putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.....I apprehend the fraud therefore, must be fraud which you can explain and define upon the face of a decree and that mere irregularity, or the insisting upon rights which upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled.

It is obvious that the plaintiff's allegations, even if true, fall short of fraud as described above. I would, therefore, hold with the lower Court that the plaintiff has failed to establish fraud and his suit must fail.

I may also remark that even, if fraud had been established in this case it was not incumbent on this Court to pass a decree in the plaintiff's favour. It is well settled that the power of a Court to set aside a judgment on the ground of fraud is discretionary and the party who wants a judgment to be vacated must

(2) [1899] 3 C. W. N. 375.
(3) [1895] 2 Ch. 273=64 L. J. Ch. 523=43 W. R. 567=12 R. 331=72 L.T. 703.
(4) [1910] 14 C. W. N. 451=5 I. C. 236=11 C. L. J. 346.
(5) [1912] 16 I. C. 611.
(6) [1912] 34 All. 143=13 I. C. 80=9 A.L.J. 1.
(7) [1884] 10 Cal. 612.
(8) [1907] 34 Cal. 83.
(9) [1906] 28 All. 585=33 I. A. 128=3 A.L.J. 710=9 O.C. 219 (P.C.).
(10) [1896] 3 Ch. 203=18 L. T. 134=16 W. R. 441.
(11) [1776] 2 Sm. L. C. 593.

show reasons why he did not assert and enforce his rights at the proper time. He must explain the whole course of his conduct throughout the previous litigation and must free himself from all imputation: See *Chinnayya* v. *Ramanna* (12).

In this case, as pointed out already, the plaintiff Dani Chand was present in Court when the compromise was talked about on the 26th April. He absented himself on the 27th, when the compromise was filed and decree passed and kept quiet till the pre-emptor had paid the money in Court. It was after the money had been withdrawn by his brother and co-vendee, that he for the first time alleged that he was not bound by the compromise. His own couduct is not above board and the Court will not exercise its discretion in favour of such a person, unless absolutely compelled to do so. For the foregoing reasons, I dismiss the appeal with costs.

Aga Haidar, J.—I was inclined to follow the law as laid down in *Shami Nath Chaudhri* v. *Ram Jas* (6), which permits a suit for setting aside a decree on grounds other than that of fraud. But a division bench of this Court has expressed a different opinion in *Jhanda Singh* v. *Mt. Lachmi* (1), which my learned brother has followed. Under these circumstances I concur in the order passed by him and agree in dismissing the appeal with costs.

D.D. *Appeal dismissed.*

(12) [1913] 38 Mad. 203=25 M. L. J. 223=19 I.C. 579=1913 M. W. N. 387.

A. I. R. 1927 Lahore 605

ADDISON, J.

Kirpal Singh and *others*—Plaintiffs—Appellants.

v.

Sohan Singh and *others*—Defendants—Respondents.

S. A. No. 1408 of 1926, Decided on 12th January 1927, from the decree of the Dist. Judge, Sialkot, D/- 19th March 1926.

(a) *Custom (Punjab) — Alienation—Outsider paying antecedent debts after making due enquiry is entitled to have the alienation declared binding.*

An outsider who pays antecedent debts in consideration of the transfer of property, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived and is entitled to have the alienation declared binding: 65 *P. R.* 1900; 1 *Lah.* 472; and *A. I. R.* 1922 *Lah.* 301. *Foll.* [P 606 C 1]

(b) *Custom (Punjab) —Alienation by Kalal for engaging money in trade to increase his income, which is insufficient, is for legal necessity.*

Kalals are usually engaged in trade or money-lending and take up service. Therefore where the income of land of a Kalal is totally insufficient for his wants, his alienating part of that land to invest it in trade in order that he should be able to live is for a necessary purpose even if he be governed by agricultural custom: *A. I. R.* 1924 *Lah.* 685 & A. I. R. 1924 Lah 41 *Foll.* *A. I. R.* 1923 *Lah.* 142 *Dist.* [P 607 C 1]

(c) *Punjab Courts Act, S.* 41—*Second appeal —The finding whether loan is required for personal necessities is a finding of fact.*

The finding that a debt is required for personal necessities is a finding of fact which cannot be contested in second appeal: *A. I. R* 1924 *Lah.* 685 *Foll.* [P 607 C 2]

Tek Chand—for Appellants.

Moti Sagar—for Respondents.

Judgment.—One Bahadur Singh, a Kalal of the Sialkot district, sold 24 kanals 18 marlas of land to Sohan Singh for Rs. 4,000 by a registered deed dated the 14th June 1924. The plaintiffs who are some of his nephews, brought a suit for the usual declaration that the sale should not affect their reversionary rights as it was without consideration and necessity. The two Courts below have concurred in dismissing the suit and the plaintiffs have preferred this second appeal.

Bahadur Singh's wife has two brothers, namely, Manohar Singh and Sukh Dev Singh, the latter of whom has a son Danishmand Singh. Danishmand Singh has been living with the vendor since his childhood as his own mother died when he was very young. Bahadur Singh in March 1923, executed a will in favour of this boy and the plaintiffs then sued to have the will set aside. Bahadur Singh during the pendency of this suit revoked the will and the suit was thereupon dropped. It was after this that the sale in question took place. The trial Court held that though the parties were Kalals they were governed by agricultural custom and that the land was ancestral. It, however, dismissed the suit as it held the sale to be for consideration and necessity.

The only point argued on behalf of the plaintiffs-appellants before the District Judge was the question of necessity and that is the only point before me. The consideration for the sale in question was

made up of three items: (1) Rs. 500 for payment to the Punjab National Bank; (2) Rs. 1,000 to pay off a pro-note dated the 28th June, 1923, executed by the vendor in favour of Manohar Singh, his wife's brother and uncle of Danishmand Singh, the boy who has lived with the vendor for most of his life. It was stated in the deed that this money had been advanced to the vendor to defray the expenses of an illness he had suffered from, namely paralysis; (3) Rs. 2.500 for personal necessity and karobar.

As regards the first item of Rs. 500: both Courts have held that this money was borrowed from the Punjab National Bank by the vendor some 17 days before the sale and it was repaid shortly after the sale. Both Courts have also held that the land held by the vendor is of very poor quality and that the income therefrom is not more than Rs. 8 per mensem. They have further held that the vendor was a man of good character and that it was not even alleged that he was of an immoral character or recklessly extravagant. This being the case they have come to the conclusion that it was enough for the vendee to enquire as to the existence of this debt and to advance the money when he discovered that it was due especially as there was nothing to put him upon his guard or to make him think that there was anything wrong with this debt.

A preliminary objection has been taken that this is a finding of fact which cannot be challenged in second appeal. I agree. In *Devi Ditta* v. *Saudagar Singh* (1) it was held that an outsider who pays antecedent debts in consideration of the transfer of property, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived and is entitled to have the alienation declared binding. This ruling covers the case of the item of Rs. 500 while *Jhandu* v. *Niamat Khan* (2) is also in point. And other authority of this Court is *Jagat Singh* v. *Gandu Singh* (3).

The next item is the one of Rs. 1,000 due on the pro-note dated the 28th June 1923, in favour of Manohar Singh. It may be the case as remarked by the District Judge, that this item may be suspicious, but the District Judge, after considering all the circumstances, held that so far as the vendee was concerned it was a just antecedent debt within the meaning of the rulings already quoted. This again is a finding of fact, which cannot be attacked in second appeal. Besides, on the evidence this appears to have been the only possible conclusion that could be arrived at. The vendee found a pro-note which was due, the vendor was of good character and not extravagant, and it was impossible for him to come to the conclusion that it was merely a nominal debt, a document which was written in order to injure the reversioners. The appeal must also fail as regards this item.

The last item of Rs. 2,500 was advanced for personal necessities and for trade, or rather money-lending, Both Courts have come to the conclusion that there was bona fide necessity for the advance of this item, Rs. 1,500 of which were, after the date of the sale in dispute, lent out at interest by the vendor. The findings in this connection are that Bahadur Singh, the vendor, owned only about 15 bighas of poor land, four bighas of which were already under mortgage, this mortgage having been effected for five or six years previously and acquiesced in by the reversioners as they have brought no suit to set it aside, This in itself helps to show that the vendor was not well off and could not live upon the income from his land which was not more than Rs. 8 a month. The vendor used to be in the army, but had to retire some 25 years ago without a pension. Since then his only source of income has been his land, i. e., Rs. 8 a month, together with certain sums, which had been lent out by his father, and which he had been able to collect. The sums collected, however, it has been held, must have been exhausted before the sale took place. That means that at the time of the sale he had only Rs. 8 a month as income from his land while he had, six years before, to mortgage his land. It was for these reasons that the Courts below held that part of this money had been advanced for personal necessities while the portion of it advanced to lend out at interest was also considered to be a prudent and proper transaction and, therefore, necessary as that was the only way to get a sufficient

(1) [1900] 65 P. R. 1900=1900 P. L. R. 322.
(2) [1920] 1 Lah. 472=54 I. C. 842.
(3) A. I. R. 1922 Lah. 301.

income to live upon. The Courts below distinguished the case of Jats who had been agriculturists from time immemorial who had no connexion with trade, and for whom it might not be a necessary purpose to sell an ancestral land to put the money in business. But they considered that the case was different with Kalals, whose usual occupation was trade and service.

The finding of the District Judge was attacked before me on the ground that it was against the principle laid down in *Santa Singh* v. *Waryam Singh* (4) which was followed in *Mohammad Usman Khan* v. *Ata Mohy-ud-din* (5). The first ruling undoubtedly laid down that a Jat agriculturist could not alienate his ancestral land in order to start trading. Since that time, however, there have been other rulings of this Court the principal of which is *Muhammad Hassan-ud-din* v. *Saif Ali Shah* (6). That was a case where the consideration for a mortgage was said to be a small amount due on a prior mortgage together with money taken for purposes of trade. The parties were Sayad agriculturists. The property mortgaged was an ancestral sarai. In that case the mortgagor had only 10 or 11 kanals of land which did not supply him with sufficient income upon which he could live. For that reason the Judges who decided the case thought he was justified in alienating the sarai for the purposes of trade. They did not think that the division bench of the 1915 case intended to lay down that under no circumstances could a member of an agricultural tribe alienate ancestral property for purposes of engaging in trade.

In the case before me the facts are very similar. The vendor is a Kalal. Kalals are usually engaged in trade or money-lending and take up service. The income of his land was totally insufficient for his wants. It seems to me, therefore, that his alienating part of that land to invest it in trade in order that he should be able to live was a necessary purpose.

It was also held in *Ram Kishen* v. *Khiali* (7) that the rules prevailing among Jats who have been agriculturists from time immemorial that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible cannot be properly applied to the community of Brahmans. In that case also it was held that the parties were governed by agricultural custom. It was held in the case that the finding of the lower appellate Court that the share of the price of one of the vendors was required for his personal necessities was a finding of fact which could not be contested in second appeal. This case, therefore, also covers the case before me as regards the item of Rs. 2,500 as to which it has been found by the lower appellate Court that this sum was advanced for personal necessities and for investing in trade.

In my opinion the Courts below came to the correct conclusion and I dismiss this appeal with costs.

R. D. *Appeal dismissed.*

(4) [1914] 19 P. R. 1915=147 P. W. R. 1914=24 I. C. 361=207 P. L. R. 1914.
(5) A. I. R. 1923 Lah. 142.
(6) A. I. R. 1924 Lah. 41=4 Lah. 122.
(7) A. I. R. 1924 Lah. 685.

A. I. R. 1927 Lahore 607

BROADWAY AND SKEMP, JJ.

Mt. Alo and *others*—Defendants—Appellants.

v.

Sher and *others*—Plaintiffs—Respondents.

First Appeal No. 2162 of 1922, Decided on 27th April 1927, from a decree of the Senior Sub-Judge., Gujrat, D/- 29th June 1922.

Punjab Land Revenue Act (1887), *S.* 44—*Later record should be preferred to the earlier.*

The presumption of correctness that attaches to revenue records must attach to the later record in preference to the earlier one unless it could be shown to be wrong. [P. 608, C. 2]

Nanak Chand—for Appellants.

Devi Dayal and *N. C. Mehra*—for Respondents.

Broadway, J.—This appeal has arisen out of a suit brought by Bahawali and others against Mt. Alo and Mt. Rajo for possession of 654 kanals 19 marlas of land situate in mauza Chot in the district of Gujrat. The parties are Gondals and the plaintiffs allege that the property in suit had belonged to one Khaja who had died without male issue and that they were entitled to succeed to the said land in preference to Khaja's

married daughters Mt. Alo and Mt. Rajo. The defendants contested that suit alleging that the plaintiffs were not collaterals of Khaja; that the property was not ancestral; that their husbands had been resident sons-in-law or khana damads and that in any event, if the property were shown to be ancestral and the plaintiffs proved that they were collaterals in the eighth degree, daughters were not ousted from succession by them. The trial Court came to the conclusion that the plaintiffs were collaterals, that the property was ancestral and that the husbands of the two daughters were not khana damads. Holding further that collaterals in the eighth degree excluded married daughters the plaintiffs were granted a decree for possession as prayed. The daughters have come to this Court in appeal and the first point for decision is whether the plaintiffs have proved that they were collaterals of the deceased Khaja. In order to establish this they produced two witnesses, Sahabat and Salam, who in general terms say that the plaintiffs are collaterals of Khaja, and P. W. No. 3 Khushi who says that he is the family bard and that the plaintiffs were Khaja's collaterals. At the same time he does not attempt to recite the pedigree-table. This evidence has been disregarded by the Court below and I think rightly. Oral evidence of this vague nature, in my judgment, would not afford any proof of the relationship. The trial Court has, however, based its decision on a pedigree-table which has been proved by the special kanungo. This pedigree-table has been compiled by the special kanungo from the revenue records of the village settlements of 1857, 1892-93, and 1915-16. It appears that according to the pedigree-table as drawn up in 1857 the plaintiffs would be collaterals, for they are shown to be descendants of one Saida, a brother of Mairu, from whom the deceased Khaja was descended. It appears, however, that in 1892-93, the settlement was carried out under the orders of Sir James Wilson and it is a well-known fact that that officer was always very thorough in the preparation of all revenue records. At this settlement Mairu is not shown as the brother of Saida and, therefore, as the son of Bahlo, but is apparently shown separately, and against his name it is entered that he had acquired property by purchase. This pedigree appears to have been repeated in 1915-16, in which year there was another settlement of this village under the supervision of Mr. Williamson.

It has been urged that preference should be given to the earlier pedigree-table. But this contention appears to be erroneous having regard to the remarks of Kensington and Johnstone, JJ. in *Ishar* v. *Dalip Singh* (1). I consider that there can be no doubt that the settlement of 1892-93 was carried out with greater accuracy than the old settlement of 1857. This correction was probably deliberately made and in my judgment the presumption of correctness that attaches to revenue records must attach to the later record in preference to the earlier one unless it could be shown to be wrong. The evidence on this record does not rebut this presumption and I would, therefore, hold that the plaintiffs on whom the onus lay, have failed to prove that they are collaterals of the deceased Khaja. Further, I would add that, even assuming that the presumption of correctness attaching to revenue records attached to both equally, the result would be that they would both have to be set aside as rebutting one another. This would leave the plaintiffs still in the position of having to prove their relationship and, in my opinion, the evidence on this record falls far short of the proof that is requisite, as I agree with the view of the Court below that the oral evidence is really worthless. In these circumstances I do not think it necessary to deal with the remaining questions, i. e., whether the property is ancestral and whether collaterals in the eighth degree would succeed in preference to daughters.

I would accept this appeal and dismiss the plaintiffs' suit with costs.

Skemp, J.—I concur.

R.K. *Appeal accepted.*

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(1) [1913] 215 P. W. R. 1912=18 I. C. 218=111 P. L. R. 1913.

A. I. R. 1927 Lahore 609

MARTINEAU, J.

B. Telu Ram—Applicant — Appellant.

v.

B. Badri Nath and *others*—Respondents.

Miscellaneous First Appeal No. 1314 of 1926, Decided on 8th November 1926, from the order of the Dist. J., Karnal, D/- 8th February 1926.

(a) *Probate and administration Act, S. 69—Relations mentioned in probate application are not necessary parties.*

Relations whose names are given in an application for probate are not necessary parties to the proceedings as the law does not require notice to be given to them. [P 609 C 1]

(b) *Will—Construction—Will, natural and reasonable, should not be rigorously construed.*

In the case of a will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand rigorous scrutiny of documents that are unnatural, unreasonable or tinged with impropriety : 36 *All.* 93 (*P.C.*), *Foll.*; 7 *L. L. J.* 230 and 20 *P. R.* 1912, *Dist.*

[P 610 C 1]

Mukand Lal Puri—for Appellant.

Parkash Chandra for *Shamair Chand*—for Respondents.

Judgment.—This is an appeal from an order of the District Judge of Karnal dismissing an application for probate of a will purporting to have been made by Mt. Bhagirathi, who was the sister of the appellant Telu Ram.

A preliminary objection is raised by the counsel for the respondents that the appeal has not been properly framed on the ground that one of the respondents died before the institution of these proceedings and that two persons who were parties in the Court below have not been impleaded as respondents. There is, however, no force in this objection. Relations whose names are given in the application for probate are not parties to the proceedings, as the law does not require notice to be given to them. The only necessary respondents in this appeal are the two caveators and they have been impleaded. The preliminary objection is, therefore, overruled.

The will was written on the 20th October, 1923, six days before the death of Bhagirathi. It was written by a petition-writer, Sansar Chand, and he and four of the attesting witnesses (P. Ws. Nos. 2 to 5) have deposed that Bhagirathi executed the will in their presence, her thumb-mark being taken on it, and that she was in her proper senses and understood what she was doing. The will also bears the attestation of Dr. Rahmat Ali, Assistant Surgeon of Karnal, who, although he was not present at the time of its execution, has stated that he visited Mt. Bhagirathi later in the day and that she answered his questions properly and understood what she was doing, and he wrote a certificate on the back of the Will as to her being of sound mind.

It does not appear to me that any serious objection can be taken to the attesting witnesses, whom the learned District Judge considered to be men either of no position or under the influence of the appellant. Plaintiff's witness No. 2 is a pan-seller who appears to have no connexion with the appellant. He was a next neighbour who would naturally have been called to witness the execution of the will. Plaintiff's witnesses Nos. 3 and 4 are merchants and P. W. No. 5 is a Mahajan. The only objection urged with reference to them is that they supply articles to the District Board of which the appellant is the secretary. This is hardly a sufficient reason for rejecting their evidence. The writer of the will, Sansar Chand, P. W. No. 1, appears to be quite disinterested.

The evidence for the respondents is only that of three witnesses who say that they saw Mt. Bhagirathi unconscious or not in her proper senses five or six days before her death. Such evidence is of no value.

It is urged for the respondents, that if the will had been duly executed by Mt. Bhagirathi, she would have signed it as she knew how to write. The reason given by the appellant for her thumb-mark and not her signature being taken was that she was ill and her hand was shaky, while some of the witnesses stated that her hand did not shake and she was not asked to sign the will. This discrepancy does appear to be important as it would not have been noticeable whether Mt. Bhagirathi had a shaky hand unless she actually tried to sign her name. Probably it was because her ordinary handwriting was shaky and she could sign her name only with difficulty that her thumb-mark was taken instead of her signature.

The testatrix was, no doubt, as stated by the learned District Judge, in a poor state of health, but the evidence shows that her mental faculties were not impaired, and that she knew what she was doing. It is contended for the respondents that this is not enough and that it was necessary for the appellant to show that the testatrix was capable of appreciating the claims of those persons who were excluded by the will from participation in the property. There might have been some force in the argument if the will had been an unnatural one, but that is not the case. Mt. Bhagirathi had been living with her brother for many years since her husband's death so that it was perfectly natural for her to wish to leave her property to him. The caveators, on the other hand, had no claim on her. One of them namely, Badri Nath, was her husband's second cousin, and the other, Jadu Sarup, was her husband's brother's maternal grandson. Moreover, the testatrix did not ignore the existence of Jadu Sarup, as she made a suggestion in the will that Telu Ram might give Rs. 500 on the occasion of the marriage of Jadu Sarup or his sister. *Prag Devi* v. *Nathu Mal* (1), which has been cited by the learned counsel for the respondents, was a case of a will made in favour of nephews to the exclusion of a daughter, who was the natural heir, and another case cited, namely, *Indar Narain* v. *Onkar Lal* (2) was one in which a lady had left all her property to a child whom she had adopted a few days before her death, and whom she had no reason to favour to the prejudice of the heirs. Those cases are clearly distinguishable from the present one.

In *Jagrani Koer* v. *Durga Prashad* (3) their Lordships of the Privy Council held that in the case of a will, reasonable, natural and proper in its terms, it was not in accordance with sound rules of construction to apply to it those canons which demand rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. The will in the present case was a perfectly natural and proper one, and I find on the evidence that it is proved to have been duly executed by Mt. Bhagirathi. No executor was appointed by the Will, so that the appellant is entitled, not to probate, but to letters of administration with a copy of the will annexed.

I accept the appeal and reverse the order of the lower Court, grant to the appellant letters of administration with a copy of the will annexed. The respondents, Badri Nath and Jadu Sarup, will pay the appellant's costs in both Courts.

J.V. *Appeal accepted.*

(1) [1926] 7 L. L. J. 230.
(2) [1911] 141 P. L. R. (1911)=233 P. W. R. (1911)=10 I. C. 130=20 P. R. 1912.
(3) [1914] 36 All. 93=16 O. C. 396=22 I. C. 103=41 I. A. 76 (P. C.).

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* * A. I. R. 1927 Lahore 610
Special Bench.

BROADWAY, ZAFAR ALI, ADDISON, TEK CHAND AND COLDSTREAM, JJ.

In the matter of Muslim Outlook, Lahore.

Criminal Case No. 1 of 1927, Decided on 21st June 1927.

* (a) *Contempt of Court—Jurisdiction.*

The Lahore High Court has jurisdiction to deal summarily with cases of contempts of itself: *A. I. R.* 1926 *Lah.* 1 (*F. B.*); *A. I. R.* 1926 *All.* 623 (*S.B.*), *Foll.* [P 611 C 2]

* * (b) *Contempt of Court—Attributing improper motives to a Judge or Court is serious contempt.*

Courts are of necessity presided over by Judges who, like all other men, are mortal and liable to err. It is no offence to subject their decisions to fair, honest and reasonable criticism. Indeed these criticisms may be couched in strong, perhaps, even extravagant language, but to ascribe their decisions not to error but to improper motives is to bring the Judge himself and the whole Court into contempt and undermine the confidence of the public in all judicial pronouncements and determinations. Nothing could be calculated to bring a Court or a Judge of a Court into contempt more than to impute improper motives to that Court or Judge in its or his decisions. *In re R.* v. *Almon* (1765) 97 *E. R.* 94 *Rel. on.* [P 612 C 1, P 613 C 1]

Where an article goes far beyond the region of fair comment or honest criticism and attributes to a Judge of the High Court a deplorable lack of experience and a sense of responsibility and a remarkable want of competence and care as a Judge and goes on to make a proposal that an enquiry should be made into the circumstances under which that extraordinary judgment was written because there is a bona fide apprehension that there must have been an extraordinary cause for its abberration which it is a public duty to expose, the article amounts to a clear contempt of the High Court. [P 612 C 1, P 613 C 1]

* (c) *Contempt of Court—Court is to proceed with contempt cases only when there is a clear case—Reasonable interpretation should be placed upon the article.*

It is only when thers is a clear case that any Court should exercise the extraordinary juris-

diction that it possesses in matters of contempt and in approaching an article with a view to ascertain what it means the only rule is to ascertain and to place upon that article a reasonable interpretation. [P 612, C 2]

Zafrulla Khan, *Muhammad Alam*, *M. Jalal-ud-Din* and *Muhammad Amin* for *D. S. Bukhari*, *Niaz Muhammad*, *Mian Abdul Aziz Abdul Ghani*—for Accused.

Govt. Advocate—for the Crown.

Broadway, J.—On the 15th of June 1927, this Court was moved by a petition filed by the Government Advocate to grant a rule against the editor and printer of a paper known as the "Muslim Outlook" to show cause why they should not be committed or otherwise dealt with in accordance with law in connexion with a contempt of Court committed by them by the publication of an article in the issue of the paper, dated the 14th June 1927. In answer to that rule the Editor, Mr. D. S. Bukhari and the printer and publisher Mr. Nur-ul-Haq, have appeared before us to-day.

The editor Mr. Bukhari has filed a written statement in reply to the notice and the Printer and Publisher Mr. Nur-ul-Haq, has filed a statement duly signed by him, associating himself with the explanation submitted by the editor.

Subsequent to this, before the learned Government Advocate opened his case, an objection was taken by Mr. Zafrulla Khan, who appeared on behalf of Mr. Bukhari, to the effect that this Court had no jurisdiction to deal with this matter as a contempt of Court. The main contention was that although this Court is a superior Court of Record, it has not the power to deal with contempts of itself, inasmuch as that power is derived from the Court of King's Bench and is only in possession of those High Courts that are situated in Presidency Towns. The question of jurisdiction was decided by a bench of this Court of which I was a member in *In the matter of Habib* (1). As pointed out by Mr. Zafrulla Khan in that case the question of jurisdiction was not argued at length as far as Syed Habib was concerned. Nevertheless as that was the first case of this nature to be decided by this Court, this question of jurisdiction was thoroughly investigated by me and my brother Judges and we came to the unanimous conclusion that we had jurisdiction. Subsequent to that decision the same question of jurisdiction was considered in the case of *In re Abdul Hassan Jauba* (2) by a Full Bench of the Allahabad High Court. It is reported as *Hadi Hussain* v. *Nasir-ud-din Haidar* (2). The matter was considered carefully and it was decided there that the jurisdiction of that High Court (the Allahabad High Court) to punish in a summary manner false and scandalous attacks existed. I do not think it necessary, therefore, to discuss the argument advanced by Mr. Zafrulla Khan on this point any further as I am still of the opinion expressed by me in *In the matter of Habib* (1). I would merely note that Mr. Zafrulla Khan was unable to cite or lay before us any authority of any Court in India or in England in support of his contention. Our decision with regard to jurisdiction having been pronounced at the time, the learned Government Advocate stated his case and we have heard Mr. Zafrulla Khan in reply on behalf of Mr. Bukhari and Mr. Niaz Muhammad has adopted his learned colleague's arguments on behalf of Mr. Nur-ul-Haq.

The article in question is printed at p. 3 of the issue of the "Muslim Outlook" of the 14th June 1927. It is headed "Resign" and opens with two suggestions, the first being :

that Mr. Justice Dalip Singh should vacate his seat on the bench in consequence of his judgment in the "Rangila Rasul" case (*A. I. R.* 1927 *Lah.* 520) and the second that an enquiry should be held as to the circumstances under which that extraordinary judgment was written.

It then sets out "to justify" these suggestions and in dealing with the first says :

We should urge in the first place that Mr. Justice Dalip Singh has betrayed a deplorable lack of experience and of a sense of responsibility, two of the most essential qualifications for a Judge of the High Court.

and after some discussion and a reference to a judgment of a Judge of another High Court it proceeds :

In the second place Mr. Justice Kunwar Dalip Singh has proved by his judgment a remarkable want of competence and care as a Judge.

After some further comments it suggests to the Government that he should not be reappointed and advised the Judge to resign as being more dignified. After this the second suggestion, namely, that

(1) A. I. R. 1926 Lah. 1=6 Lah. 528 (F. B.).

(2) A. I. R. 1926 All. 623=48 All. 711 (S. B.).

an enquiry should be held is dealt with in the following terms :

As to the proposed enquiry we believe that if the prerogative of independence of a High Court Judge cannot be a bar to the examination of any act of his as a public servant and even a Governor-General may be impeached in the public interest, then there is in the present judgment a bona fide apprehension that there must have been an extraordinary cause for its patent aberration. If this is so, it is a public duty to bring it to the light of day.

Now I want to make it quite clear and to emphasise that with the merits or demerits of the judgment in the "Rangila Rasul" case these proceedings are not in any way concerned. Whether it is right or wrong it has to be borne in mind that Courts are of necessity presided over by Judges who, like all other men, are mortal and liable to err. It is no offence to subject their decisions to fair, honest and reasonable criticism. Indeed these criticisms may be couched in strong, perhaps, even extravagant language, but to ascribe their decisions not to error but to improper motives is to bring the Judge himself and the whole Court into contempt and undermine the confidence of the public in all judicial pronouncements and determinations. It was pointed out by Chief Justice Sir John Wilmot *In re R.* v. *Almon* (3) that

attacks upon Judges excite in the minds of the people a general dissatisfaction with all judicial determinations and whenever man's allegiance to the laws was so fundamentally shaken, it is most vital and dangerous obstruction of justice calling for more rapid and immediate redress than any other obstruction ; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people.

This authority was referred to *In re In the matter of Habib* (1) and was cited with approval by Mookerji, J., in [*Moti Lal Ghose*] *In the matter of Amrita Bazar Patrika* (4).

In the present case I am of opinion that the article goes far beyond the region of fair comment or honest criticism when it attributes to a Judge of this Court a

"deplorable lack of experience and a sense of responsibility" and "remarkable want of competence and care as a Judge"

I would emphasise in this connexion the words "lack of a sense of responsibility" and a "remarkable want of care"), and when it goes on to make a proposal that

(3) [1765] Wilms, 243=97 E. R. 94.
(4) [1918] 45 Cal. 169=26 C. L. J. 459=45 I. C. 338=21 C. W. N. 1161 (F. B.).

"an enquiry should be made into the circumstances under which that extraordinary judgment was written" because "there is in the present judgment a bona fide apprehension that there must have been an extraordinary cause for its aberration which it is a public duty to expose."

Now, what possible reason is there for an enquiry into the circumstances under which the judgment was written and what is there that calls for exposure if the imputation is not that the judgment was not an honest one had been pronounced through improper ulterior motives. It has been urged by Mr. Zafrulla Khan that the written statement of his client gives an explanation of this article and attention was drawn to page 3 paragraph commencing "I have explained above under what circumstances etc." It continues

our efforts to reconcile ourselves with the view of the law expressed in that judgment have been entirely futile and no amount of reasoning is likely to persuade us that that view of the law is correct. In this state of bewilderment I felt it my duty to suggest that an enquiry should be held into the circumstances under which this extraordinary judgment was pronounced.

It should be noted here that what the explanation amounts to is that he felt bewildered and, therefore, thought it necessary that an enquiry should be made into the circumstances under which this extraordinary judgment was pronounced. Later on he says that the article in question imputes no motive to the Hon'ble Judge and casts no personal reflection on him as already explained. Mr. Zafrulla Khan supplemented this explanation by suggesting that the enquiry referred to related to the question whether the case had been properly argued by the counsel for the Crown and might also elicit the reason why the learned Judge did not refer the case to a Division Bench. It seems to me that this explanation makes matters worse. I am fully in accord with the authorities cited by Mr. Zafrulla Khan that, it is only when there is a clear case that any Court should exercise the extraordinary jurisdiction that it possesses in these matters, but it seems to me that in approaching an article with a view to attempting to ascertain what it means the only rule is to ascertain and to place upon that article a reasonable interpretation. To my mind the only reasonable interpretation of this particular paragraph relating to a demand for

an enquiry is what it clearly means. It imports an improper motive to the judgment concerned—a motive which had nothing to do with judicial reasons but was clearly extra-judicial. Nothing could be calculated to bring a Court or a Judge of a Court into contempt more than to impute improper motives to that Court or Judge in its or his decisions. And as pointed out by Lord Chief Justice Russell in *R.* v. *Gray* (5) :

> Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court

and I, therefore, consider that this article amounts to a clear contempt of this High Court. In coming to this conclusion I have not lost sight of the argument advanced by the learned Government Advocate that it was also contempt to call upon a Judge to resign his seat. In regard to this Mr. Zafrulla Khan has urged that it does not amount to such contempt as would justify a Court to take action. In fact as I understand Mr. Zafrulla Khan he thought that it was mere a case of "impertinence" than of contempt and I have, therefore, excluded that portion of the article from the matter of contempt. As I have said, in my judgment, the article is clearly a contempt of a very serious nature for which both Mr. D. S. Bukhari and Mr. Nur-ul-Haq are responsible.

It has been urged that the editor has in his statement taken full responsibility for the article on his shoulders and Mr. Niaz Muhammad on behalf of his client has cited certain authorities to show that in certain instances the printer has either been dealt with very leniently or completely discharged. It is not necessary to discuss these authorities for the same reason that in each one of them, as Mr. Niaz Muhammad admitted the printer had pleaded ignorance of the language and ignorance of the fact that the article had been published and had repudiated the article itself. In the present case neither the editor nor the printer has attempted to express any regret for his action, nor has the printer stated either himself or through his counsel that he had no knowledge of the article in question prior to its being published.

I consider that this is a very serious case of contempt. It is the third case that has occurred since this Court became a High Court. In the first case the offender, i. e., Syed Habib, tendered a full and complete apology and stated that he was thoroughly ashamed of what had been said and for that reason a lenient view was taken. In the next case six months' simple imprisonment was awarded as well as a fine. I refer to the case of Bhagat Singh Azad. This being the third case I would sentence Mr. D. S. Bukhari to six months' simple imprisonment and the payment of a fine of Rs. 750 or in default six weeks' simple imprisonment and Mr. Nur-ul-Haq to three months' simple imprisonment and a fine of Rs. 1,000 or in default to one month's simple imprisonment.

Zafar Ali, J.—I agree.
Addison, J.—I agree,
Tek Chand, J.—I agree.
Coldstream, J.—I agree.

R.D. *Accused convicted.*

(5) [1900] 2 Q.B. 36=69 L.J.Q.B. 502=64 J. P. 484=82 L.T. 534=48 W.R. 474=16 T. L.R. 305.

A. I. R. 1927 Lahore 613

HARRISON AND DALIP SINGH, JJ.

Mohammad Akbar and *others*—Plaintiffs—Appellants.

v.

Dharamsala Baba Sidqi Das and *others*—Defendants—Respondents.

F. A. No. 801 of 1922, Decided on 3rd May 1927, from a decree of the Sr. Sub-Judge, Gujranwala, D/- 24th November 1921.

Custom (Punjab) — Gift by co-proprietor — Other co-proprietors, having no connexion with founder of village, cannot set aside.

Members of a proprietary body, who are a heterogeneous collection of persons, none of whom can show any connexion or relationship whatsoever with the founder of the village, or with any member of the original proprietary body, have no locus standi to dispute an alleged gift by the last proprietor. [P 614 C 1]

Durga Das and *Maya Dass*—for Appellants.

Mehr Chand and *D. S. Chand* for *Des Raj Narang*—for Respondents.

Judgment. — The plaintiffs in this case being members of a proprietary body of Chihanwali brought a suit against Mahant Ishar Das and others, members of the proprietary body, for possession of 1,118 kanals 16 marlas of land which the mahant is holding in virtue of an

alleged gift in his favour by two men Jawala and Diala. These men Jawala and Diala were the last of their race and kind in this village, they being Sidhu Jats, and the plaintiffs came to Court resting their claim on the fact of their being members of the same proprietary body as the deceased donors. The trial Court has held that they are in no sense the heirs of the donors; that the land should have escheated to Government, but as Government has not exercised its right they, the village proprietary body, have a right to oust a perfect stranger or in other words, a trespasser can oust another trespasser. In support of this finding counsel has referred us to *Umra* v. *Karim Bakhsh* (1) and *Jotu* v. *Lehna* (2), both of which are quoted by the trial Court. Neither of these help the plaintiffs' case in any way. In *Umra* v. *Karim Bakksh* (1), the plaintiffs relied successfully on an entry in the riwaj-i-am which was in their favour, and in *Jotu* v. *Lehna* (2) they belonged to the same *got* and had descended from the original founder of the village. In this case neither of these circumstances exist. The plaintiffs are a heterogeneous collection of Mahomedans and Sikhs none of whom can show any connexion or relationship whatsoever with the founder of the village or with any members of the original proprietary body. In these circumstances the plaintiffs have wholly failed to establish their locus standi and it is not necessary to go into the question whether the finding of the trial Court is correct or not as to the genuineness and validity of the gift.

We dismiss the appeal with costs.

R.K. *Appeal dismissed.*

(1) [1912] 16 P. R. (1912)=36 P. L. R. 1912 =14 I. C. 492=140 P. W. R. 1912.

(2) [1913] 18 P. L. R. (1913)=18 I. C. 832= 216 P. W. R. 1913.

A. I. R. 1927 Lahore 614

ZAFAR ALI, J.

Kundan Lal and *others*—Plaintiffs—Appellants.

v.

Baldev Singh and *others*—Defendants—Respondents.

S. A. No. 2272 of 1926, Decided on 9th May 1927, from the decree of the Sr. Sub-Judge, Kangra, D/- 7th July 1926.

Civil P. C., S. 100—*Judgment based on wrong assumptions—Second appeal lies.*

Where the lower appellate Court has proceeded on wrong assumptions and it is doubtful what weight the lower appellate Court would have attached to the rest of the evidence if it had avoided these erroneous assumptions, the decree can be set aside in second appeal. [P 615 C 1]

Fakir Chand—for Appellants.

Nawal Kishore for *Mehr Chand Mahajan*—for Respondents.

Judgment.—On the death of Sikhnu the plaintiffs, who are sons of Lahnu, entered into possession of the land of which Sikhnu was adna malik and they sued for a declaration that they were Sikhnu's collaterals and reversioners. The claim was resisted by the ala malik who pleaded that the plaintiffs were not related at all to Sikhnu. The plaintiffs' case was that their grandfather, Rattu, and Ghasita father of Sikhnu, and Budhu were brothers, sons of Hira. In the revenue records three separate pedigree-tables are given showing the descendants of Rattu, Budhu and Ghasita, respectively, but it is not shown that these three men were brothers. When Budhu's line became extinct on the death of Faturi, Sikhnu laid claim to Faturi's estate and in the mutation proceedings that followed Sikhnu stated that Rattu and Budhu were brothers of his father Ghasita. The ala malik resisted Sikhnu's claim but the revenue officer found in favour of Sikhnu and he succeeded to Faturi's estate. Subsequently Sikhnu gifted that estate to Dittu son of Lahnu stating that Dittu was his karibi bhai, that is, near collateral, and the revenue authorities sanctioned the mutation of gift. The present declaratory suit was decreed by the trial Court but the senior Sub-Judge accepted the ala malik's appeal and dismissed the suit, holding that the plaintiffs had failed to establish that they were collaterals of Sikhnu.

In second appeal it is argued that the lower appellate Court has come to this conclusion on two erroneous assumptions:

(1) that in the mutation proceedings that followed Faturi's death Sikhnu stated that he was the only collateral of Faturi; and (2) that the sons of Lahnu did not contest Sikhnu's claim to Faturi's estate.

As regards (1) it is clear that Sikhnu never asserted that he was the only

collateral of Faturi. On the other hand, a pedigree-table was given in the mutation proceedings in which Lahnu's descendants were shown to have taken their share in village Amb. As regards (2), Lahnu's sons undoubtedly omitted to claim a share in Faturi's estate, but it is not known why they did so. As against that omission there is the fact that Sikhnu gifted that estate to a son of Lahnu. Thus there can be no manner of doubt that the lower appellate Court proceeded on wrong assumptions. On the other hand, it must have taken into consideration in favour of the plaintiffs, Sikhnu's statement that Ghasita, Rattu and Budhu were brothers.

As it cannot be said what weight the lower appellate Court would have attached to the rest of the evidence if it had avoided these erroneous assumptions, I accept the appeal, set aside the order of the lower appellate Court and remand the case to it for re-decision in the light of the observations made above. Costs to abide the event.

R.K. *Case remanded.*

A. I. R. 1927 Lahore. 615 (1)

BHIDE, J.

Muhammad Ali—Plaintiff—Appellant

v.

Gulab and *another*—Defendants—Respondents.

Second Appeal No. 640 of 1927, Decided on 22nd June 1927, from a decree of the Senior Sub-Judge, Sialkot, D/- 6th December 1926.

Civil P. C., O. 18, R. 2—New pleadings cannot be introduced.

New pleadings cannot be introduced without leave of the Court, at the time of stating the case under O. 18, R. 2. Plaintiff has only the right to state his case as it had already been put forward. [P 615 C 2]

Ghulam Rasul—for Appellant.

Khurshaid Zaman—for Respondent.

Judgment.—This was a pre-emption suit with respect to an open site in a village. According to the plaintiff's allegation the sale was effected on the 27th November 1924. The suit was instituted on the 26th November 1925. Defendant pleaded inter alia that the suit was time barred inasmuch as the sale took place not on 27th November, 1924, as alleged by the plaintiff but on 15th September 1924. The Court of the first instance held the suit to be within time and decreed it.

On the appeal the senior Sub-Judge held that the plaintiff had failed to prove that the sale took place on 27th November 1924. The suit was accordingly held to be time barred and was dismissed. From this decision the plaintiff has filed a second appeal. The only point raised in second appeal is that of limitation. The lower Court's finding that the plaintiff had failed to prove that the sale took place on 27th November, 1924, is one of fact and cannct be challenged in second appeal. It is, however, contended on behalf of the plaintiff that possession of the open site sold was not delivered and that the suit was governed by Art. 120 Indian Limitation Act. This contention is, however, opposed to the plaint in which it was distinctly stated that possession of the property had been delivered on the date of sale, i. e., 27th November 1924. The question of possession was apparently never raised till plaintiff's counsel stated his case under O. 18, R. 2, Civil P. C; but that was not the stage at which new pleadings could be introduced without leave of the Court. Plaintiff's counsel had only the right to state his case as it had already been put forward. If the plaintiff wanted to amend the pleadings he should have applied to the Court for the purpose. If he had done so and permission had been granted a separate issue should certainly have been framed on the point. As matters stand, I think, there was no plea at all that possession had not been delivered and consequently the contention which counsel wants to put forward now in second appeal cannot be entertained.

I dismiss the appeal with costs.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 615 (2)

JAI LAL, J.

Amir Bibi—Defendant-Appellant.

v.

Dheru and *another*—Plaintiffs—Respondents.

S. A. No. 847 of 1927, Decided on 29th June 1927, from the decree of the Senior Sub-J., Jullundur, D/- 20th January 1927.

(a) *Punjab Land Revenue Act, S. 150—Nature of land altered long before action is taken—S. 150 does not apply.*

S. 150 is not intended to apply to cases where the original nature of the land has been altered long before action is taken. [P 616 C 1]

(b) *Jurisdiction—Determination.*

It is the nature of the property at the time of the suit that determines the question of jurisdiction. [P 616 C 1]

Hazara Singh—for Appellant.

Niaz Muhammad—for Respondents.

Judgment.—Acting under S. 150 Land Revenue Act the revenue assistant of Jullundur directed the plaintiffs to dismantle a building alleged to have been constructed on a public road. The road in dispute is situte in a village and is entered in the revenue records as *shamilat deh hasab rasad khewat sharh-i-am ghair munkin rasta.* The plaintiff instituted a suit for a declaration that the land alleged to have been encroached upon by him is owned and possessed by him and is not part of the public road and that the order of the revenue assistant was invalid and illegal. The suit was dismissed by the trial Court, but the senior Sub-Judge on appeal held that the revenue assistant had no jurisdiction to issue the notice and on that ground alone decreed the plaintiff's suit. He found that the houses of the plaintiff " are of fairly long standing " and consequently at the time of the suit or the notice by the collector the land had ceased to be land as defined in the Punjab Tenancy Act and the Land Revenue Act and, therefore, S. 150 of the latter Act did not authorise the collector to issue a notice.

The matter is not free from doubt but it appears to me that S. 150 was not intened to apply to cases where the original nature of the land had boen altered long before action under that section is taken. The original nature of the land having been changed, the above conclusion also disposes of the ground taken by counsel for the appellant that no appeal lay to the senior Sub-Judge but that the suit being in respect of the land the appeal lay to the District Judge. It is the nature of the property at the time of the suit that determines the question of jurisdiction and there is no doubt that according to the finding of the senior Sub-Judge it was no longer land as defined in the Land Revenue Act when the notice was given and the suit was filed. The suit was, therefore, an unclassed one and the appeal was cognizable by the senior Sub-Judge. I dismiss this appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 616

BROADWAY, Ag. C. J. AND BHIDE, J.

Nathu Mal—Petitioner.

v.

Income-Tax Commissioner, Punjab—Respondent.

Misc. P. No. 765 of 1926, Decided on 22nd June 1927.

Income-Tax Act, S. 66—Joint Hindu family—Legal effect of disruption is question of law.

The question as to the disruption of a joint Hindu family is one of fact but the legal effect of the disruption is a question of law.

Mehr Chand Mahajan—for Petitioner.

Jagan Nath Aggarwal—for Respondent.

Order.—It appears that one Nathu Mal and his six sons constituted an undivided Hindu family carrying on business at Amritsar, one of their firms being styled Kalu Mal-Shori Mal. This family business had been assessed income-tax as one concern. On the 18th April, 1923, the family as a joint family came to an end, partition having been effected, and it appears that the business carried on under the name of Kalu Mal Shori Mal fell to the share of Nathu Mal. Nathu Mal accordingly moved the income tax authorities for a consideration of the assessment alleging that he was entitled to the benefit of S. 25 (3) of the Income Tax Act. The matter came up before the Income Tax Commissioner, ultimately, on an application filed under S. 66 (2), Income Tax Act in which Nathu Mal asked for a review of the Income Tax Commissioner's order, or in the alternative a reference to this Court. The Income Tax Commissioner on the 28th May, 1926, declined to refer the matter to this Court on the ground that the question as to the disruption of the family was one of fact and not of law. It appears, however, that he has held that there has been a disruption of the family and the family business. The legal effect of the disruption is, in my judgment, a question of law, and I would, therefore, accept this petition and direct the Income Tax Commissioner to refer that question to this Court for decision. Costs will follow the event.

R.D. *Petition accepted.*

A. I. R. 1927 Lahore 617

DALIP SINGH, J.

Majhi and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Cr. A. No. 110 of 1927, Decided on 23rd May 1927, from an order of the Session Judge, Attock, D/- 23rd December 1926.

(a) Penal Code, S. 147—Evidence of prosecution interested—Enmity between factions—Evidence of prosecution should be carefully scrutinized.

Where in a case under S. 147 the evidence of the prosecution is all interested and a considerable amount of enmity exists between the factions who are concerned in the affair, it is necessary to scrutinize the evidence of the prosecution witnesses very carefully. [P 617 C 2]

(b) Criminal trial—Part assigned to particular accused falsified by medical evidence—Locality and motive for fight not established—The accused cannot be said to have taken part—Penal Code, S. 147.

When it is found that the part assigned to any particular accused is falsified by the medical evidence, and further when the locality and the motive for the fight are not established, it cannot be said that the accused had taken part in the fight. [P 617 C 2]

M. S. Bhagat—for Appellants.

Khurshaid Zaman for *Govt. Advocate*—for the Crown.

Judgment.—The eleven accused in this appeal have been sentenced by the learned Sessions Judge under S. 147, I. P. C., and sentenced to two years' rigorous imprisonment with one month's solitary confinement. The learned Sessions Judge has disbelieved the story of the prosecution as to the locality of the fight and as to main incidents of the fight as related by the prosecution witnesses. He has, however, found that it is sufficiently proved that all the accused are guilty of rioting. He has in his judgment specifically disbelieved Fazal Dad who purported to be an eye-witness of the affair. As regards another witness, Jazu, he states at the end of his evidence that the demeanour of this witness was most unsatisfactory and he appeared a thoroughly unreliable witness. Counsel for the Crown has not relied on Fazal Dad but he has relied on Jazu, Mt. Bhuri, Mt. Roshnai, Hidayat and Nawab as the witnesses proving the complicity of the accused in the riot.

The story accepted by the learned Sessions Judge is based partly on the defence story and partly on the prosecution story. He finds that there were really two fights, one in which Dulla, accused, was beaten by members of the other party and in the course of that fight Dulla received a severe wound one hip being completely pierced as shown by the medical evidence. Thereafter Dulla went back to the village, collected his party and a fight took place in which a pistol shot was fired which caused the death of one Ahmad Khan. He holds that it is not proved who fired this pistol shot. I am unable to rely on the evidence of Jazu and it seems to me further that the learned Sessions Judge was right in rejecting the evidence of Fazal Dad. Mt. Bhuri and Mt. Roshnai were injured in the fight and, therefore, there is little doubt that they were eye-witnesses. At the same time the medical evidence makes it clear that their evidence against Majhi and Karmun that these two persons successively fired shots from a pistol which killed Ahmad Khan is untrue.

Now, in a case like this where the evidence of the prosecution is all interested and where a considerable amount of enmity exists between the factions who are concerned in this affair, it is necessary to scrutinise the evidence of the prosecution witnesses very carefully as pointed out by the learned Sessions Judge. It is not enough to hold that all the accused were present because all the witnesses say they were so present. When it is found in a particular case, that the part assigned to any particular accused is falsified by the medical evidence, and further when the locality and the motive for the fight are not established and are not accepted by the Court who heard those witnesses, I would hold that Majhi and Karmun have not been proved to have taken part in this riot because the part assigned to them has been disproved by the medical evidence. I would, therefore, accept their appeal and acquit them. It may be that Karmun was present because he is the brother of Dulla, and Dulla had obviously been injured by some of the other faction. It may also be that he has been named and assigned a part simply because he is the brother of Dulla. The matter is far too doubtful and in view of the hostility of the witnesses against him in particular I must give him the benefit of the doubt. Similar reasons apply in the case of Majhi. I would point out

that the prosecution witnesses have, however, themselves to thank if, as a result, possibly one of the principal offenders in the case escapes scot free.

As regards Dulla, I am of opinion that he also must be given the benefit of the doubt. Accepting the defence version that Dulla was injured in a previous fight, though not accepting their version that he was injured by one of his own companions, it seems to me highly improbable that a man with a wound of that description could have been able to take an active part in any subsequent fight though the medical evidence shows that it is possible that before his wound stiffened he might have been able to walk about. It must, however, be remembered that he had to wait some time while his party collected when in all probability I should think that it would be unlikely that he would be able to do much. I, therefore, accept his appeal and, giving him the benefit of the doubt, acquit him.

There remains, however, the fact that Mt. Bhuri and Mt. Roshnai were injured in this fight, and it is hardly likely that when they would assert that certain persons beat them they are wrong about it though it is possible that they may have added names. However, as pointed out by the learned Sessions Judge in a case like this where the story of the prosecution is that a number of persons overwhelmed different persons of another faction, it is not possible to look for injuries as corroboration of the prosecution evidence on the accused persons. I, therefore, consider that the appeal of Nawab, Ashraf, Fazal, Said Akbar and Gulab should be dismissed.

As regards Asfar no particular part is assigned to him by any witness and though it is quite possible, as pointed out, that he was present, I give him the benefit of the doubt, accept his appeal and acquit him.

As regards Shah Nawaz and Khan there is the evidence against him of Nawab and Hidayat. Their evidence is that these persons along with Ashraf and Dulla beat Jazu and that evidence is corroborated by the undoubted fact that Jazu did receive injuries. I, therefore, dismiss their appeal. I see no reason to interfere with the sentences in the case.

R.D. *Order accordingly.*

A. I. R. 1927 Lahore 618

BHIDE, J.

Ram Lal—Defendant—Appellant.

v.

Budho Mal—Plaintiff—Respondent.

Misc. Second Appeal No. 664 of 1927, Decided on 22nd June 1927, from the order of the Senior Sub-Judge, Delhi, D/- 23rd November 1926.

(a) *Limitation Act, S. 5—Appeal filed with vakalatnama not properly signed—Appeal returned—Appeal time barred at refiling—Time was extended under S. 5.*

An appeal was instituted accompanied by a vakalatnama, which, though accepted by the counsel filing the appeal, was not properly signed. The appeal was returned to remedy the defect. At the time of re-institution the appeal was time barred.

Held: that the defect was only technical and that it was a fit case for extending the time under S. 5.: *A. I. R.* 1921 *All.* 210, *Ref*; 36 *All.* 46, *not Appr.* [P 619, C 1]

(b) *Civil P. C., O. 41, R. 23—Case not decided on a preliminary point—Higher Court cannot remand the case for retrial.*

A Court of appeal is not competent to remand a case under O. 41, R. 23, for retrial where the lower Court has not decided it upon a preliminary point. [P 619, C 1]

Bhawani Singh Puri—for Appellant.

Bishan Narain—for Respondent.

Judgment.—A preliminary objection has been raised in this appeal that the appeal was not properly instituted inasmuch as the vakalatnama which accompanied the memorandum of appeal did not contain the name of the advocate who filed the appeal. The appeal was first filed on the 23rd February 1927. The memorandum of appeal, along with the vakalatnama, was then returned to counsel for remedying the defect. The appeal was finally filed on the 12th March 1927, but was time barred on that date. In support of his contention that the appeal was not properly instituted counsel for the respondent cites *Mohammad Ali Khan* v. *Jasram* (1). This authority, no doubt, appears to be in his favour, but the correctness of the ruling has been doubted in a subsequent decision of the same Court in *Shambhu Nath* v. *Badri Das* (2).

In the present instance the vakalatnama was, as a matter of fact, accepted by the advocate and his signature appears at the bottom. The defect was of

(1) [1914] 36 All. 46=23 I. C. 464=11 A. L. J. 1015.

(2) A. I. R. 1921 All. 210—43 All. 392.

a very technical character and in the circumstances of the present case I would extend the time under S. 5 of the Indian Limitation Act, and hold the appeal to be within time.

The suit was for ejectment of a tenant and arrears of rent. The defendant claimed to be a permanent tenant and also put forward various pleas including want of notice.

The Court of first instance held that no notice has been served on the defendant and only passed a decree for Rs. 5-7-0 on account of rent.

The plaintiff appealed to the senior subordinate judge who was of opinion that the finding of the Court of first instance, that no notice had been served on the defendant, was not correct. He also held that that Court had not properly dealt with the question whether the defendant was a permanent tenant or not. The appeal was, therefore, accepted and the suit was remanded for re trial of issues 1, 2, 3, 5, 6, 7 and 8. From this order of remand the present appeal has been filed.

The sole point raised in this appeal is that the learned senior subordinate judge was not competent to remand the case under O. 41, R. 23, for re-trial inasmuch as the Court of first instance had not decided it on any preliminary point. This contention appears to be sound. The order of remand does not specifically mention, O. 41, R. 23, but the order as regards the refund of Court-fees included in it leaves no doubt that the remand was under O. 41, R. 23 and not under S. 151, Civil P. C. There was no reference to S. 151, Civil P. C., nor any justification for resorting to it, as far as I can see. The learned senior subordinate judge apparently recorded a finding on one of the issues, namely, issue 4, and wanted the Court of first instance to dispose of the remaining issues. This was obviously not the correct procedure. The case was admittedly not decided on a preliminary point. The proper procedure in the circumstances would have been for the lower appellate Court to decide all the issues itself, though it could if necessary, make an order of remand under O. 41, R. 25, for finding on any issues which were left undecided by the Court of first instance.

I must, therefore, accept this appeal and, setting aside the order of the lower appellate Court, remand the case to that Court for the decision of the appeal according to law. As the present appeal was 'due to an error on the part of the lower appellate Court I leave the parties to bear their own costs in this Court.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 619

BHIDE, J.

Ali Muhammad and *others*— Defendants—Appellants.

v.

Barkat Ali and *others* — Plaintiffs and Defendants—Respondents.

Special Second Appeal No. 653 of 1927, Decided on 27th June 1927, from a decree of the Addl. Dist. Judge, Jullundur, D/- 11th December 1926.

Adverse possession—Ejectment suit —Defendants entered as saunjidars in revenue records—Defendants pleading adverse possession —Onus lies on defendants.

The defendants in an ejectment suit were entered as saunjidars in the revenue records. The plea was that they were in adverse possession of the lands in suit.

Held; that the onus of proving affirmatively that the possession had become adverse lay upon the defendants. [P 620, C 1]

Fakir Chand—for Appellants.

Niaz Muhammad—for Respondents.

Judgment.—The plaintiffs sued in this case for ejectment of defendants 1 and 2 from the land in suit. It was alleged that the defendants were, in the first place, not the heirs of the last incumbent Hadi Hussain, and secondly, that they had ceased to perform the services which they were liable to render as saunjidars and that the saunji had on that account terminated. The defendant pleaded inter alia that they were not liable to render any services, and lastly that the suit was time barred. The first Court found the issues in favour of the defendant, and dismissed the suit. On appeal the district judge held that the suit was within limitation, that the defendants were liable as saunjidars to perform certain services in connexion with a mosque, that they had ceased to perform those services and that the plaintiffs were entitled to claim possession of the land. The appeal was accordingly accepted and the suit

decreed. From this decision defendants Ali Muhammad has filed a second appeal.

The only points urged before me were, first, that the suit was time-barred, and, secondly, that the finding of the lower Court that the saunji was granted subject to certain condition is not supported by any evidence. As regards the first point, defendants 1 and 2 are entered as saunjidars in the revenue record. The only plea as regards limitation which they raised was that they had been in adverse possession for over twelve years ; but, as the learned district judge has pointed out, Ali Ahmad died in 1912 and the possession of the appellant could not extend over twelve years as the suit was instituted on the 21st February 1922. In the face of the entries in the revenue records showing appellant as saunjidar it was incumbent upon him to prove affirmatively that his possession had become adverse, but he failed to discharge the onus.

The second question, namely whether the saunji was given subject to the rendering of any service was entirely one of fact. It is true that there is no documentary evidence showing the conditions on which the saunji was granted. At the same time the lower Court has believed the oral evidence produced coupled with the general nature of the saunji tenure as described in *Muhammad Badar Khan* v. *Chiragh Shah* (1). It cannot, therefore, be said that the finding of the learned district judge is not supported by any evidence at all. I note further that in the settlement of 1913-14 and in the latest jamabandi entry of 1922-23 it is stated in the column of rent that the saunjidars had been exempted from payment of rent in consideration of their rendering services to the takia. This entry also goes to support the finding of the learned district judge.

In view of the above facts I see no reason for interference with this second appeal and accordingly reject the appeal with costs.

J.V. *Appeal rejected.*

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(1) [1912] 16 P. L. R. 1912=13 I. C. 32=43 P. W. R. 1912.

A. I. R. 1927 Lahore 620

SHADI LAL, C. J., AND ZAFAR ALI, J.

Mt. Maya Wanti and *another*—Defendants—Appellants.

v.

Salig Ram and *others*—Plaintiff and Defendants—Respondents.

S. A. No. 1007 of 1923, Decided on 18th May 1927, from the decree of the Dist. Judge, Amritsar D/- 7th April 1923.

Hindu Law—Joint family—Bona fide settlement of doubtful claim by father as manager is binding upon sons.

A settlement of a doubtful claim by the father as the manager of the joint family entered into in good faith, is binding upon his sons : 24 *I. C.* 491, *Foll.* [P 621 C 1

Badri Das—for Appellants.

Faqir Chand—for Respondents.

Judgment.—On the 5th October 1911, Govind Das, who, with his two sons Girdhari Lal and Salig Ram, formed a joint Hindu family governed by the Mitakshara law, created a marriage settlement in favour of Mt. Maya Wanti, the bride of his elder son Girdhari Lal, by which one residential house and one-third of a shop was gifted to the lady. It appears that the possession of the property was not delivered to her, and she consequently brought an action in the beginning of 1919 against her father-in-law Govind Ram for the recovery of the property. The dispute was, however, settled on the 3rd March 1919, by a compromise, by which one-third of the shop was given to her and the house was allotted to Govind Ram and his minor son Salig Ram, the elder son Girdhari Lal renouncing his claim to the house. The result of the settlement of this family dispute was that Mt. Maya Wanti and her husband Girdhari Lal got one-third of the shop, while his father Govind Ram and Salig Ram got the residential house exclusively for themselves.

The present suit was raised by Salig Ram in order to impeach the aforesaid compromise and to enforce his claim to the shop allotted to his brother and the latter's wife.

Now, we have considered all the relevant circumstances of the case and reached the conclusion that the compromise was entered into bona fide by the father in his capacity as the manager of

the joint family and was a just transaction, and that the plaintiff is not entitled to disturb it. It has been repeatedly laid down that a settlement of a doubtful claim by the father as the manager of the joint family entered into in good faith is binding upon his sons : vide inter alia *Venkatagiri Nayani Varu* v. *Subbarayalu Nayani Varu* (1).

We accordingly accept the appeal and, setting aside the judgment and the decree of the district judge, dismiss the suit with costs throughout.

J.V. *Appeal accepted.*

(1) [1914] 24 I. C. 491.

A. I. R. 1927 Lahore 621

JAI LAL, J.

Ruldu Mal-Thakur Das—Plaintiff—Petitioner.

v.

Allah Ditta—Defendant—Respondent.

Revision Petition No. 623 of 1925, Decided on 21st June 1927, from the decree of the Small Cause Court Judge., Simla, D/- 9th May 1925.

(a) *Usurious Loans Act, S. 3, Prov.—Suit based on only one transaction—Explanation to proviso does not apply.*

Where a suit is not based on any series of transactions but only on one transaction, the explanation to the proviso does not apply. [P 622 C 1]

(b) *Usuriours Loans Act, S. 3—Excessive interest and transaction to be substantially unfair must be proved—Court must consider prevailing rate of interest, security offered, nature of dealings, and period of accounts being outstanding.*

The Court can act under S. 3 only if the interest be excessive and the transaction between the parties is substantially unfair. [P 622 C 1]

In deciding whether the rate charged is excessive and the transaction between the parties thereto substantially unfair the Court must have regard to the prevailing rate of interest on similar transactions in the locality where the transaction takes place, the security offered to the plaintiff, the nature of the dealings between the parties and the period during which the accounts have remained outstanding. [P 622 C 2]

N. Sohan Lal—for Petitioner.

Niaz Muhammad—for Respondent.

Judgment.—This is a petition by the plaintiff for revision of a judgment, dated the 9th May 1925, passed by the Judge, Small Cause Court, Simla, whereby he granted a decree to the plaintiff for Rs. 50 and costs thereon payable in instalments of Rs. 5 per month with the proviso that a default in the payment of any one instalment shall render the whole of the remaining balance payable at once. The suit was for recovery of Rs. 458 by the firm of Ruldu Mal-Thakar Das against Allah Ditta, a tailor of Simla. It was based on a bond for Rs. 300 executed on the 17th October 1922. The bond provided that the sum of Rs. 300 would be payable without interest by instalments of Rs. 10 per mensem, but that if a default be made in the payment of any one instalment the whole of the balance due was to become recoverable with interest at 37½ per cent per annum.

The suit was instituted on the 30th March 1925, and the amount claimed included the sum of Rs. 158 interest, calculated at the rate of 18 per cent. per annum. The defendant admitted the execution of the bond, but added that it was made up mainly of interest. The learned judge thereupon proceeded to examine the plaintiff as to the previous history of the dealings between the parties, and finally, acting under the provisions of the Usurious Loans Act, re-opened the whole transaction and granted a decree to the plaintiff as already mentioned.

The statement of the plaintiff disclosed that the dealings between the parties started in 1914 and that on the 26th July 1917, a pro-note for Rs. 221 was executed by the defendant in plaintiff's favour. The amount included Rs. 49 as interest on the principal amount advanced. Rs. 20 was paid by the defendant to the plaintiff at the time of the execution of the pro-note. Thereafter Rs. 18-9-9 more was advanced by the plaintiff to the defendant up to the 17th October 1921, when the bond in suit was executed. In the meantime the defendant had repaid to the plaintiff Rs. 126-10-0. Rs. 28 was paid by him after the execution of the bond in suit. This is the only evidence on the record as to the previous dealings between the parties. The defendant has not gone into the witness box to deny these facts and the learned Judge of the Small Cause Court has accepted them as correct. But he is of opinion that the whole amount is practically made up of interest and that only Rs. 8 is due to the plaintiff on account of principal, and for that reason he has applied the provision of the Usurious Loans Act and has granted a decree for

a lump sum of Rs. 50 in favour of the plaintiff.

In the first instance I am unable to hold, having regard to the proviso to S. 3 of that Act, that the learned judge was entitled to go behind the pro-note of the 26th July 1917. That pro-note was admittedly executed more than six years before the date of the suit. The proviso referred to above lays it down that, in the exercise of the powers conferred by S. 3, the Court shall not reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than six years from the transaction. This suit was not based on any series of transactions but only one transaction of the 17th October 1921, and, therefore, the explanation to the proviso does not apply. Moreover, the Court can act under S. 3, Usurious Loans Act, only if the interest be excessive and the transaction between the parties substantially unfair. Now, so far as the bond for Rs. 300 is concerned, it is to be observed that initially no interest is payable on the principal mentioned therein which is payable by instalments of Rs. 10 per mensem. This is indeed a very favourable transaction from the point of view of the debtor. But then a condition is added that if default is made in the payment of any instalment the whole of the balance shall become payable with interest which certainly is excessive. The condition as to the payment of interest does not come into operation unless default is made by the debtor, and it is a question whether, under the circumstances, it can be held that the interest is excessive for the purpose of the Usurious Loans Act. But the second condition necessary for the exercise of the power of the Court does not, in my opinion, exist in this case.

In arriving at the conclusion that at the date of the suit only Rs. 8 out of the principal was due to the plaintiff the learned judge has entirely ignored the fact that some interest was to be paid, if not at the agreed rate, at a reasonable rate, on the transaction between the parties from 1914 to October 1921. The counsel for the respondent does not contest the allegation of the counsel for the petitioner, that if calculation is made it would be found that interest up to that date was charged roughly at 15 per cent per annum. I have already stated that after the date of the bond, though the interest provided was 37½ per cent per annum payable only on default in payment of instalments, the plaintiff has charged interest at 18 per cent. per annum. In deciding whether the rate charged is excessive and the transaction between the parties thereto substantially unfair, the Court must have regard to the prevailing rate of interest on similar transactions in the locality where the transaction took place, the security offered to the plaintiff, the nature of the dealings between the parties and the period during which the accounts have remained outstanding. I am not prepared to hold that, under all the circumstances of the case, interest at 15 per cent. per annum, charged prior to the execution of the bond and 18 per cent. per annum interest charged after the execution of the bond on default of payment of the instalments, is at all excessive or that the transaction in suit is substantially unfair as between the parties. I hold, therefore, that the conditions necessary to enable the Court to interfere under the Usurious Loans Act with contracts voluntarily entered into between the parties do not exist in this case and the plaintiff was entitled to the decree prayed for.

Accepting this revision I set aside the decree of the learned Judge of the Small Cause Court and decree the plaintiff's suit with costs throughout.

R.D. *Decree set aside.*

A. I. R. 1927 Lahore 622

AGHA HAIDER, J.

Khushi Muhammad and *others*—Petitioners.

v.

Mt. Barkat Bibi—Respondent.

Civ. Rev. Petition No. 191 of 1927, Decided on 16th May 1927, for re-admission of Civil Appeal No. 2776 of 1926.

(a) *Civil P. C., O. 9, R. 8—Suit or appeal dismissed for default can be restored only if sufficient cause is shown—In the absence of such cause, inherent powers cannot be invoked—Civil P. C., S. 151, and O. 41, R. 17.*

Suits or appeals dismissed for default under O. 9, R. 8, or O. 41, R. 17, can only be restored if sufficient cause is shown and the Courts, in the absence of such sufficient cause being shown are precluded from invoking in aid their inherent powers under S. 151. [P 624 C 1]

(b) *Civil P. C., O. 9, Rr. 8 and 13, and O. 41, Rr. 17 and 19—Provisions are exhaustive.*

The provisions of O. 9, Rr. 8 and 13, are exhaustive in respect of cases where the plaintiff makes default in appearance in a suit, and so also the provisions of O. 41, Rr. 17 and 19 are equally exhaustive in the matter of appeals. [P 624 C 1

(c) *Civil P. C., S. 151—Special provisions made by legislature—Party cannot have recourse to inherent powers.*

When the legislature has made special provisions in order to meet a particular contingency it is not open to a party to have recourse to the residuary and more or less nebulous powers inherent in Courts to do justice under S. 151. (*Case law fully considered.*). [P 625 C 1]

Muhammad Amin—for Petitioners.

Amar Nath Chona for *Gobind Ram Khanna*—for Respondent.

Order.—This appeal out of which the application has arisen came on for hearing before me on the 11th March 1927. It was dismissed for default as neither the appellant nor the counsel appeared. The order passed by me runs as follows :

I have waited for Malik Muhammad Amin for several minutes. He has not put in appearance. I reject the appeal, which is hereby dismissed for default of prosecution with costs.

It may be noted that on the 11th March 1927, the respondent was represented by counsel. An application was put in on the 22nd March 1927, by Malik Muhammad Amin accompanied by his affidavit. On the 8th April, 1927, I admitted it and notice was issued to the opposite party. Assuming every word of the application and the affidavit to be true, there cannot be any doubt that the applicant has failed to prove that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing. After a perusal of the application and the affidavit the only impression that is left upon one's mind is that the learned counsel, who was to appear on behalf of the appellant was grossly negligent and careless in the discharge of his duty both towards his client and this Court. In order to make sure if there was any mistake made by the office in putting up the case for hearing on Friday the 11th March, 1927, I sent for the proper official and in the presence of the parties he explained to me that everything was in order according to the established practice and rules of the Court. In fact the learned counsel for the appellant exonerates the office. In his affidavit in para. 3 the learned counsel says :

I do not know that such cases could be taken up on Friday and in para. 4 he says that on account of this I did not look up the list for Friday the 11th March well and missed finding out the above case.

The learned counsel argued that this affidavit gives sufficient cause for the restoration of the appeal and in the alternative pleaded that he could appeal to the inherent power of the Court to restore the appeal. Now if this Court were to act upon affidavits of this kind and to restore cases dismissed for default it would amount to putting a premium upon extreme carelessness and laxity on the part of the learned gentlemen of the bar. Personally I should be reluctant to encourage any such beliefs among the members of the bar that cases dismissed for default can be restored, practically on any ground, however inadequate and absurd. I may here quote the case of *Krishnaswami Naidu* v. *Chengalroya Naidu* (1), which has a direct bearing on the question under consideration, as it deals with the petition of a vakil who allows his case to be dismissed for default of prosecution. In this case also there was a failure on the part of the vakil to appear when his appeal was called on for hearing. The appeal being dismissed for default an application for restoration was made. It was held that if in such a case the Court can act under its inherent powers it would involve a finding that in every case of dismissal of an appeal or a suit by reason of the non-appearance of the vakil the Court has inherent powers which it must exercise ex debito justitiae in favour of setting aside the order dismissing the suit or appeal. The learned judges dissented from the view of law as laid down in *Sonubai Baburao* v. *Shivajirao Krishnarao* (2) and rejected the application for restoration though reluctantly.

The learned counsel for the applicant drew my attention to a case reported as, *Mohar Chand* v. *Habib* (3). But the facts of that case are totally different from those of the case before me. The affidavit filed in the case showed that the counsel who was engaged in a part-heard case before another bench had taken responsible steps for his appeal to be properly looked after and argued in his absence. The case stood 9th and last on the day's list and arrangements had been made

(1) A. I. R. 1924 Mad. 114=47 Mad. 171.
(2) A. I. R. 1921 Bom. 20=45 Bom. 648.
(3) A. I. R. 1925 Lah. 617.

with another counsel to appear when the case would be called on for hearing. He had further instructed his clerk to watch the case in Court and inform the counsel who was put in charge of the appeal as to when it was likely to be taken up. The clerk went to the Court room at 11-30 and found that a case which stood fourth on the list was being heard. He went away apparently feeling secure that there were four cases in between the case which was being heard and his master's case. It happened, however, quite unexpectedly that the list collapsed and at 12 o'clock the last case No. 9 was reached, thus upsetting everybody's calculations. It may be noted that no one appeared even on behalf of the respondent in that case. On this affidavit which was accepted by the learned judge the appeal was restored because in the opinion of the learned judge 'sufficient cause' had been made out.

The expression "sufficient cause" has not been defined for the very best of reasons by the legislature anywhere. Each case depends upon its own peculiar circumstances and the Court has to arrive at its own conclusion upon the facts of each case. In the present case, as I have indicated above "sufficient cause" has not been made out. The trend of decisions also shows that suits or appeals dismissed for default under O. 9, R. 8 or O. 41, R. 17 Civil P. C. can only be restored if sufficient cause is shown and the Courts, in the absence of such "sufficient cause" being shown, are precluded from invoking in aid their inherent powers under S. 151, Civil P. C. It has been laid down that the provisions of O. 9, Rr. 8 and 13, Civil P. C. are exhaustive in respect of cases where the plaintiff makes default in appearance in a suit and it follows that O. 41, Rr. 17 and 19, Civil P. C., are equally exhaustive in the matter of appeals. I may quote *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4), *Krishnaswamy Naidu* v. *Chengalroya Naidu* (1), *Kallu* v. *Nadir Baksh* (5), and *Ram Sarup* v. *Gaya Prosad* (6). The last case followed *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4). The Bombay High Court still adheres to the view that, apart from the provisions of O. 9, R., 9, and O. 41, R. 19 Civil P. C., a Court has inherent jurisdiction to restore cases if the ends of justice so require: vide *Bilasirai Lakminarayan* v. *Cursondas Damodardas* (7). In this case the law, as laid down in *Lalta Prasad* v. *Ram Karan* (8), was followed. In another case (already referred to) of the Bombay High Court reported as *Sonubai Baburao* v. *Shivajirao Krishnarao* (2) the inherent powers of the Court were invoked and the principles of law as laid down in *Somayya* v. *Subbamma* (9) and *Lalta Prasad* v. *Ram Karan* (8) were accepted and followed. Now the view taken in *Somayya* v. *Subbamma* (9) was distinctly abandoned in the Full Bench case of *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4), and the case was overruled. *Lalta Prasad* v. *Ram Karan* (8), in its turn, was based upon *Somayya* v. *Subbamma* (9). Having regard to this history of the case-law it is clear that *Somayya* v. *Subbamma* (9) is not accepted as good law in Madras and the view of the law laid down in *Lalta Prasad* v. *Ram Karan* (8) must be taken to have been definitely departed from in the later Allahabad decisions which accept the view of the law as enunciated in *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4).

This being so it must be admitted with all due respect that the foundation on which *Bilasirai Lakminarayan* v. *Cursondas Damodardas* (7) and *Sonubai Baburao* v. *Shivajirao Krishnarao* (2) were based has been undetermined and the authority of these two cases loses much of its sanction. I may further observe that the attention of the learned Judges of the Bombay High Court who decided the case reported as *Sonubai Baburao* v. *Shivajirao Krishnarao* (2) does not appear to have been drawn to the Full Bench case reported as *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4), although the latter decision was given on the 1st October 1919, while the case reported as *Sonubai Baburao* v. *Shivajirao Krishnarao* (2) was not decided until the 9th August 1920. When the legislature has made

(4) [1920] 43 Mad. 94=37 M. L. J. 599=10 M. L. W. 606=53 I. C. 847=(1920) M. W. N. 19 (F. B.).
(5) A. I. R. 1922 All. 441.
(6) A. I. R. 1925 All. 610=48 All. 175 (F. B.).
(7) [1920] 44 Bom. 82=53 I. C. 252=21 Bom. L. R. 952.
(8) [1912] 34 All. 426=14 I. C. 187=9 A. L. J. 666.
(9) [1903] 26 Mad. 599.

special provisions in order to meet a particular contingency it is not open to a party in my humble judgment to have recourse to the residuary and more or less nebulous powers inherent in Courts to do justice under S. 151, Civil P. C. I need not refer to the numerous authorities of the various High Courts which lay down that the powers recognized by S. 151, Civil P. C., cannot be exercised when there are specific provisions in the code to meet the exigencies of a particular case : *Joshi Shib Prakash* v. *Jhinguria* (10), *Tota Ram* v. *Panna Lal* (11), *Ajodhya Mahton* v. *Phul Kuar* (12), and *Bissa Mal* v. *Kesar Singh* (13) may be taken as samples. It is laid down in *Krishnaswamy Naidu* v. *Chengalroya Naidu* (1), which itself is founded upon *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (4), that where a code declares the law on any matter specifically dealt with by it, the law must be ascertained by the interpretation of the language used by the legislature, for the essence of a code is to be exhaustive on such matters.

In view of the weight of authorities I do not feel strong enough to allow the present application and to restore the appeal which had been dismissed for default. I therefore dismiss this application with costs.

R.D. *Application dismissed.*

(10) A. I. R. 1924 All. 446=46 All. 144.
(11) A. I. R. 1924 All. 668=46 All. 631.
(12) A. I. R. 1922 Patna. 479=1 Pat. 277.
(13) [1920] 1 Lah. 363=58 I. C. 789=2 L. L. J. 249.

A. I. R. 1927 Lahore 625

SHADI LAL, C. J., AND BROADWAY, J.

Niadar Mal—Judgment-debtor—Appellant.

v.

Rattan Lal—Decree-holder—Respondent.

Letters Patent Appeal No. 300 of 1925, Decided on 4th February 1927, from the judgment of Addison, J., D/- 24th October 1925 in Civil Appeal No. 1654 of 1925.

Civil P. C., S. 144—"*Restitution.*"

The word "restitution" implies restoration to a party of what has been lost to him in execution of a decree or directly in consequence of that decree. *A.I.R.* 1924 *Cal.* 769, *Rel. on.* [P 626 C 1]

Mehr Chand Mahajan—for Appellant.
Sardha Ram Kapur—for Respondent.

Broadway, J.—The circumstances giving rise to this letters patent appeal are briefly these :

Ratan Lal and Niadar Mal were partners in two separate businesses. In respect of one of these businesses Ratan Lal filed a suit for dissolution and rendition of accounts against Niadar Mal and was given a final decree for a sum of Rs. 2,281 payable by Niadar Mal. In the decree it was also declared that Niadar Mal alone was responsible for the claim of one Gustav Spielmann. Soon after the passing of this decree, and while an appeal against it was pending in the High Court, the Custodian of Enemy Property (the District Judge of Delhi) took proceedings against both Ratan Lal and Niadar Mal in connexion with Gustav Spielmann's claim against them, with the result that they each paid a half of the claim to the said Custodian of Enemy Property. Subsequent to this Ratan Lal approached the said custodian and induced him to refund to him the amount paid by him (Ratan Lal), on his giving security for its repayment if repayment should become necessary, and Niadar Mal was made to pay to the custodian the entire amount due to Gustav Spielmann. In February 1925 the High Court set aside that portion of the decree which related to the declaration that Niadar Mal alone was responsible to Gustav Spielmann, Ratan Lal having admitted that that matter related to the second partnership.

After this order of the High Court Niadar Mal applied to the Senior Subordinate Judge, Delhi, under S. 144, Civil P. C., for restitution of half of the sum paid by him to the custodian as stated above. He urged that the payment had been made by him because of the decree of the Court of first instance. This application having been dismissed, he preferred an appeal to this Court which was dismissed by Mr. Justice Addison.

The point for determination in this appeal is whether S. 144, Civil P. C.. is applicable in the circumstances detailed above. S. 144 (1) is as follows :

Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as

may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, ** ****.

As stated by Mr. Justice Addison, the word "restitution" implies restoration to a party of what has been lost to him in execution of a decree or directly in consequence of that decree. Ratan Lal had made a certain payment to the Custodian of Enemy Property which he induced him to refund on a certain condition. After the refund had been made the custodian insisted on Niadar Mal paying up the full amount of Gustav Spielmann's claim. This payment by Niadar Mal was certainly not made in execution of any decree or in consequence of any decree. Again, Ratan Lal is not in possession of any property or money that had been taken out of Niadar Mal's possession by any decree or order of a Court, and, therefore, Niadar Mal is not entitled to claim restitution. In this view I am supported by *Baikuntha Nath Chattoraj* v. *Prosannamoyi Debi* (1).

In my judgment S. 144, Civil P. C., is not applicable and the view taken by the learned judge in chambers is correct.

I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

R.D. *Appeal dismissed.*

(1) A.I.R. 1924 Cal. 769=51 Cal. 324.

A. I. R. 1927 Lahore 626

BROADWAY AND SKEMP, JJ.

Ratti Ram and *another*—Plaintiffs—Appellants.

v.

Nand Lal and *others*—Defendants—Respondents.

First Appeal No. 2908 of 1922, Decided on 14th April 1927, from the decree of the Senior Sub-Judge, Rohtak, D/- 30th October 1922.

Registration Act, S. 17—Sale and mortgage previously executed—Subsequent letter reciting that previous deeds were without consideration and inoperative is not admissible without registration.

An unregistered letter is inadmissible in evidence to show that a deed of mortgage and a deed of sale executed previously were not to be acted on and no money was due under the former and no property passed under the latter: 26 *M. L. J.* 151, *Foll.* *A. I. R.* 1926 *Mad.* 362, *Diss. from.* [P 628 C 2]

Shamair Chand and *Nanwa Mal*—for Appellants.

Jagan Nath Aggarwal and *Madan Gopal*—for Respondents.

Broadway, J.—This and the connected appeal 213 of 1923, have arisen out of two suits instituted by one Kanhaya Lal against his brother Todar Mal. In the one case the plaintiff sought to recover a sum of Rs. 6,193-5-0 on the basis of a mortgage-deed, dated the 19th January 1911, securing a sum of Rs. 4,000 carrying interest at the rate of 6 per cent. per annum. In the other suit a sum of Rs. 288 was claimed on account of rent of a house, and ejectment from the said house was also prayed for. The defence set up by Todar Mal was that the mortgage-deed had been indeed executed by him but that no consideration passed, the plea being that at about the time when this transaction was entered into he (Todar Mal) was being pressed by his creditors and that this mortgage transaction had been entered into with his brother in order to protect the lands mortgaged from his creditors. Similarly, in the other case the plea was that the lease was a bogus one and that the sale-deed executed on the 30th November 1910, relating to the house which was the subject-matter of the lease had been entered into in the same manner and for the same reasons as the mortgage was entered into a few weeks later. The two cases were tried together and by agreement of parties evidence recorded in one was to be evidence in the other. In the suit on the mortgage the only issue that was settled was: Is the mortgage-deed without consideration and fictitious, the onus being placed on the defendant Todar Mal. In the rent suit the issues were:

1. Is the defendant a tenant of the plaintiff?
2. Is the deed of lease fictitious?
3. What are the arrears of rent?

The trial Court examined the evidence on the record of the two cases and came to the conclusion that the defendant Todar Mal had discharged the onus placed on him and had proved in the

suit on the mortgage, that no consideration had passed and that the mortgage was a fictitious one and in the suit on the lease, that the sale of the house was without consideration and formed a part of the same transaction with the lease which was entirely fictitious and both suits were dismissed with costs.

In these appeals the heirs of Kanhaya Lal, who has died, seek to establish the fact that the view taken by the learned Subordinate Judge is wrong and that conclusions arrived at are not warranted by the evidence on the record.

Turning to the suit based on the mortgage it is perfectly clear, and has been frankly admitted by Mr. Jagan Nath Aggarwal, that the onus of establishing want of consideration and the fictitious nature of the transaction lay on the respondent. He urged that the Court below had come to the right conclusion on the evidence. An examination of this evidence, however, shows that the conclusions arrived at by the learned subordinate judge are based on very flimsy material. The first point noted was that the consideration money, i. e., Rs. 4,000 had been paid at home and not before the sub-registrar at the time of registration. Next it was urged that there was considerable delay in obtaining mutation and that even up to the present moment some land has not been mutated in the name of the mortgagee. Thirdly, it was said that the account books of the plaintiff were not reliable and that the evidence showing that Todar Mal was being pressed by his creditors supported his allegation that the transaction was a bogus one and entered into in order to defraud the creditors or protect the property from these creditors.

Now having regard to the fact that the parties were brothers I am unable to see anything sinister or suspicious in the fact that the money was paid at home. Again with regard to the mutation, possession under the mortgage-deed was to continue with Todar Mal. The registrar's office had, under the rule, to report this transaction to the revenue authorities and the report was duly made. The mere fact that Kanhaya Lal did not show any undue haste in getting the lands mutated in his favour does not to my mind discredit the transaction in any way. With regard to the account books they have been produced and although the learned subordinate judge refers to the ghair khata as being of "an irregular character," no irregularity has been pointed out at the bar. As far as I am able to see these account books are in order and there is nothing suspicious about them.

Finally, as to the state of Todar Mal's finances at that period : it seems to me that no opinion adverse to Kanhaya Lal can be formed, for it is obvious and indeed admitted that at that time Todar Mal was badly in need of money. It is also in evidence that after these transactions had been entered into Todar Mal was able to make settlement with various creditors and thus avoid decrees being passed against him. This clearly shows that Todar Mal managed to secure funds with which to satisfy creditors who admittedly were pressing. Kanhaya Lal's statement that these funds were, at any rate, partly provided by him by means of this particular mortgage transaction is, therefore, amply supported. Kanhaya Lal has gone into the witness-box as a witness for the defence and his statement is clear that money that was advanced was actually paid and that the transaction was entered into in good faith in order to help his brother with money. Todar Mal, who is now dead, did not go into the witness-box at all although he was alive during the proceedings.

Before disposing of this appeal it is necessary to refer to certain documents, namely, Exs. D-1 and D-2, D-1 relating to the mortgage-deed and D-2, to the deed of sale. When in the course of the examination of Nand Lal, son of Todar Mal, it was sought to bring these two documents on to the record, objection to their admissibility was raised and they were disallowed. In consequence they have not been proved. Mr. Jagan Nath has urged that the Court below was wrong in disallowing these documents and has asked that they should now be brought on to the record and an opportunity given to prove them if necessary. It is said that these documents relate to the mortgage and the sale respectively, were written the day after the execution of the mortgage deed and deed of sale respectively and nullify the effect of the mortgage and the deed

of sale respectively, in that they purport to be letters stating that the deed of mortgage and the deed of sale were not to be acted on and no money was due under the former and no property passed under the latter. They have been refused admission on the ground that they required registration and it has been urged before us that this is incorrect and that the documents are admissible. In support of this contention various authorities have been cited by both sides. Mr. Jagan Nath has relied principally on *N. Ramayya* v. *N. Appayya* (1). This is a decision of Mr. Justice Phillips of the Madras High Court in which it has been held that an unregistered document which merely shows that a registered sale-deed executed previously in respect of certain immovable property was only nominal in its nature is admissible in evidence inasmuch as it is not used as evidence of any transaction affecting immovable property. Mr. Justice Phillips, in coming to his conclusion, did not follow a Full Bench decision of his own Court reported as *P. Venkatachalapathi* v. *M. Venkatachalapathi* (2) and purports to rest his judgment on certain dicta to be found in a case reported as *M. Venkatachalapathi* v. *P. Venkatachapathi Garu* (3) which itself, according to Mr. Justice Phillips, was based on *Rajah of Venkatagiri* v. *Narayana Reddi* (4). In that case, however, it seems to me that the matter, which is now before the Court, was not agitated. Their Lordships in delivering their judgment pointed out that:

> The real nature of this suit is for compensation for disturbing the plaintiff in his possession, and doing the necessary acts to entitle him to possession, such, for example, as not executing the counterpart of the lease and duly registering it; so that the non-registration is itself part of the plaintiff's cause of action.

As I understand that judgment the point we are now considering never arose and was never decided.

On the other hand in *P. Venkatachalapathi* v. *M. Venkatachalapathi* (2), a Full Bench of the Madras High Court laid down very clearly that an unregistered letter is inadmissible in evidence to show either that a sale executed the previous day is in fact a mortgage or that it conveys no title. In either view the unregistered letter affects immovable property and is not admissible in evidence without registration. In my judgment that case concludes the matter before us and I would, therefore, hold that neither of these documents are admissible in evidence and have been rightly excluded by the Court below.

In this view of the case it follows that the appeal relating to the mortgage-deed must succeed and I would, therefore, accept it and grant the plaintiff a decree as prayed with costs throughout.

In the case based on the lease certain other points have been raised. It was contended by Mr. Shamair Chand that inasmuch as it is a suit by a landlord against his tenant and the execution of the lease has been admitted, the defendant-tenant is estopped from questioning or challenging the plaintiff-landlord's title. On the other hand Mr. Jagan Nath has referred to three Bombay cases namely *Laxmanlal* v. *Mulshankar* (5), *Shridhar Balakrishna Vaidya* v. *Babaji Mula Agarya* (6) and *Bhawan Lallu* v. *Umar Mahomed Bhaiji* (7), in which it was held that in certain circumstances a defendant was not estopped from challenging the title of a plaintiff who claimed to be his landlord. A careful examination of those cases will show that they are not applicable to the case before me. In each of those cases what was held was that the alleged tenant was not estopped from pleading the illegality of certain transactions which had been entered into in contravention of certain statutes. In the present case no such question arises. The plaintiff claims to have purchased this house from his brother on the 30th November 1910, and he further claims to have leased the said property to his brother under a lease, dated the 19th January 1911. What the defendant seeks to do is to attack the deed of sale on the ground that it was never intended to be acted upon and was a fraudulent transaction, fraudulent in the sense that it was entered into colourably with a view to protect the house from the creditors. As

(1) A. I. R. 1926 Mad. 362.
(2) [1914] 26 M. L. J. 151=1 M. L. W. 157=23 I. C. 409=(1914) M. W. N. 178.
(3) [1912] 23 M. L. J. 652=17 I. C. 987=12 M. L. T. 579.
(4) [1894] 17 Mad. 456=4 M. L. J. 198 (F.B.).
(5) [1908] 32 Bom. 449=10 Bom. L. R. 553.
(6) [1914] 38 Bom. 709=28 I. C. 134=16 Bom. L. R. 586.
(7) A. I. R. 1927 Bom. 129=51 Bom. 43.

I have said I do not think that the authorities cited by Mr. Jagan Nath assist him, but in any event I am of opinion that the defendant has failed to prove that the sale was a fictitious one.

The only point that raised any suspicion at all was the fact that in the deed of sale it was specifically stated that the money raised by way of sale had been paid to certain creditors in Court on the 28th November 1910, whereas the deed of sale was not executed till two days later and the plaintiff's account books show that payments were entered up on that date, i. e., 30th November 1910. I think there is some force in Mr. Shamair Chand's argument that at that time Kanhaya Lal and Todar Mal were on the best possible terms and that the money had, as a matter of fact, been paid on the 28th November 1910, and the entries made on the date when the document was finally executed and registered, and that the defendant is attempting to take advantage of this mistake. The onus is clearly on the defendant and, in my judgment, he has failed to discharge that onus.

I would, therefore, accept this appeal as well with costs throughout and grant the plaintiff a decree for the amount claimed. The plaintiff is also given a decree for ejectment.

Skemp, J.—I concur.

R.D. *Appeals accepted.*

A. I. R. 1927 Lahore 629

JAI LAL AND FFORDE, JJ.

Amar Nath—Defendant—Appellant.

v.

Kishen Chand and *others*—Plaintiffs—Respondents.

F. A. No. 2833 of 1922, Decided on 7th May 1927, from the decree of the 1st Class Sub-Judge, Lahore, D/- 15th August 1922.

(a) *Civil P. C., O. 41. R. 1—Interim order not attacked in appeal—Copy of the order need not be filed.*

It is not necessary for the appellant to file with memorandum of appeal a copy of an interim order which he does not want to attack. [P 630 C 1]

(b) *Hindu Law—Alienation by manager—Necessity—Recital as to, is sufficient evidence if direct evidence is impossible owing to lapse of time.*

When proof of actual enquiry has become impossible by lapse of time, the recital of necessity and its representation to the purchaser would be sufficient evidence to support an alienation of joint family property by the manager, but this rule would not apply where there is no lapse of time: *A.I. R.* 1916 *P. C.* 110 (*P.C.*). *Ref.* [P 631 C 1]

Badri Das and *Amin Chand*—for Appellant.

J. N. Aggarwal and *Lal Chand*—for Respondents.

Jai Lal, J.—The undisputed facts of this case are as follows:

By a sale-deed dated the 2nd October 1907 one Salig Ram on his own behalf and acting as guardian of his minor brothers Charan Das and Sham Das sold the house in dispute to Amar Nath, appellant, for Rs. 2,000. The consideration for the sale, as recited in the deed, was as follows:

1. Received as earnest money Rs. 100.

2. Paid to Lala Jaswant Rai, a previous mortgagee of the house, Rs. 1244.

3. Received in cash before the sub-registrar, Rs. 656.

At the date of the sale Salig Ram had a minor son named Durga Das who is now dead. On the 29th August 1919 the present action was commenced by Sham Das and Kishen Chand, Gopal Das and Ram Saran Das, minor sons of Salig Ram, claiming possession of the house on the ground that they, the plaintiffs, were members of a joint Hindu family with Salig Ram and the house in dispute was their coparcenary property and therefore Salig Ram was not competent to sell it except for family necessity. The existence of such a necessity was denied. The suit was defended by the vendee on various grounds, including the one, with which we are now concerned, which is that the consideration for the sale was needed by Salig Ram for family necessity. The learned trial judge has held that Rs. 1,244, the amount due to the previous mortgagee was an antecedent debt due from the family and therefore constituted valid necessity. He held, for reasons, which we find ourselves unable to follow, that

Rs. 200 may be taken as required for the joint ancestral business of the parties.

He has consequently given the plaintiffs a decree subject to their paying Rs. 1444, the amount found by him to have been spent for the benefit of the

family, and Rs. 3,654 costs of improvements bona fide made by the vendee when in possession of the property. This decree has been granted in favour of the minor sons of Salig Ram. The suit has been dismissed so far as Sham Das is concerned on the ground that he had acquiesced in the sale owing to his having stood by and allowed the vendee to make improvements to the house and having omitted to take any action to set aside the sale for many years. The vendee has filed this appeal.

A preliminary objection is taken on behalf of the respondent that this appeal is not competent as the copy of an interim order passed by the trial Court on certain preliminary issues has not been filed with the memorandum of appeal. An examination of the grounds of appeal, however, shows that no ground is taken by the appellant attacking the correctness of the interim order. I hold, therefore, that it was not necessary for the appellant to file a copy of an order which he does not desire to attack, and overrule the preliminary objection.

As already stated the only point discussed before us by the counsel for the appellant is as to the existence of the necessity for the sale. The contention of the learned counsel was that admittedly there was joint ancestral business which was carried on by Salig Ram as manager of the family, that money was needed for the business and that Rs. 756 was spent by Salig Ram in carrying on that business and also for educating and bringing up his minor brothers. Admittedly there is no evidence on the record to show that the money was actually spent by Salig Ram for the maintenance of the minors or for carrying on the joint business. The counsel, however, contends that the vendee was not bound to see to the application of the money but that it was quite sufficient if he satisfied himself as to the existence of the necessity for the purpose aforesaid after proper enquiry and, honestly believing in the representation, lent the money. Counsel for the respondent does not contest this proposition in its abstract form, but contends that there is absolutely no proof on the record as to the existence of a necessity or that any enquiry whatsoever was made by the vendee. On behalf of the appellant reliance was placed on the testimony of P. W. 3 Ganga Bishen which is to the effect that Gobind Ram, who represented the vendee in the transaction of the sale, was informed by the witness that the vendors were good people, and that Salig Ram had once told him that he would redeem the house and engage in work and trade with the money taken from the vendee; of Amar Nath who states that Salig Ram had an account with him but all the money due from him has been realized and that Salig Ram told him that he required the money for the shop; and finally of Amir Chand who states that Gobind Ram asked his opinion whether he should buy the house in dispute and whether the vendors were nice persons and that he referred him to one Khuda Bakhsh who told him that they were good persons and owed Rs. 1200 to somebody and also to some saraf. It is obvious that these statements do not establish that the vendee made a proper enquiry as to the existence of the necessity. All that he satisfied himself about was as to the personal character of Salig Ram.

Counsel then urged that in the sale-deed the purpose for which the money was required is mentioned and that this by itself is good evidence of the existence of the necessity and in support of this contention relied upon *Nandalal* v. *Jagat Kishore* (1), where their Lordships of the Privy Council have made the following remarks:

> Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them.
>
> But in such a case as the present their lordships do not think that these recitals can be disregarded nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available the recitals would deserve but slight consideration and certainly should not be accepted as proof of the fact. But as time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance and cannot be lightly set aside; for it should be remembered the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy

(1) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249 (P. C.).

himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction, perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.

In the first instance I am not satisfied that there has been such a delay in the institution of this suit as would justify me to hold that the vendee was absolved from giving actual proof of the existence of the necessity but, apart from that, beyond the mere recital in the deed that the money was needed for the shop and for educating and bringing up the minors the existence of no such circumstances has been established from which an inference can be drawn that an enquiry would have confirmed the truth as to the existence of the necessity. Counsel for the appellant placed great reliance on Ex. D-5, a letter dated 7th October 1907, written by Gobind Ram to the vendee. But a perusal of that letter shows that no enquiry whatsoever was made about any necessity for the sale. On the other hand, it was stated therein that the vendor was a man of property, that the bargain was very beneficial to the vendee and that there was no defect in the title of the vendor. I hold, therefore, that there is no proof as to the existence of the necessity for sale beyond Rs. 1,244, the amount due to the previous mortgagee, but there is no cross-objection by the plaintiffs with regard to Rs. 200 allowed by the sub-judge, and therefore I must assume that necessity to the extent of Rs. 1,444 has been established.

The next contention of the counsel for the appellant was that in any case there was necessity to the extent of the amount due under the mortgage and therefore the sale should not have been set aside. I am unable to concede to this contention because an examination of the mortgage deed (dated 1st September 1906) shows that its terms were very favourable to the mortgagor and the period of ten years fixed thereby for the mortgagor to redeem the mortgage had not yet expired, and it is not shown that the mortgagee was pressing for his money; in fact I cannot understand how in the face of the terms of the mortgage he could press for it. I am, therefore, unable to hold that the sale of the property was necessary in order to discharge the mortgage.

Further, I do not think that the delay in the institution of this suit in any way affects the right of the sons of Salig Ram, who are still minors, to have the sale declared void. The learned sub-judge has made his decree for possession conditional on the payment of the cost of improvements made by the vendee in the property in suit and this is the most that he could do for the appellant under the circumstances of the case.

The result is that the decree of the sub-judge is correct and this appeal must be dismissed with costs.

Fforde, J.—I agree.

D.D. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 631

TEK CHAND AND AGHA HAIDAR, JJ.

• *Tulsi Das* and *others*—Plaintiffs—Appellants.

v.

Shiv Dat—Defendant—Respondent.

F. A. No. 1221 of 1923, Decided on 14th June 1927, from the decree of the 1st Cl. Sub-Judge, Multan, D/- 6th March 1923.

(a) Civil P. C., O. 21, R. 63—Property sold by auction after rejecting the objection—Decree-holder is not necessary party to suit against auction-purchaser.

Where an objection under O. 21, R. 58, is rejected and the property is sold by auction, the objector can proceed against any person who in the meantime, after the rejection, has come to have any interest in the disputed property, and the decree holder is not a necessary party to a suit by the objector against the auction-purchaser for possession: *A. I. R.* 1923 *Mad.* 58; 27 *Mad.* 94; 16 *Bom.* 608; *Foll.*

[P 633 C 2 & P 634 C 1]

(b) Civil P. C., O. 21, R. 63—Suit under R. 63 is not affected by proviso to S. 42, Specific Relief Act.

The proviso to S. 42, Specific Relief Act, does not operate so as to take away from a party, against whom an order is made under O. 21, Rr. 60-63, the right to sue for a declaration of of his title in so far as it is affected by the order which he seeks to impeach: 29 *Mad.* 151, *Foll.*

[P 633 C 1]

H. C. Kumar for *Kahan Chand*—for Appellants.

Mehr Chand Mahajan and *R. C. Soni*—for Respondent.

Judgment.—This appeal is a continuation of certain claim-proceedings. The facts are these:

One Murli Dhar, the father of plaintiffs 1 and 2, was the judgment-debtor and the Derajat Sindh Bank, Multan, was the decree-holder. In execution of the decree, the bank attached the lands in dispute, through the Court of the District Judge, Multan. The present plaintiffs filed objections under O. 21, R. 58, Civil P. C., but these objections were dismissed on the 1st March 1921. On the 16th September 1921, the lands in dispute were put up for sale in execution of the decree and were purchased at a public auction by Doctor Shiv Datt, defendant 2, the sale being confirmed on the 3rd November 1921.

The plaintiffs have brought the present suit ostensibly under the provisions of O. 21, R. 63, Civil P. C. In this suit they impleaded the Derajat Sindh Bank, Multan (decree-holder) in liquidation, through the liquidator, Lahore, as defendant 1, and Doctor Shiv Dat, the auction-purchaser, as defendant 2. Murli Dhar, the judgment-debtor, having died in the meantime. Their main allegations are that Lala Murli Dhar, the father of plaintiffs 1 and 2, had no concern with the lands in suit which had been settled upon the plaintiffs and in respect of which mutation had been sanctioned in their favour as long ago as the 14th February 1920. They further allege that the father of plaintiffs 1 and 2, Lala Murli Dhar, was a man of immoral character, who had squandered most of his property in profligacy and extravagance, though the income of the property was sufficiently large for the needs of the family. Their case in short is that the settlement of the property, noted in the heading of the plaint, was an accomplished fact already, before the bank took proceedings in execution against the father of plaintiffs 1 and 2 and which subsequently culminated in the auction sale in favour of defendant 2. It may also be noted that a sum of Rs. 3,800 was in deposit in the Government treasury to which the plaintiffs claimed to be entitled. Para. 8 of the plaint is as follows:

> 8. The value of the suit for purposes of Court-fee is Rs 10 fixed and for purposes of jurisdiction Rs. 7,800, i. e., value in excess; of sale proceeds Rs. 4,000 and the amount in deposit in the Government treasury Rs 3,800.

The plaintiffs pray that (a) the sale of the lands noted in the heading of the plaint, dated the 16th September 1921, in favour of defendant 2, may be set aside and declared null and void as against the rights of the plaintiffs, and (b) that defendant 1 has no claim to Rs. 3,800 deposited in the Government treasury after payment of the decretal amount to Lala Kala Ram, petition-writer. As already mentioned, the Derajat Sindh Bank, Multan, had been impleaded as defendent 1 in the present suit; but under an order dated the 26th July 1922, its name was struck off the list of the defendants, as, according to the statement of Pandit Ganpat Rai, pleader for the defendant, the liquidation proceedings had terminated.

A written statement was filed by defendant 2 on the 5th October 1922; but at present we are concerned only with one plea which had been taken by him in the jawab-i-dawa and also in the statements of the pleaders for the parties. The plaintiffs' mukhtar stated that

> the land in suit is cultivated by tenants who pay rent to defendant. Plaintiffs are not in possession. Defendant is realizing rent since the date of auction. Defendant has given the land to new tenants. The old tenants, who cultivated the land in the time of Murli Dhar, have gone away.

This statement of the plaintiffs' own mukhtar was reiterated by Doctor Shiv Dat, the sole contesting defendant in the suit. He said that he was in possession of the whole land since the time of the auction and that the plaintiffs could not sue for a mere declaration. These statements were recorded on the 6th March 1923, and in the written statement also, in para. 8, a similar plea had been taken on behalf of the defendant. The learned senior subordinate judge had disposed of the case on the preliminary issue, viz. as to whether the plaintiff can maintain a suit for a mere declaration and has held that, as the plaintiffs' mukhtar admits that the plaintiffs are out of possession and that the land is cultivated by tenants who pay rent to the defendant, the tenants' possession must be deemed to be that of the defendant and the suit for a mere declaration was not maintainable, as it was open to the plaintiffs to sue for possession. He accordingly dismissed the suit.

The plaintiffs have filed an appeal to this Court, and their learned counsel

invited our attention to *Dhondo Sakharam* v. *Govind Babaji* (1). In that case it was held that a Court-fee of Rs. 10 was sufficient in a suit brought under the provisions of old S. 283, Act 14, 1882 (corresponding to O. 21, R. 63 of the present code), even though there was a prayer for possession. This case was followed in *Dayaram Jagjivan* v. *Gordhan Das Dayaram* (2), and ultimately received the imprimatur of their Lordships of the Privy Council in the case reported as *Phul Kumari* v. *Ghanshyam Misra* (3). On the basis of these cases the learned counsel argued that, even if there had been a distinct prayer for possession, the Court-fee of Rs. 10, which he had paid, would have been quite sufficient, and the Court was not justified in throwing out his suit on this ground. There is, however, a Full Bench case reported as *Kristnam Sooraya* v. *Pathma Bee* (4) which is more in point. It is laid down in that case that the proviso to S. 42, Specific Relief Act, does not operate so as to take away from a party against whom an order is made under Ss. 280 to 282 of the old Civil P. C, (corresponding to O. 21, Rr. 60, 61 and 62 of the present Civil P. C.) the right to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach. On the authority of this Full Bench case the decision of the trial Court is palpably erroneous. It was argued on behalf of the respondent that the present suit could not be treated as a suit under O. 21, R. 63 Civil P. C., in that the decree-holder had ceased to be a party to the suit and furthermore that in such a suit the auction-purchaser could not be impleaded as his title came into existence after the termination of the attachment and claim proceedings, in the execution of the decree. This argument is not based upon any sound legal principles and is, in fact, opposed to a fairly large volume of case-law on the subject. As regards the decree-holder (the bank), it has been pointed out that it had already vanished into the thin air and had ceased to exist as a juristic personality. The contention that the quandum shareholders of the bank should have been impleaded as parties to the suit, although the bank, according to the defendant's own pleader, had gone into liquidation and even the liquidation proceedings had also terminated, is not sustainable. Apart from the case-law on the subject the language of O. 21, R. 63, Civil P. C., is very significant and disposes of the respondent's contention. The section runs as follows:

> Whether a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Now, the defeated claimant under the provisions of this rule is directed to establish his right against the property in dispute. It follows as a matter of course that he can proceed against any person who, in the meantime, after the rejection of his objections, has come to have any interest in the disputed property. And there cannot be any doubt that the auction-purchaser who has purchased the property after the disposal of the claim proceedings, is such a person and can be proceeded against in a suit brought under the provisions of O. 21, R. 63, Civil P. C. In the cases reported in *Dhondo Sakharam* v. *Govind Babaji* (1), and *Dayaram Jagjivan* v. *Gordhandas Dayaram* (2), the auction-purchaser was, as a matter of fact, a party. It is true that the point as to whether an auction-purchaser can be impleaded as a party defendant to a suit under S. 283 of the old code (corresponding to O. 21, R. 63 of the new code, does not appear to have been specifically raised and the position seems to have been taken for granted but I think that if there had been any legal objection to the auction-purchaser being impleaded as a party in a suit of this discription, the point would have been raised by the learned counsel who appeared in these cases and also by the learned judges of the Bombay High Court. In the case of *Dorasamy Pillai* v. *Muthusamy Mooppan* (5), it was laid down that where a suit is brought under S. 283 of the old code different purchasers of the attached property may be properly joined as defendants in the same suit, and it was further pointed out that the wrongful sale being the cause of action

(1) [1885] 9 Bom. 20.
(2) [1907] 31 Bom. 73=8 Bom. L. R. 885.
(3) [1909] 35 Cal. 202=35 I. A. 22=7 C. L. J. 36=12 C. W. N. 169 (P. C.).
(4) [1906] 29 Mad. 151.
(5) [1904] 27 Mad. 94=13 M. L. T. 479.

different purchasers at that sale, were rightly impleaded as defendants.

There is a very important and instructive decision reported as *Sadhu* v. *Ram* (6) in which the judgment of the Court was delivered by a very eminent Judge of the Bombay High Court, namely Telang J. This case after a full discussion of the case-law on the subject, lays down that in a suit under S. 283 of the Civil P. C. the auction-purchaser may be impleaded as a necessary party when the plaintiff, besides praying for declaration of his title, also prays for partition by way of consequential relief. It was further held that S. 283 was not limited to a mere declaratory decree but the plaintiff could have asked not only for cancellation of attachment but also for replacing the plaintiff in possession of the property in question. This latter course would only be possible if the person in possession of the property in dispute, as auction-purchaser, was impleaded.

As to the objection raised by the learned counsel for the respondents that the decree-holder ought to have been impleaded as a party, it has already been pointed out that it was not possible to bring the said decree-holder before the Court in any shape or form. But apart from this and as an abstract proposition of law I may refer to a recent case reported as *Subbaraya Mudaliar* v. *Kandaswamy Mudaly* (7), where Mr. Justice Ramesam observed that the decree-holder is not a necessary party to a claimant's action, under O. 21, R. 63, Civil P. C., though he may be made a party in such a suit for recovery of possession from an auction-purchaser. This last case is an answer to both the arguments put forward on behalf of the learned counsel for the respondent in that it shows that the decree-holder is not a necessary party to a suit brought under O. 21, R. 63, Civil P. C., and along with the cases reported as *Dorasamy Pillai* v. *Muthusamy Mooppan* (5), and *Sadhu* v. *Ram* (6), is also clear authority against the contention of the respondent that an auction-purchaser cannot be impleaded as a party defendant in such a suit.

With the merits of the case we are not concerned. The short question for decision by this Court in appeal was as to whether the order of the Court dismissing the suit brought ostensibly under the provisions of O. 21, R. 63, Civil P. C., was erroneous, because although it was open to the plaintiffs to sue for possession, they brought the suit in its present form for a mere declaration. I have already shown that the decision of the Court of first instance on this point is already erroneous and must be set aside.

I would, therefore, allow the appeal, set aside the decree of the Court below and, as the case has been disposed of on a preliminary point, remand the case under the provisions of O. 41, R. 23, Civil P. C., to the trial Court for disposal according to law. Costs here and hereafter would abide the event.

Tek Chand, J.—I agree.

R.K. *Appeal allowed.*

(6) [1892] 16 Bom. 608.
(7) A. I. R. 1923 Mad. 58.

A. I. R. 1927 Lahore 634

TEK CHAND, J.

Rahamat Ali—Accused—Appellant.

v.

Emperor—Opposite Party.

Cr. A. No. 415 of 1927, Decided on 20th May 1927, from an order of the S. J., Karnal, D/- 15th March 1927.

Penal Code, S. 511—Attempt is some external act, tangible and ostensible, showing progress towards the actual commission.

Under the Penal Code all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted: 34 *Bom.* 378; 14 *P. R.* 1914 *Cr., Rel. on.* [P 635, C 2]

R. C. Soni—for the Crown.

Judgment.—The appellant, Rahmat Ali, has been convicted by the Sessions Judge of Karnal of an attempt to cheat one Jai Bhagwan (P. W. No. 2) and sentenced to undergo rigorous imprisonment for two years including three months' solitary confinement. The case for the prosecution is thus stated by Jai Bhagwan. Two or three days before the 18th August 1926, the appellant brought two old silver coins to him and sold them to him at nine annas each. Next day he brought two more silver coins of the same type and these were also pur-

chased by Jai Bhagwan at the same rate. Jai Bhagwan asked the appellant where he had got these coins from and he replied that he had in his possession 10,000 such rupees. On Jai Bhagwan asking where did he get such a large quantity of coins from, he answered that he had found them buried in the ground. On this Jai Bhagwan asked him to bring a small quantity of those coins. He declined to do so saying that they were buried in the jungle behind the Octroi Post on the Budhakhera road, and that he was afraid of bringing them to the town as he might be caught by the Police.

Next day the appellant came again to Jai Bhagwan and asked him to accompany him to the place where the coins were buried. He suspected some foul play and did not go to the spot but mentioned the whole matter to (P. W. No. 3) Dr. Abdul Aziz who has a druggist's shop at Karnal. This witness went to the police station and brought with him Sardar Bishen Singh, sub-inspector, who took down Jai Bhagwan's statement. The sub-inpector directed Jai Bhagwan to go to his shop and to wait for another opportunity when the accused would come to him. The accused came again to him at 4-30 or 5 p. m. the same day and asked him to go with him saying that he should take at least five hundred rupees with him. Jai Bhagwan states that he took currency notes worth Rs. 400 or 500 with him, and went with his servant Karta Ram (P. W. No. 1). On reaching the spot the accused left Jai Bhagwan and Karta Ram at a certain spot behind the Octroi Post and himself went behind the trees and brought out a bag of coins similar in appearance to those which he had shown two days before but which had been covered with mud, on this the sub-inspector with a number of police men and Dr. Abdul Aziz appeared on the scene and it was found that 240 coins had been delivered to Jai Bhagwan, while 795 were still in the bag which the appellant was holding. It was also discovered that all the coins in the bag as well as those which had been delivered to Jai Bhagwan on that date were not silver coins but contained mixture of lead and zinc. The appellant was arrested and sent up for trial under S. 420, I. P. C. The learned sessions judge found that the acts of the appellant would not fall under S. 420 but that it was a clear case of attempt to cheat. He accordingly convicted him under S. 420/511. The appellant has appealed from jail. I have gone through the record and heard Mr. Soni for the Crown.

After examining the relevant evidence on the record, I am of opinion that the offence of attempt to cheat (Ss. 420/511, I. P. C.) is fully established against the appellant. Though nobody was actually cheated it is quite clear that the appellant made an attempt to cheet Jai Bhagwan. Under the Indian Penal Code all that is necessary to constitute an attempt to commit an offence is

> some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. *Ganesh Balwant Modak* v. *Emperor* (1).

Reference may also be made to the leading English authority, *R.* v. *Hensler* (2). The point is also fully discussed by Johnstone, J., in *Abdulla* v. *Emperor* (3). I would, therefore, uphold the conviction. The sentence is by no means severe. I dismiss the appeal.

R.D. *Appeal dismissed.*

(1) [1910] 34 Bom. 378=5 I.C. 612=12 Bom L. R. 21.
(2) [1870] 11 Cox. C. C. 570=19 W. R. 108=22 L. T. 691.
(3) [1914] 14 P. R. 1914 Cr.=66 P. L. R. 1914=23 I. C. 473=13 P. W. R. 1914 Cr.

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* A. I. R. 1927 Lahore 635

DALIP SINGH, J.

Moti Singh—Plaintiff—Appellant.

v.

Harbhajan Singh and *others*—Respondents.

Misc. F. A. No. 566 of 1927, Decided on 24th June 1927, from an order of the Senior Sub-J., Hoshiarpur, D/- 5th January 1927.

* (*a*) *Interpretation of statutes—Stare decisis—Practice.*

In the matter of a fiscal enactment where the question is in doubt the rule of stare decisis should apply. [P 636 C 1]

(*b*) *Court-fees Act, Sch.* 1, *Art.* 1—*Appeal from order under Civil P. C., S.* 144, *does not require ad valorem fee but a fee of Rs.* 4.

An appeal from an order under S. 144, Civil P. C., does not, according to the practice of the

Lahore High Court, require ad valorem fee but a Court-fee stamp of Rs 4 is sufficient : *A. I. R.* [P 636 C 2]
1925 *All.* 137, *Ref.*

(c) *Civil P. C., S.* 144—*Power of restitution is not limited to S.* 144.

The power of the Court to do all things necessary to do substantial justice between the parties in the matter of restitution is not limited to S. 144 and in all cases where the parties have invoked the aid of the Court and the Court has recognized a certain transaction on the basis of an existing decree, then, if that existing decree is set aside on appeal, the Court may order the parties to be restored to the position they would have been in, if they had not taken action under the existing decree : *A. I. R.* 1922 *Cal.* 28, *Foll.* [P 637 C 1]

Badri Das—for Appellant.

Gullu Ram—for Respondents.

Facts.—One Sodhi Narendar Singh died and two persons claimed to be entitled to certain property of his. Moti Singh was his son and claimed to be entitled to certain property of his. Wazir Singh claimed certain property under a will of Sodhi Narendar Singh. Wazir Singh brought a suit on the basis of the will. Moti Singh sued for possession of certain land which had been mortgaged to his father by one Kishan Singh. Kishan Singh pleaded redemption by payment to Wazir Singh. Wazir Singh was made a party to the suit and he admitted the payment by Kishan Singh. Wazir Singh's suit was dismissed on the 12th March 1920, and Moti Singh's suit was decreed. Wazir Singh appealed in his suit and Kishan Singh and Wazir Singh put in a joint appeal in the suit of Moti Singh. Kishan Singh died during the pendency of the appeal and the appeal abated so far as he was concerned. Wazir Singh's appeal in his own suit was decreed by the High Court and his appeal in Moti Singh's suit was also decreed by this Court, and, in spite of Kishan Singh's appeal having abated under O. 41, R. 33, the High Court held that the decree against both should be set aside. In the meantime, before the appeals were decreed, Moti Singh took out execution and claimed that he had got possession. Kishan Singh, however, denied that Moti Singh had got possession. The Court did not pass any order of satisfaction of the decree because, in the meantime the parties compromised and Kishan Singh retained or got back possession of the land on payment of Rs. 21,664 to Moti Singh. This compromise was recorded by the Court, and in it it was stated that Rs. 11,000 had already been paid by Kishan Singh and Rs. 10,664 would be paid after ten days. It was further agreed that if the appeals succeeded, Moti Singh would refund Rs. 21,664 to Kishan Singh with interest at 6 per cent. When the appeals were decreed, the heirs of Kishan Singh applied for restitution under S. 144. The executing Court held that it had power to order refund of the Rs. 21,664 with interest at six per cent according to the terms of the compromise and granted the application. Moti Singh brought this appeal from that order.

Judgment.—(After setting out facts as stated above the judgment proceeded) A preliminary objection has been taken that the stamp for this appeal should be ad valorem because Government notification under S. 35 relates only to applications under S. 47 [old S. 244 (c)] and not to applications under S. 144. There is a divergence of opinion in the High Courts on this point. The Patna, Bombay, Madras and Calcutta rulings hold that such application is an application in execution and a Court-fee of Rs. 4 is sufficient. The Allahabad High Court holds to the contrary that the appeal should be stamped ad valorem : see *Baijnath Das* v. *Balmukand* (1). It is conceded on both sides that the practice of this Court so far has been to have such appeals on a Court-fee stamp of Rs. 4. In the matter of a fiscal enactment, where the question is in doubt, it seems to me that the rule of stare decisis should apply and I hold, therefore, that the appeal is properly stamped. I therefore overrule the preliminary objection.

It is contended by counsel for the appellant that the order regarding the compromise and the order directing Kishan Singh to pay within ten days the balance due were not passed in connexion with the decree at all. It seems to me, however, that though technically perhaps this is correct, the Court did purport to be acting in execution of the decree. It is contended by counsel for the appellant that all these orders were ultra vires, but I am not now concerned with whether those orders were or were not ultra vires, but with the question whether those orders were passed in connexion with the decree of Moti Singh or not. I therefore consider that the application should be treated as one

(1) A. I. R. 1925 All. 137=47 All. 98.

under S. 144. At any rate, if I am wrong in this, *Rai Charan* v. *Debi Prosad* (2) shows that the power of the Court to do all things necessary to do substantial justice between the parties in the matter of restitution is not limited to S. 144, Civil P. C., and that in all cases where the parties have invoked the aid of the Court and the Court has recognized a certain transaction on the basis of an existing decree, then, if that existing decree is set aside on appeal, the Court may order the parties to be restored to the position they would have been in if they had not taken action under the existing decree.

Counsel for the appellant states that there are appeals to the Privy Council pending from the decrees of this Court decreeing the suit of Wazir Singh and dismissing the suit of Moti Singh, and he says one of the reasons why they are contending this application is that they may have difficulties themselves in recovering the money from Kishan Singh's heirs if their appeals to the Privy Council or, at any rate, appeal qua Moti Singh's suit succeeds. Counsel for the respondents undertakes that if the appeal to the Privy Council in Moti Singh's case succeeds, the respondents will not raise any objection to the application by Moti Singh to recover the money back again under S. 144. It seems to me that by this undertaking all trouble in the case will be avoided, and I accordingly put on record the undertaking of the respondents. The matter is not free from doubt and accordingly, while dismissing the appeal, I leave the parties to bear their own costs throughout.

R.D. *Order accordingly.*

(2) A. I. R. 1922 Cal. 28.

A. I. R. 1927 Lahore 637

SHADI LAL, C. J., AND JAI LAL, J.

Ralla and *others* — Defendants — Appellants.

v.

Mula and *another*—Plaintiffs — Respondents.

S. A. No. 233 of 1923, Decided on 29th April 1927, from a decree of the Dist. Judge, Hoshiarpur, D/- 1st November 1922.

Custom (Punjab) — Compromise by father — Consent given by him bona fide binds his son— Circumstances at the time of effecting the compromise must be looked to for bona fides.

Where consent is bona fide given by a father to a compromise the compromise is binding on the son : 68 *P. R.* 1912, *Appl.*

In deciding whether a compromise is a bona fide one, the Court must look at the circumstances as they existed when it was effected.

[P 638, C 1]

Hargopal and *Badri Das* — for Appellants.

Fakir Chand—for Respondents.

Judgment. — The pedigree of the parties will be found at p. 3 of the printed-paper book. Nathu, son of Gulaba, was adopted by his uncle Bannu. Gullu and Hamira, sons of Mangal, another uncle of Nathu, instituted a suit in the year 1895 to set aside this adoption. The dispute was settled by means of a compromise whereby 28 kanals 1 marla of land inherited by Nathu from Bannu was given by him to Mangal's sons who recognized his title to the rest of the land in dispute expressly providing in the agreement of the compromise that Nathu would have an absolute title to the property in dispute. Nathu having died childless the present action was brought by Gullu and Mula, sons of Hamira, to recover possession of the land in suit from the real brothers of Nathu on the ground that on the latter's death without issue the property reverted to Bannu's heirs. The plea of the defendants was that by virtue of the compromise Nathu having been given an absolute title in the land in suit it did not revert to the heirs of Bannu but descended to Nathu's heirs.

The learned district judge has held that Gullu being a party to the compromise effected in 1895 was not entitled to any relief. He has, however, decreed the suit so far as the claim of Mula was concerned on the ground that Mula's father Hamira had legally no power to relinquish the future rights of succession of his descendants to Bannu's land. In his opinion the fact that as a result of the compromise Hamira and Gullu got 28 kanals of land could not validate such transfer. He has consequently decreed the suit to the extent of Mula's share in the land in suit. Both the parties have appealed to this Court. The brothers of Nathu appeal on the ground that the view of the district judge that Mula was not bound by the settlement

made by his father is erroneous and Mula plaintiff on the ground that the district judge has not given him a decree for the whole of the land claimed by him.

We are unable to agree with the learned district judge that Mula is not bound by the compromise effected by his father Hamira. In *Habib Khan* v. *Muhammad* (1) it was held that consent bona fide given by a father to an alienation by a widow binds his sons. The principle laid down in that case governs the present one and as the compromise was effected by Hamira bona fide and in consideration of having received 28 kanals of land which, under the circumstances as they existed at the time of the compromise, he or his descendants might not have ultimately got, we consider that the compromise is binding on Mula, his son. In deciding whether a compromise is a bona fide one the Court must look at the circumstances as they existed when it was effected, and in 1895 Nathu was apparently young and the parties must have been conscious of the fact that if he got male issue there would be no chance for the descendants of Mangal to inherit any portion of the property then in dispute. We hold, therefore, that the compromise is binding on Mula plaintiff, and accepting the appeal preferred by the brothers of Nathu we set aside the decree of the learned district judge and dismiss the suit with costs throughout.

This disposes of the appeal by Mula which becomes infructuous. That appeal is dismissed with costs.

R.D. *Appeal dismissed.*

(1) [1912] 68 P. R. 1912=210 P. L. R. 1912=16 I. C. 463=194 P. W. R. 1912.

A. I. R. 1927 Lahore 638

ADDISON, J.

Court of Wards Estate, Sodhi Richpal Singh—Judgment-debtor—Petitioner.

v.

Devi Das—Decree-holder — Respondent.

Civil. Rev.No. 92 of 1927, Decided on 1st February 1927, from the order of the Sr. Sub-Judge, Ferozepore, D/- 25th August 1926.

Punjab Court of Wards Act (1903), *S.* 31 (2)—*Decree outstanding against ward at the time of the estate coming under the Court of Wards—Execution proceedings taken without certificate under S.* 31 (2) *are ultra vires.*

Where the estate of a person comes under the management of the Court of Wards under Ss. 9 and 10 and at that time there is an outstanding decree against the ward, the executing Court has no jurisdiction to go on with the execution of the decree until the decree-holder files a certificate under S. 31 (2). Proceedings in execution without such certificate are ultra vires and liable to be set aside. [P 639 C 1]

Carden-Noad—for Petitioner.

Mulk Rai—for Respondent.

Judgment.—The estate of Sodhi Richpal Singh came under the management of the Court of Wards under Ss. 9 and 10. Act 2, 1923, on the 18th March 1926. At that time there was an outstanding decree for Rs. 15,000 with costs against the ward. The decree-holder had, on the 13th December 1925, i. e. prior to the estate coming under the Court of Wards, applied for execution and a certain house was attached. Though it is alleged to be a very valuable property, it was knocked down to the decree-holder for Rs. 400 at the auction sale which took place on the 6th July 1926, i. e. long after the estate had come under the Court of Wards. On the 9th August 1926, i. e. 33 days after the date of the auction sale, the manager of the Court of Wards appeared before the executing Court and presented an application that all the proceedings were void as the estate was in the charge of the Court of Wards and it was necessary for the decree-holder to inform the deputy commissioner before he could proceed to execute his decree. The executing Court, on the 25th August 1926, treated this as an application objecting to the sale and held it to be time barred as it had been presented more than thirty days after the sale. Consequently the executing Court confirmed the sale on the above date. Against this order this application for revision has been preferred.

It is obvious that there was no objection to the sale, but a general objection by the manager of the Court of Wards that the executing Court has no jurisdiction to go on. This being the case, this is not so much an appeal as a revision against the order of the executing Court, dated the 25th August 1926, on the ground that it acted without jurisdiction

in going on with the execution proceedings when it had been brought to its knowledge that such proceedings were barred under Act 2, 1903.

It was admitted before me that under the provisions of Chap. 6, Punjab Act 2, 1903, it was necessary for the decree-holder, after the 18th March 1926, to obtain a certificate from the Deputy Commissioner before he could proceed any further with his execution. It is true that it is stated in S. 31 (1) that the Deputy Commissioner should not disallow any claim based upon a decree, but from S. 31 (2) it follows that, after the 18th March 1926, all suits and all proceedings in execution of any decree against the ward should have been stayed until the plaintiff or decree-holder filed a certificate that the claim had been notified in accordance with S. 26. In the present case the Deputy Commissioner was never approached and no certificate was ever obtained. It follows that all the proceedings after the 18th March 1926, were without jurisdiction.

It was argued on behalf of the respondent that proceedings could now be stayed by me in order to allow him to obtain the necessary certificate. This is, however, impossible as the proceedings have ended. Though the deputy commissioner may be compelled under S. 31 (1) of the Act to allow a claim based upon a decree, still the application for the certificate would have put him on his guard and allowed him to make arrangements for paying off the decree or coming to a settlement with the decree-holder. He had no such opportunity in the present case. There is no doubt that the executing Court had no jurisdiction to go on with the execution after the 18th March 1926. I, therefore, accept this petition and set aside all the proceedings of the lower Court regarding the sale of the house in question. I, however, maintain the attachment upon the house in question. But further proceedings for the sale of the house cannot be taken until the decree-holder files a certificate under S. 31 (2), Punjab Act 2, 1903. The petitioner will have his costs here.

R.D. *Petition accepted.*

A. I. R. 1927 Lahore 639

ADDISON, J.

Bigga—Defendant—Appellant.

v.

Mohumd Shah and *others*—Plaintiffs—Respondents.

S. A. No. 1632 of 1926, Decided on 10th May 1927, from a decree of the Senior Sub-Judge, Jullundur, D/- 12th April 1926.

Co-sharer—Suit for customary dues must be for the whole.

A suit for rent or customary dues of a riaya must be a suit for the whole of the rent or dues : 19 *Cal.* 735 and 35 *Cal.* 744, *Foll.* [P 640, C 2]

Badri Das—for Appellant.

Jagan Nath Aggarwal—for Respondents.

Judgment.—Plaintiffs claimed that they were the ground landlords of a site upon which defendant 1, their riaya, had built his house and that they were entitled to certain customary dues as given in the wajib-ul-arz from him. When he married his son, he refused to pay these dues and the plaintiffs, therefore, sued him for Rs. 5, their value. Defendant 1 pleaded that he was the riaya of one Jamal-ud-din whose heirs were necessary parties and that this Jamal-ud-din had mortgaged his rights to him. Accordingly the mother and widow of the last male descendant of Jamal-ud-din were impleaded as defendants. The trial judge held that the plaintiffs' ancestors and Jamal-ud-din were the ground landlords, that they had sued defendants' father in 1854 and obtained a decree against him ; that the mortgage of 1865 by Jamal-ud-din in defendants' favour did not give him any title ; and that dues had continued to be paid to plaintiffs. He, therefore, decreed the sum of Rs. 5, the amount of which was not disputed.

On appeal the learned Senior Subordinate Judge held that the suit had not abated on account of the fact that on the death of the widow of the last male descendant of Jamal-ud-din her heirs under Mahomedan law had not been impleaded ; that the plaintiffs were not bound by the mortgage made by Jamal-ud-din in defendants' favour as to which it would not be presumed that they had knowledge ; that this mortgage-deed had never been enforced ; that plain-

tiffs appeared to have been receiving the customary dues, but in any case this did not matter ; and that the plaintiffs were entitled to sue for the whole of the dues as they could not sue only for their share of them. In the result he dismissed the appeal and against his decision this second appeal has been preferred.

It was first argued that the suit abated for the reasons stated above. Defendant 1 did object that the personal heirs of the widow of Jamal-ud-din's last male descendant should be impleaded in her place, but did not name who they were. I agree that the widow and mother of the last male descendant of Jamal-ud-din sufficiently represented the estate which came down from Jamal-ud-din and that on the death of the widow the mother alone, sufficiently represented it, seeing that it is not known whether parties follow custom or Mahomedan law, and this is a suit for customary due under a wajib-ul-arz. Besides, no personal heir of the widow has been named and it is not clear that any are in existence : see *Begam Jan* v. *Jannat Bibi* (1). There is no force in this contention,

There are concurrent findings that the plaintiffs and Jamal-ud-din were the ground landlords and this is established by the suit in 1854. In 1860 defendants' father executed a document to the effect that he took permission from Jamul-ud-din to sink a well in the property in question, described as that of Mian Muhammad Shah and on which defendants' father already had a house. At the same time defendants' father reserved the right to take away the material if the site was abandoned, and stated that he would be liable to pay the customary dues as formerly. This does not prove that Jamal-ud-din had become sole owner. Then Jamal-ud-din mortgaged his right in the site to defendants' father in 1865, but again, this cannot prejudice the plaintiffs. The onus still remained on defendant 1, to establish that Jamal-ud-din had the right to mortgage the whole site including the plaintiffs' share and this he failed to do.

The third contention advanced before me was that plaintiffs had not proved receipt of dues within 12 years of the suit. The trial Court clearly found on the evidence that these dues had been formerly paid on the occasions on which they were customarily payable. The lower appellate Court's finding was that the plaintiffs appeared to have been receiving them. This must be taken to mean that they had been receiving them. The word " appeared " is usually used in this sense by Indian judges. There is ample evidence for such a finding.

Lastly it was urged that the plaintiffs could not sue for Jamal-ud-din's share of the dues. This argument also fails. A suit for rent or customary dues of a riaya must be a suit for the whole of the rent or dues : *Pergash Lal* v. *Akhowri Balgobind Sahoy* (2) and *Shashi Kumar* v. *Seeta Nath* (3).

I dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) A. I. R. 1927 Lah. 6=7 Lah. 438.

(2) [1892] 19 Cal. 735.

(3) [1903] 35 Cal. 744=7 C. L. J. 425.

A. I. R. 1927 Lahore 640

SHADI LAL, C. J., AND JAI LAL, J.

Dhani Ram and *another*—Plaintiffs—Appellants.

v.

Mt. Goman and *another*—Defendants—Respondents.

S. A. No. 270 of 1923, Decided on 22nd April 1927, from the decree of the Dist. Judge, Amritsar, D/- 27th November 1922.

Civil P. C., O. 41, R. 1—Preliminary judgment not attacked in appeal—Copy thereof need not be filed.

Where a copy of the final judgment of the trial Court has been filed and, in the grounds of appeal before the High Court, no objection is taken by the appellant to any of the points decided by the trial Court by the preliminary judgment, it is not necessary for the appellants to file a copy of the preliminary judgment. [P 641, C 2]

Mul Chand for *Bevan Petman*—for Appellants.

Kahan Chand—for Respondents.

Jai Lal, J.—This appeal arises out of a suit instituted by the plaintiffs Dhani Ram and Ram Lal against Mt. Jivan and Abdulla for possession of a shop and Rs. 180 an account of compensation for illegal occupation of the same. The allegation of the plaintiffs was that they

were owners of the shop in suit; that they, along with Mt. Goman, the widow of Ram Kishen, their deceased brother, had rented the shop to Nizam Din and Najaf Ali on the 21st December 1912, and that the defendants had taken illegal possession of the same in collusion with Mt. Goman. The suit, therefore, was for the ejectment of the trespassers and for compensation for illegal occupation. The defendants claimed that they were in possession of the shop as tenants of Mt. Goman who was thereupon, added as a defendant. She raised various pleas, but we are now concerned with two of them: (1) that the suit was barred under O. 2 R. 2; (2) that there had been a partition between the plaintiffs and her deceased husband, Ram Kishen, and that the shop in dispute came to the share of Ram Kishen and consequently she was the sole owner thereof.

The district judge, agreeing with the subordinate judge, has held that the suit is not barred under O. 2, R. 2, and also that it had not been established that there was any separation between Ram Kishen and his two brothers, the plaintiffs, whereby the former became the sole owner of the shop in suit. He also held that Mt. Goman had failed to establish that she had held exclusive possession of the shop as heir and representative of Ram Kishen, but the learned judge varied the decree of the subordinate judge, who had decreed the suit in full, by passing a decree in favour of the plaintiffs for possession of two-thirds of the shop, and for the recovery of two-thirds, of Rs. 126-4-0 which had been assessed as damages suffered by the plaintiffs owing to the wrongful possession of the shop in suit by the original defendants.

It appears that for some reason or other Mt. Goman was mentioned by Nizam Din and Najaf Ali as one of the landlords along with Dhani Ram and Ram Lal in the said deed of the 21st December 1912. The learned district judge is of opinion that by allowing her to be joined as a co-landlord the plaintiffs admitted her to be a partner with themselves in the shop. It is on this ground that he held that Mt. Goman's right to be a partner had been established to the extent of one-third in the shop in suit and accordingly he dismissed the suit to the extent of one-third share therein. The plaintiffs appeal against the decree of the district judge dismissing their suit to the extent of one-third share in the shop and in the damages.

A preliminary objection is taken by the respondents that the appeal has not been properly filed because a copy of the judgment of the trial Court disposing of certain legal objections raised by the defendants has not been filed with the memorandum of appeal. A copy of the final judgment of the trial Court has been filed, and in the grounds of appeal before us no objection is taken by the plaintiffs to any of the points decided by the preliminary judgment. We do not consider that under these circumstances it was necessary for the appellants to file a copy of the judgment the correctness of which they do not attack in this Court.

On the merits we consider that this appeal must be accepted. The learned district judge, having found that there was no partition between the plaintiffs and their brother Ram Kishen and that Mt. Goman never held exclusive possession of the shop in dispute as heir and representative of Ram Kishen, it follows that the plaintiffs are entitled to the property by right of survivorship, and that the widow of Ram Kishen has no right to succeed to any part of the joint family property, her right being confined merely to maintenance and residence. She nowhere claimed in her written statement that by virtue of her inclusion as a landlord in the rent deeds she was given a share in the property by the plaintiffs, and we cannot understand how she can be held to be a partner in the property in suit merely owing to her name being mentioned as one of the landlords by the tenants. The suit being essentially one against the trespassers and the plaintiffs having established their title to the property in suit they were entitled to the decree for compensation as prayed for.

But the counsel for the respondents seeks to support the decree of the learned district judge on the ground that the suit is barred under O. 2, R. 2, Civil P. C.

In our opinion the view of the learned judge that it is not so barred is correct. It seems that the plaintiffs and Mt. Goman instituted a suit against one

Amir Bakhsh for the recovery of the amount due from him as a debtor of Gujar Misar, the father of the plaintiffs, and Ram Kishen. That suit was compromised and a decree passed against Amir Bakhsh, but in the deed of compromise it was agreed that the question of Mt. Goman's right to a share in the amount so decreed would be settled by arbitration or in separate proceedings thereafter to be taken in the civil Courts. It appears that Mt. Goman realized a portion of the amount decreed from Amir Bakhsh and a suit instituted by the present plaintiffs against her for the recovery of the amount so realized by her was finally decreed, the Court holding that Mt. Goman had no right in the estate of Gujar other than the right of residence and maintenance and that there had been no partition between her husband Ram Kishen and the plaintiffs. It is contended on behalf of Mt. Goman that in that suit the plaintiffs should have claimed possession of the shop in suit from her and that having omitted to do so they were precluded from instituting the present suit by virtue of O. 2, R. 2. In our opinion there is no force in this contention. As we have already observed this is a suit essentially against trespassers, the original defendants. No relief was claimed against Mt. Goman, as her name was added merely as a pro forma defendant on the objection of the original defendants. Moreover, in 1916, when the former suit was instituted against Mt. Goman she was not in possession of the shop in suit, nor does it appear that the plaintiffs had any reason to apprehend that Mt. Jiwan and Abdulla were holding the property in suit from Mt. Goman.

The consequence is that the decree of the learned district judge must be set aside and that of the subordinate judge restored with costs throughout.

D.D. *Decree set aside.*

A. I. R. 1927 Lahore 642

TEK CHAND AND AGHA HAIDAR, JJ.

Muzaffar Muhammed—Plaintiff—Appellant.

v.

Imam Din and *another*—Defendants—Respondents.

F. A. No. 2607 of 1923, Decided on 1st June 1927.

Custom (Punjab)—Agricultural tribe—Restricted power of alienation — Agricultural tribe forsaking agriculture as their main occupation —No presumption of restricted power arises.

The presumption in favour of restricted power of alienation applies to members of agricultural tribes who are members of village communities. But where a family, though member of an agricultural tribe, has altogether drifted away from agriculture as its main occupation, and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood, no initial presumption exists: 55 *P. R.* 1908; 270 *P. L. R.* 1913; 2 *L. L. J.* 27 *and A. I. R.* 1923 *Lah.* 557, *Foll.* [P.644 C 1]

Niaz Mohamad. and *Mohamad. Monir* —for Appellant.

Mathra Das and *Maya Das*—for Respondents.

Tek Chand, J.—On the 7th January 1919, Iftikhar Ahmad, father of the plaintiff-appellant, sold 277 kanals of agricultural land in the Lyallpur District to Haji Imam-ud-din and Haji Rahim Bakhsh, defendants-respondents 1 and 2, for Rs. 11,000. The whole of the sale price was paid before the sub-registrar, and on the following day was deposited by the vendor in the Punjab-Sind Bank, Lyallpur.

On the 3rd February 1922, the plaintiff-appellant, Muhammad Muzaffar, who is the only son of the vendor, instituted the suit out of which this appeal has arisen for the usual declaration, alleging that the land was ancestral; that his father, the vendor did not possess unrestricted powers of alienation over it and that the sale being without consideration and necessity was not binding on him. Shortly after the institution of the suit, the vendor Iftikhar Ahmad died on the 16th May 1922, and on the application of the plaintiff-appellant the plaint was amended to one for possession.

The main pleas raised by the defendant vendees were that the plaintiff had no locus standi to contest the alienation as the vendor was governed by Mahomedan law and not by custom and that in any case the alienation was for consideration and necessity and binding upon the plaintiff.

The learned Subordinate Judge placed on the plaintiff the onus of proving that the vendor was governed by custom and not by Mahomedan law and held this issue unproved. On the question of consideration and necessity he found that consideration in full had passed and

that though it could not be definitely said that immediate and urgent necessity existed for the transaction at the time of the alienation, the sale was an act of good management as the vendor lived in Lahore and could not efficiently manage the land in the Lyallpur District and it was more profitable to sell it and invest the sale-proceeds in a bank. He therefore held that the transaction was binding on the plaintiff, especially when the money deposited in bank was taken possession of by the plaintiff on the vendor's death. He accordingly dismissed the suit. The plaintiff has preferred a first appeal to this Court, and we have heard Mr. Niaz Mohamad. on his behalf.

The first question argued is that of onus. It is contended that the vendor was a Kamboh, which is one of the dominant agricultural tribes in the Lahore District, and, therefore, there is a presumption that he was governed by the general agricultural custom of the Province and did not possess unrestricted power of alienation over ancestral land. As stated already, the trial Court had placed on the plaintiff the onus of proving that the family of the vendor was governed by custom. It does not seem to have been objected at the time when the issues were framed or at any stage of the trial in the Court below that the onus was wrongly placed on the plaintiff. Nor do we find this point specifically taken in the grounds of appeal to this Court. Therefore strictly speaking the plaintiff-appellant was not entitled to agitate this question for the first time at the hearing of the appeal. Having regard to the general importance of the question, however, we allowed Mr. Niaz Mohamad to address us on this point. It is clear from the evidence given by the plaintiff himself as D. W. 3 that his ancestors had from time immemorial settled in the town of Lahore, and none of them had actually followed agriculture as a perfession but that their main occupation had, for generations, been service or trade. The plaintiff's grandfather Muhammad Bakhsh was employed as a teacher in jail and seems to have been a man of great influence in the town of Lahore, so much so that a street inside the Akbari Gate is known after him as Gali Muhammad Bakhshwala. His son Iftikhar Ahamd, the vendor, served in the Las Bela State as head accountant for a number of years, and on retirement lived in the town of Lahore. The other relations of the plaintiff have been or are employed in various offices at Lahore. It has not been shown that any one of them had had anything to do with the plough, except that like many other capitalist proprietors, living in towns, they had purchased as a means of an investment small plots of land in the suburbs of Lahore like Qikka Gujar Singh, Gari Shahu, Sultanpur, Miran-di-Khui or Ichhra. It is conceded that none of the plaintiff's ancestors had ever been connected with any compact village community or that any of his collaterals actually carried on agricultural operations. Mr. Niaz Mohammad is unable to point out to any evidence that might controvert these facts but he argues that the mere fact that the vendor's family belongs to one of the dominant agricultural tribes of the Lahore District is by itself sufficient to shift the onus on to the defendant to prove that its members are not governed by custom, even though they have never belonged to a village community and had never, so far as is known, followed agriculture as a profession. In other words he argues that every member of an agricultural tribe must be presumed to be governed by custom regardless of his residence, occupation, connexion with village life and family tradition. But, as pointed cut by Lal Chand, J. (Johnstone, J. concurring), in the well-known case of *Muhammad Hayat Khan* v. *Sandhe Khan* (1), the mere fact that a person belongs to a well-known agricultural tribe is not by itself sufficient to raise a presumption that his power of alienation over property, ancestral or acquired, is restricted. As observed by the learned judge at p. 274 of the Report :

> In order to apply the initial presumption against the power of alienation laid down by the Full Bench judgment in *Gujar* v. *Sham Das* (2) it is necessary to prove, not merely that the family belongs to an agricultural tribe, but that its main occupation is agriculture. As further explained in *Ramji Lal* v. *Tej Ram* (3) the presumption in favour of restricted power

(1) [1908] 55 P. R. 1908=105 P. W. R. 1908.
(2) [1887] 107 P. R. 1887.
(3) [1895] 73 P. R. 1895.

of alienation applies to members of agricultural tribes who are members of village communities. But where a family, though members of of an agricultural tribe, has altogether drifted away from agriculture as its main occupation, and has settled for good in urban life and adopts trade, industry or service as its principal occupation, and means and source of livelihood, I am not inclined to hold that any initial presumption would exist or apply that the power to alienate ancestral immovable property by the members of such family is necessarily restricted.

These dicta of Lal Chand, J., have been cited with approval and followed in a number of rulings : see *Nathu* v. *Rafiq Muhammad* (4), *Ghulam Mohamed* v. *Bura* (5) and the more recent decision in *Prem Singh* v. *Darbara Singh* (*A.I.R.* 1923 *Lahore, p.* 557). Similarly Shah Din, J. (Robertson, J., concurring) in *Jamiat-ul-Nisa* v. *Hashmat-ul-Nisa* (6) refused to raise any presumption that a family of Awans settled in Ludhiana city was governed by custom. There, as here, it was found that for generations past no member of the family actually cultivated land ; but that the ancestors of the parties followed service or other independent means of livelihood and had acquired agricultural land in a village merely as means of investment. At p. 564 of the Report the learned judge remarked :

> Unless, therefore, it can be predicated in this case, upon the materials before us, that there is a definite rule of customary law which governs the parties to this appeal in matters of succession, we must fall back for the decision of the point in issue upon the personal law, though ostensibly the tribe to which the parties belong may be said to be governed generally by custom and not by Mahomedan law. Starting then with these premises, we have to ascertain whether it has been shown, having regard to the nature of the property in dispute, to the parties' caste and station in life, to their occupations and their social environments and to the rule of succession which may have been observed in the family in the past, that the application of the personal law must be excluded in favour of a well-defined rule of custom by which the parties are governed in matters of inheritance.

It is well known that the foundation of the rule of Punjab customary law, which restricts the powers of a male proprietor to alienate ancestral land is that in most Punjab villages the land was held by members of certain tribes on principles of agnatic relationship. As explained by Roe, J. (who it may be remarked was one of the leading exponents of the agnatic theory) in the leading case of *Gujar* v. *Sham Das* (2), the basis of the rule is that in most of the Punjab villages land is held by a male proprietor :

> as a member of a village community which at no distant period held the whole of their lands jointly recognizing in the individual member only a right of usufruct, that is a right to enjoy the profits of the portion of the common land actually cultivated by him and his family, and to share in those of the portion still under joint management. In such a community the proprietary title and the power of permanently alienating parts of the common property is vested in the whole body.

Again in *Sita Ram* v. *Raja Ram* (7), the said learned judge observed that :

> the whole principle underlying the enjoyment of and succession to land in villages held by a body of proprietors belonging to one tribe or descended from a common ancestor is that the land does not belong absolutely to the individual holder for the time being ; it belongs to the family or community.

Now it will be conceded that by no stretch of reasoning can such a state of things be predicated with regard to a family, that is not known to have ever lived in a village, or held land on communal basis, the mere fact that they belong to a tribe whose members usually form compact village communities being wholly immaterial. Indeed, if persons belonging to such tribes leave village life, migrate to towns, drift away from agriculture, depend on trade industry or service and adopt modes of life followed by non-agricultural communities, the presumption would be that they follow the personal law which governs their urban neighbours and associates.

For the contrary proposition Mr. Niaz Mohamad refers to a number of rulings which I now proceed to discuss. The first case cited was *Kasim* v. *Hasham* (8). This case related to Lohars of the small town of Kunjah in the Gujrat District, who along with Tarkhans, were found to own most of the agricultural land there and formed a compact village community and whose main occupation was agriculture. The case, instead of supporting the appellant, is really against him, as it shows that persons belonging to a non-agriculturist tribe may, by

(4) [1913] 270 P. L. R. 1913=20 I. C. 207=171 P. W. R. 1913.
(5) [1920] 14 P. W. R. 1920=2 L. L. J. 27=54 I. C. 367=8 P. L. R. 1920.
(6) [1909] 124 P. R. 1908=4 I. C. 638=3 P. L. R. 1909.
(7) [1892] 12 P. R. 1892 (F.B.).
(8) [1906] 39 P. R. 1906=98 P. L. R. 1906.

adopting agriculture as their main source of livelihood and forming themselves into a village community, he proved to adopt customary rules of succession. The next case relied on was *Mt. Mahtab Bibi* v. *Mt. Hussain Bibi* (9), where the question to be decided was whether a Kashmiri carrying on the business of a comb-maker in the town of Jhelum was competent to devise by will the whole of his property in favour of his daughter, and it was proved by a large volume of evidence that Kashmiris of Jhelum town had been making bequests of self-acquired property unfettered by the rules of Mahomedan law. The case has obviously no bearing on the point to be decided here.

Mr. Niaz Mohammad next referred to *Muhammad Din* v. *Ahmad Din* (10), and *Rahim Bakhsh* v. *Umar Din* (11), both of which were cases of Arains, residents of Lahore city. In the former, it was found as a fact that though the parties resided in the town their main profession was agriculture and they actually cultivated their own land which was situate in the suburbs of the town. In the latter case, the parties were Gulfrosh Arains and the only question involved was as to the power of a proprietor to make wills, in derogation of the restrictions placed on testamentary power by Mahomedan law. *Taj Muhammad* v. *Sayad Muhammad* (12), again was a case of Arains of Jullundur city, relating to the power of making wills, and there also it was found that these Arains had consistently exercised full testamentary power unrestricted by the rules of Mahomedan law. It is clear that none of these rulings touches the point now before us.

On a review of the authorities, and after giving full consideration to the arguments of the learned counsel, I must hold that the onus to prove that the power of the vendor in this case to alienate ancestral land was restricted was rightly placed on the plaintiff-appellant.

Now let us see whether the plaintiff has succeeded in discharging this onus. Reliance is placed on two instances in the family of the vendor, in which it is alleged that custom and not Mahomedan law was followed. The first of these is the case of Muhammad Jamil, a cousin of the vendor, who is alleged to have succeeded to the whole of the estate left by his father to the exclusion of his mother. The only witness who gave evidence relating to this matter is P.-W. 4 Saif-ul-Haq, a clerk in the Military Accounts Department at Lahore. No mutation or other revenue entry relating to the succession to Muhammad Habib's property was referred to nor has any member of the family of Muhammad Habib, who would have direct knowledge of the facts relating to this succession been produced. It is obvious that the oral testimony of Saif-ul-Haq, who is a young man 27 years of age, is insufficient to prove this instance.

The second case in which custom was alleged to have been followed in the family is a decision of Lala Kundan Lal, Munsif, Lahore, *In re, Dina Nath* v. *Mt. Bhagan, etc.*; decided on the 2nd of February 1914 (Ex. P-9). But that was a case in which the ancestors of the then plaintiff Dina Nath, who were the proprietors of certain agricultural land in mauza Sultanpur, one of the suburbs of Lahore, had allowed one Allah Bakhsh to build a house on an open site on the usual non-proprietary tenure. On Allah Bakhsh's death a dispute arose as to whether the site underneath the house built by Allah Bakhsh would revert to the proprietor or would be taken by his daughter Mt. Barkat Bibi or by his collaterals Siraj Din, etc. It had to be only incidentally decided whether the defendants were governed by custom or Mahomedan law. The main question in issue was whether the site would, on Allah Bakhsh's death, revert to the latter. A perusal of the judgment shows that very little evidence on the rule of succession prevailing in Allah Bakhsh's family was led, and ultimately the case was decided in favour of the proprietor. It is obvious that this case is of no value as an instance in support of the point now in issue.

As against this we have the important fact that on the death of Tafakhar Ahmad, the elder brother of the vendor

(9) [1913] 17 P. R. 1913=249 P. L. R. 1913=15 I. C. 556=124 P. W. R. 1912.
(10) [1915] 26 P. R. 1915=27 I. C. 577=31 P. L. R. 1915.
(11) [1915] 49 P. R. 1915=243 P. L. R. 1915=29 I. C. 382=111 P. W. R. 1915.
(12) [1916] 122 P. R. 1916=48 P. L. R. 1917=34 I. C. 126=94 P. W. R. 1916.

Iftikhar Ahmad, the latter claimed one-sixth share in his property according to Mahomedan law. In 1915 he actually instituted a suit against Mt. Mehra and Mt. Malan, the widows of the deceased brother, and Mt. Rahman Bibi, his daughter, and in the plaint it was definitely asserted that the family was admittedly governed by the *Shara"* Reference was also made to a *fatwa* given at the instance of the parties by the Anjuman-i-Numania, Lahore, to the effect that the property of the deceased was divisible in accordance with Mahomedan Law shares. In the litigation Iftikhar Ahmad produced a number of witnesses to prove that the family was governed by Mahomedan law and he ultimately succeeded in obtaining a decree in his favour against the widows and daughters of his brother : (Ex. D. 5.)

It is clear from the above discussion of the evidence that the plaintiff has not only been unable to prove any instances in the family where custom was followed but that, on the other hand, there is at least one instance in which his own father succeeded to his brother under Mahomedan Law.

Counsel next relied upon certain instances from amongst Kambohs of the suburbs of Lahore. He first referred to Ex P. 10, which is a judgment *in re Mahi* v. *Amir Bibi* passed by a Munsif on the 29th May 1889. The parties to that case were Kambohs, resident of Lahore and the land in dispute was situate in mauza Naulakha. The dispute related to a claim by a widow co-sharer for partition of a joint khata, and it was held that the widow co-sharer in possession of a life-estate had no right to claim partition in her lifetime. The sole question litigated was whether a widow co-sharer could, under the Punjab Land Revenue Act, claim partition. The question as to whether Mohomedan law or custom governed the powers of alienation among Kambohs was neither considered nor decided.

Ex. P. 7 is a decision by the Land Acquisition Officer, Lahore, between certain Kambohs to the effect that collaterals were entitled to take the compensation money in preference to daughters. The judgment is a very brief one and does not state to what place the parties belonged. Ex. P 8 is a judgment of the Divisional Judge, Lahore, *in re Nur Din* v. *Mt. Bhagan*, dated the 30th of March 1894. The case related to the Kambohs of Garhi Shahu, and it was held that a widow was not entitled to alienate property without necessity. Ex. P. 16 is an ex-parte judgment also relating to Kambohs of Garhi Shahu. The defendant in that case did not appear and no evidence was led on the question of custom. The last instance relied upon by Mr. Niaz Muhammad is Ex. P-4, a judgment, *in re* ; *Hassan Din* v. *Hukam Din* by a Munsif 1st class, Lahore, on the 21st of March 1921. It again relates to Kambohs of mauza Ichhra where, as is well known, many agriculturists cultivate lands with their own hands. It is obvious that none of those judgments is of any assistance in determining the rule of succession and power of alienation of a male proprietor belonging to the family of the plaintiff. The oral evidence led by the plaintiff is worthless and has not been discussed before us. Mr. Niaz Mohammad did not place any reliance upon the so-called instances of succession, deposed to by these witnesses, but with regard to which they were unable to give the necessary particulars.

After a careful examination of the evidence on the record I have reached the conclusion that the plaintiff-appellant has failed to discharge the onus that lay on him to prove that his family was governed by custom and not by Mahomedan law, and that his father did not possess unrestricted power of alienation over ancestral property. I must, therefore, hold that he had no locus standi to contest the sale in question. In this view of the case it is not necessary to go into the question of necessity. It need only be mentioned that Mr. Niaz Mohammad has not contested the finding of the lower Court that full consideration had passed or that the sale-proceeds were invested by the vendor in a bank.

For the foregoing reasons I would dismiss the appeal with costs.

Agha Haidar, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1927 Lahore 647 (1)

DALIP SINGH, J.

Khushdil and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1015 of 1926, Decided on 29th November 1926, from an order of the 1st Cl. Magistrate, Jullundur, D/- 26th August 1926.

Penal Code, S. 75—Long time passed since previous conviction—Court may not enhance sentence.

Where long period had elapsed since the previous conviction, *Held*: there was no need to apply S. 75. [P 647. C 2]

L. Saunders—for Appellants.

Judgment.—Khushdil and Ghulam Rasul, appellants, have been sentenced under S. 457/75, I. P. C. for breaking into the house of Aziz Din, Sub-Inspector, and stealing a belt and under Ss. 457/511, I. P. C. for attempting to break into the house of Sharif on the same night. They have been sentenced to seven years' rigorous imprisonment each and also under S. 565, Criminal P. C., to report to the police for five years.

The facts as established by the prosecution evidence are that Sharif, P. W. No. 2, woke up on hearing a noise and found the two appellants endeavouring to break into his house. He called certain of his neighbours and proceeded to try and catch them. He also went to the Sub-Inspector and there it was discovered that the Sub-Inspector's house had been broken into previously and his property was lying scattered about. The appellants were finally arrested in a field in which they had concealed themselves. At the time of their arrest they seem to have offered some resistance and injured though slightly, one Faqir Mohammad constable. The appellants were found in possession of an *ala naqab* and a *takwa* respectively. Also Khushdil produced Ex. P-15, the belt of the Sub-Inspector, next morning from a field where it had been buried.

The evidence of Sharif, Barkat Beg and others leaves no doubt that these appellants were endeavouring to break into the house of Sharif. Counsel for the appellants contends that the evidence does not amount to anything more than proof of preparation for burglary. I do not see that where the appellants are found actually endeavouring to break into a house how it can be held that this was only a preparation and not an attempt. I, therefore, consider that the accused have been rightly convicted under S. 457/511.

As regards the burglary in the house of the Sub-Inspector: the production of the belt by Khushdil in the circumstances of this case is sufficient to prove that he was one of the burglars and the fact that Ghulam Rasul was found in his association shortly afterwards endeavouring to break into the house of Sharif and the fact that Ghulam Rasul alone had an *ala naqab* seem to point irresistibly to the inference that Ghulam Rasul was also the companion of Khushdil. I therefore consider that the appellants have been rightly convicted under S. 457.

There remains the question of sentence. I find that Ghulam Rasul has two previous convictions: one on 23rd April 1913, under S. 380, Indian Penal Code, and one on 23rd May 1922, under S. 411/75, I. P. C. Khushdil has the following previous convictions. (1) On 5th June 1901, under S. 411, I. P. C. (2) On 22nd December 1905, under S. 379, I. P. C. (3) On 11th April 1908, under S. 379, I. P. C.

I do not consider, in view of the length of time that has elapsed in the case of Khushdil from his last conviction, that there is any need to apply S. 75 and I consider also in the case of Ghulam Rasul that though S. 75 might be applied there is no reason to distinguish his case from that of Khushdil. I, therefore, accept the appeal to this extent that I reduce the sentence to five years' rigorous imprisonment in each case, and I further order that under S. 565, Criminal P. C., the appellants should notify their residences as provided by law after release for a period of three years from the date of the expiration of their sentences. The appeal is otherwise dismissed.

R.D. *Sentence reduced.*

A. I. R. 1927 Lahore 647 (2)

SHADI LAL, C. J.

Sri Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 596, of 1927, Decided on 20th May 1927, reported by the S. Judge, Ambala, on 3rd March 1927.

Cantonments Act (1924), *S.* 118 (1).(*c*)—*Takhtposh or moveable wooden platform does not fall within Cl.* (*c*).

A takhtposh or moveable wooden platform cannot be held to be "earth, or material of any discription, or any offensive matter, or rubbish" within the meaning of Cl. (c), S. 118 (1). [P 648 C 1]

Facts.—On a complaint filed by the Cantonment Authority of Ambala Cantonment, Sri Ram, a shop-keeper, in the cantonment Sadar Bazar, was convicted under Cl. (c) of S. 118 (1) Cantonments Act 2 of 1924, for keeping or depositing a takht posh, or wooden platform, in front of his Shop No. 5087, in the Sadar Bazar and was sentenced to pay a fine of Rs. 30.

Grounds.—Cl. (c) of S. 118 runs as follows:

Whoever deposits or causes or permits to be deposited, earth or materials of any description, or any offensive matter, or rubbish ..... in any street or other public place or waste or unoccupied land under the management of the Cantonment authority, shall be punishable with a fine which may extend to Rs. 50.

A takhtposh or moveable wooden platform does not fall within the purview of the clause, which only prohibits deposit of earth, or materials, or any offensive matter or rubbish. A takhtposh is none of these, and, in my opinion, the petitioner, Sri Ram, has not committed any offence punisbable under this clause. The placing or depositing of takht poshes in front of shops is obviously meant to be regulated by a bye-law framed by the cantonment authority, under S.282 of the Act, vide Cl. 13 of the said section. The accused has, therefore, I consider, been wrongly convicted, and the case is submitted to the Honorable High Court with a recommedation that his conviction and sentence be set aside, and the fine refunded.

Order.—I agree with the learned Sessions Judge that the takht posh or moveable wooden platform cannot be held to be "earth, or material of any description, or any offensive matter, or rubbish" within the meaning of Cl. (c) of S. 118 (1) Cantonment Act (2 of 1924). Accordingly, I set aside the conviction and the sentence and direct that the fine, if realized, be refunded to the accused.

R. D. *Conviction set aside.*

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* A. I. R. 1927 Lahore 648

MARTINEAU AND DALIP SINGH, JJ.

Durga Datt Jagan Nath—Plaintiffs—Appellants.

v.

Ganesh Das Ishar Das—Defendants—Respondents.

F. A. No. 2721 of 1922, Decided on 10th April 1926, from the judgment of the Sr. Sub-Judge, Delhi, D/- 31st July 1922.

* *Contract—Construction—Contract for sale of goods — Goods to be delivered when arrived—Damages for non-delivery will be with regard to date of actual arrival of goods.*

Where, in a contract of sale of goods, it was stipulated that patterns and invoices were to be delivered when they arrived, that the sellers were to give intimation to the buyers of the arrival of the goods, that when the goods arrived the buyers were to take delivery on payment to the bank, and that they would be liable for godown rent if they did not take delivery atonce :

Held : that the time for performance was to be the time when the goods actually arrived, and for the calculation of the damages regard must be had to the actual dates of arrival of the goods and not to the dates on which the goods might have been expected to arrive : *Civil Appeal No.* 3259 *of* 1921 and *A. I. R.* 1927 *Lah.* 557, *Ref.* [P 649 C 1, 2]

Sardha Ram and *B. Narain*—for Appellants.

Tek Chand and *Mehr Chand Mahajan*—for Respondents.

Judgment. — The parties are cloth merchants of Delhi. On the 1st December 1916 the defendant agreed to sell to the plaintiffs 75 cases of white shirting D. 1 of R. J. Wood & Company's Office of the November, December, and January. February, March and April shipments. They did not deliver 37 cases of the February, March and April shipments and the plaintiffs have accordingly sued for damages for breaches of contract, together with interest claiming Rs. 18,394-2-3 in all. The defendants deny liability, pleading that they did not receive 33 out of the 37 cases from the persons from whom they had bought them, and that the plaintiffs did not demand the goods.

The Subordinate Judge found for the plaintiffs, but has given, decree for only Rs. 1,418-12-0 calculating the damages with reference to the market rates prevailing at the times when the goods might have been reasonably expected to arrive, which he takes to be three months after shipment. The plaintiffs have appealed.

There is nothing in the contract to show that the delivery of the goods by the defendants to the plaintiffs was contingent on the defendants receiving them from their own sellers and we agree with the lower Court's finding on this point.

On the question of demand the lower Court held that as the defendants had undertaken to send invoices and patterns and to report the arrival of the goods to the plaintiff, it was not incumbent on the latter to make a demand for the goods. It is unnecessary to discuss this point, as we think that the making of the demand has as a matter of fact been sufficiently proved by the evidence of the plaintiffs' agent Jhandu Mal (P. W. 13), who states that they made several demands and that he went personally also to make them. The defendant Ishar Das though he went into the witness box, did not contradict Jhanda Mal's statement on that point and we, therefore, see no good reason for rejecting it.

It is argued for the defendants that the plaintiffs have not proved that they were ready and willing to perform their part of the contract, but we must decline to go into this question as although an issue was framed by the lower Court on the point the defendants did not raise it in their pleas. They pleaded that the plaintiffs did not tender the money but that is a different matter.

Similarly, we cannot entertain the arguments that the goods contracted for did not arrive, as the plaintiffs distinctly stated in the third paragraph of their plaint that the goods arrived and specified the periods during which the several shipments arrived; and these allegations were not denied by the defendants in their pleas.

The main question in the case is whether the dates for the performance of the contract were the dates on which the goods might reasonably have been expected to arrive in Delhi as held by the lower Court, or the actual dates of their arrival, as contended by Mr. Sardha Ram on behalf of the appellants. It was stipulated in the contract (p. 7 of the paper-book) that patterns and invoices were to be delivered when they arrived, that the defendants were to give intimation to the plaintiffs of the arrival of the goods, that when the goods arrived the plaintiffs were to take delivery on payment to the bank, and that they would be liable for godown rent if they did not take delivery at once. This shows that the time for performance was to be the time when the goods actually arrived. The learned Subordinate Judge thinks that if the goods after having been shipped at the proper time, arrived after great delay the buyers would not have been bound to take them up. We have, however, merely to construe the contract from its terms, and we are of opinion that the appellants' interpretation is the correct one, notwithstanding that in other cases decided by this Court (see Civil Appeals Nos. 3259 of 1921 and *Prag Das-Budhsen* v. *Munni Lal* (1) relating to contracts of a similar nature, a different view has been taken as to the due date for performance. We hold that for the calculation of the damages regard has to be had to the actual dates of arrival of the goods and not to the dates on which the goods might have been expected to arrive.

It is stated in the plaint that the February shipment arrived from September to December and the April shipment from September 1917 to March 1918. The dates of the various months are given in Ex. P. W. 1/1, page 8 which is proved by Mr. Shariff, the Manager of R. J. Wood & Co.'s Office, and has been prepared from his registers. The last dates are the 4th October 1917, for the February shipment, the 7th December 1917, for the March shipment and the 4th March 1918, for the April 1917 shipment. These are the dates of the arrival of the railway receipts, and ten days may reasonably be added for the time which it would take for the goods to reach Delhi from Bombay. Thus the due dates for the February, March and April shipments, respectively, would be the 14th October 1917, the 17th December 1917, and the 14th March 1918.

The rates prevailing on these dates are given in entries in the account books produced by P. Ws. 4 and 11, the rate on the 14th October 1917, being Rs. 24-4-0 per piece (p. 19 of the paper-book); the rate on the 17th December 1917, Rs. 24-3-0 (p. 36) and the rate on the 14th March 1918, Rs. 25 (p. 20).

It is contended for the respondents that the rates have not been proved as the witnesses in whose books they are shown have stated nothing more than that the

(1) A.I.R. 1927 Lah. 557.

copies which they produced are true translations of the entries. It would appear however, that the defendants did not really dispute the correctness of the entries in the books, for they made no attempt to cross-examine the witnesses in regard to them; so that, although the examination of the witnesses was defective, we think that in the circumstances the rates given in the books may be taken to be the correct rates. A further contention is that it has not been shown whether the rates covered were the rates for ready goods or for forward goods, but on this point also there was no cross-examination, and we think the argument has little force. We Therefore take the rates shown in the books to be those prevailing on the due dates. A deduction of 4 annas per piece has however, to be made as the rates entered are the retail rates, and it is in evidence (see statement of D. W. 1) that goods sold wholesale are 4 annas per piece cheaper. The contract rate, including the sellers' profit and the expenses payable by the buyers, was Rs. 16 per piece. The difference between the contract rate and market rate is thus Rs. 8 per piece for the February shipment Rs. 15 for the March shipment, Rs. 8-12-0 for the April shipment. But the plaintiffs claimed damages in respect of the February shipment at the rate of only Rs. 7-11-0 and they must be limited to that.

The damages for the non-delivery of the 12 cases (i. e. 600 pieces, of the February shipment, 12 cases of the March shipment and 13 cases of the April shipment come to Rs. 612-8-0, Rs. 762-8-0 and Rs. 687-8-0 respectively. The total to which the plaintiff is entitled for damages, is therefore, Rs. 15,062-8-0. We do not think that any interest should be allowed.

We accept the appeal and give the plaintiffs a decree for Rs. 15,062-8-0 with proportionate costs in both Courts.

G.B. *Appeal accepted.*

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* A. I. R. 1927 Lahore 650

TEK CHAND, J.

Hasni—Accused—Petitioner.

v.

Emperor—Opposite Party.

Crl. Rev. Pet. No. 453 of 1927, Decided on 24th June 1927, from an order of the Sub-Judge Montgomery, D/- 7th February 1927.

* (a) *Criminal P. C., S. 364—Examination of accused by putting a long composite question is irregular.*

Where the magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law. [P 650 C 2, P 651 C 2]

(b) *Evidence Act, Ss. 24 and 30—Confession.*

Where an accused charged under S. 380 was asked whether he had stolen the mare and he was arrested while riding it and the accused said "yes": *Held*, that the answer did not amount to a confession. [P 650 C 2]

(c) *Penal Code, S. 378—Jointly owned animal, in possession of one co-owner, taken away by the other—Latter is not guilty unless he acts dishonestly.*

If a jointly owned animal is actually in possesion of one co-owner, and is taken away by the other co-owner, this circumstance alone would not be sufficient to bring the act of the accused within S. 378. The Act must be done "dishonestly" as defined in the Code. [P 651 C 1,2]

L. Saunders—for Petitioner.

C. L. Mathur for *Govt. Advocate*—for the Crown.

Judgment.—The petitioner Hasni has been convicted under S. 380, I. P. C., for having stolen a mare from the stable of P. W. 1 Dildara in Chak 551-5L in the Montgomery district. The animal is alleged to have been stolen on the night between the 4th/5th November 1926. The petitioner was arrested at Dijkot in the Lyallpur district on the 6th of November while riding the mare, on the strength of suspicion raised by his worn out appearance which indicated that he had been riding the mare a long distance without sleep. The petitioner was convicted by the Magistrate, First Class, Montgomery under S. 380 and sentenced to two years' rigorous imprisonment. The learned Magistrate thought that the accused had admitted his guilt and it was practically on his statement that the conviction was based.

On appeal the learned Sessions Judge very properly came to the conclusion that there was no admission of guilt made by the petitioner, in answer to the question that had been put to him by the trying Magistrate. The Magistrate had, as pointed out by the learned Sessions Judge, instead of asking separate questions to the accused put him a long composite question enquiring whether he had stolen the mare and whether he had been arrested while riding it. In answer to this question he replied "Yes." The learned Sessions Judge quite rightly points out that an answer given in the affirmative to a question of this kind

does not amount to a confession that the accused had stolen the animal. This is also borne out by the fact that immediately after making the statement the accused definitely pleaded not guilty and entered upon his defence.

The lower Courts have disbelieved the evidence of the wajtakkar witnesses and also that of the tracker. The learned Session Judge, however, maintained the conviction on the following facts: (1) That the mare was stolen on the night between the 4th/5th November in the Montgomery district; (2) that the accused was arrested riding in the Lyallpur district on the 6th November, and (3) that the accused had a worn out appearance at the time, and on being challenged gave false name and a false residence. The defence put forward by the accused was that the animal had been purchased jointly by the complainant Dildara and the accused. This defence, though supported by a number of witnesses, has been rejected merely on the ground, that in his statement before the Magistrate, the accused did not allege joint ownership of the mare. However, the examination of the accused by the Magistrate was, as shown by the learned Session Judge himself, irregular and not in accordance with law. The accused could hardly be expected to allege joint ownership, in answer to the question that was put to him.

I have examined the evidence of the prosecution witnesses and find that P. W. 1 Dildara was definitely asked in cross-examination as to whether the animal belonged to him and the petitioner jointly. Dildara, of course, gave a reply in the negative, but the fact that such a question was put indicates that this defence was present to the mind of the accused and his counsel, from the very beginning, and that it was not an afterthought that had struck them after the charge had been framed.

On the record it seems to me established that the mare belonged jointly to the complainant and the petitioner. Even if the story of the partition, as given by the defence is not accepted, the fact remains that the petitioner and Dildara were joint owners of the animal. If a jointly owned animal was actually in possession of one co-owner and was taken away by the other co-owner, this circumstance alone would not be sufficient to bring the act of the accused within S. 378, I. P. C. The act must be done "dishonestly" as defined in the Indian Penal Code. On the record I am unable to find any indication, that there was any dishonest intention on the part of the petitioner.

If the animal was jointly owned, the conduct of the petitioner in riding a long distance throughout the night and giving a false name, when apprehended, are capable of innocent explanation.

I would, therefore, accept this petition for revision, set aside the conviction and sentence passed against the petitioner and direct that he be acquitted.

R.D. *Conviction set side.*

A. I. R. 1927 Lahore 651

DALIP SINGH, J.

Mir Mahomed Khan—Appellant.

v.

Surjan Mal & Co.—Respondents.

Misc. F. A. No. 295 of 1927, Decided on 22nd June 1927, from an order of the senior Sub-Judge, Simla, D/- 16th November 1926.

(a) *Civil P. C., S. 47—Executing Court ordering amendment of decree—Order is appealable under S. 47.*

An executing Court has no power to amend a decree, but when it does pass an order to amend any decree, its order comes within the purview of S. 47. [P 652 C 2]

(b) *Execution—Apart from question of jurisdiction, executing Court cannot consider whether decree is valid or invalid.*

When a decree is not passed without jurisdiction, an Executing Court cannot consider whether the decree is invalid or not: *A. I. R.* 1925 *Cal.* 907 (*F. B.*), *Dist.* [P 652 C 2]

(c) *Civil P. C., S. 47—Executing Court can decide if decree is a nullity—Such decision is within S. 47: (Obiter).*

The executing Court can consider the question whether the Court which passed the decree had no jurisdiction to pass it; in other words whether the decree is a nullity, and such a decision would come under S. 47: *A. I. R.* 1925 *Cal.* 907 (*F. B.*), *Appr.* [P 652 C 2]

Mahomed Amin Khan—for Appellant.

Badri Das—for Respondents.

Judgment.—The facts of this appeal are as follows:

The decree-holder firm, Messrs. Surjan Mal & Co., Simla, brought a suit against the judgment-debtor, K. B. Mir Mahomed

Khan, Advocate, Simla, for partition of certain property and for mesne profits. The parties compromised the case and, though the compromise is not very regularly recorded, yet, reading the record of the original suit, I am quite convinced that the parties did agree that the suit should be compromised and on the terms that the defendant should pay Rs. 28,870 in all to the decree-holder and that the title to the property should pass to the judgment-debtor from the 31st December 1925, and that until the whole of the money was paid, the decree-holder was entitled to half the excess of the income from the property over the expenditure in connexion with the property.

In recording this order about this compromise the Court, however, varied to some extent the terms of the compromise. Instead of giving the decree-holder a lien on the income of the property less expenditure up to the date of total recovery, it made the payment of the total decretal amount a condition precedent to passing title to the defendant. A decree was drawn up embodying the terms of the order of the Court and in execution of that decree the decree-holder has attached the property in dispute for what he claims is the money-decree of Rs. 28,870. The trial Court on the objections taken by the judgment-debtor to the sale and attachment of the said property and on the reply of the decree-holder to those objections proceeded (1) to pass an order declaring that the decree should be amended so as to bring it in accordance with the terms of the compromise as it really was between the parties. I consider that the Court was correct in thinking that this was the real compromise between the parties both after considering the various orders passed by the Court at the time of the compromise and because in the trial Court it was not asserted by the judgment-debtor that the compromise was other than as the decree-holder stated it to be. (2) It held that the title had passed to the judgment-debtor and the property could, therefore, be attached and sold and that the decree was executable.

The judgment-debtor has appealed and, after the case had been heard, he also put in an application to revise the order of the Court amending the decree, It seems to me necessary to deal with this last question first. I am not sure that any revision application to amend the decree was necessary because I do not think that the executing Court considered that it was dealing with the matter as an original Court, but did proceed to pass an order amending the decree in its capacity as executing Court. I am fortified in this finding by the fact that there is actually no amended decree on the record.

As executing Court, the Court had no power to amend the decree and there is no separate application for revision necessary because the order amending the decree would I think in the circumstances come within the purview of S. 47 and be appealable, and the Court, I think, must be taken to be purporting to act under S. 47. But this question by no means disposes of the case. The judgment-debtor contends that as the suit was a suit for partition and mesne profits and the compromise related to what amounted to half-share of the property for a sum of money, therefore the compromise was extraneous to the suit. With this contention I am unable to agree. It was the subject-matter of the suit which was compromised, for, a partition suit necessarily involves both a declaration of title and a right to possess, and it was this which was compromised by the judgment-debtor agreeing to pay Rs. 28,000 and odd to the decree-holder in lieu of his rights in the property.

Further, in any event the decree having been passed, it was not without jurisdiction even if it was illegal, and it was not for the executing Court to consider whether the decree was invalid or not in the limited sense of 'illegal.' I agree with the Full Bench case of *Gora Chand Haldar* v. *Profulla Kumar Roy* (1) that the executing Court can consider the question whether the Court which passed the decree had no jurisdiction to pass it; in other words, whether the decree is a nullity, and I further consider that such a decision would come within the meaning of S. 47. But I do not consider that this is such a case at all. It, therefore, becomes clear that the decree-holder has a right to execute the decree against the judgment-debtor and the question as to whether he can attach his own property or not is a question for himself to consider

(1) A. I. R. 1925 Cal. 907=53 Cal. 166 (F. B.)

and it is, surely, not for the judgment-debtor to object to.

It has been pointed out to the petitioner that the result of this decision is, that if he presses the revision petition or appeal qua the order of amendment he is only damaging himself because, as a result of it, if this judgment stands, he will not be entitled to the property until complete payment of the decretal amount, whereas if the decree were interpreted as conveying title to him on the 31st December 1925, at any rate he would be the owner of the property. He, however, has chosen to persist in his appeal. I dismiss the revision petition holding that there was no separate order on this point by the Court to be revised. I accept the appeal so far as to declare that the Court had no power to order the decree to be amended, but I hold further that the decree can be executed for the full decretal amount against the judgment-debtor. As the judgment-debtor appellant has practically failed in his contentions he must pay the costs of the decree-holder.

J.V. *Appeal partly accepted.*

A. I. R. 1927 Lahore 653

ADDISON, J.

Umar Din—Judgment-debtor—Appellant.

v.

Ghulam Muhammad and *others* — Decree-holder and Judgment-debtors — Respondents.

Misc. S. Appl. No. 423 of 1927, Decided on 4th June 1927, from an order of the Dist. Judge, Amritsar, D/- 13th December 1926.

Limitation Act, Art. 182 — *Application to summon witnesses to resist judgment-debtor's objection is a step-in-aid.*

In order that an application by the decree-holder should serve as a step-in-aid, it is not necessary that it should be made in a pending execution application.

An application by the decree-holder to summon witnesses to resist an objection by the judgment-debtor is a step-in-aid : *A. I. R.* 1922 *All.* 432 ; 22 *C. W. N.* 1027 ; and *A. I. R.* 1927 *Mad.* 288 ; *Foll.*; *A. I. R.* 1925 *Pat.* 459 ; 26 *C. L. J.* 115; and 2 *Pat. L. J.* 5; *Ref.* [P 654 C 1]

Mool Chand for *Ghulam Rasul*—for Appellant.

Niaz Muhammad—for Respondents.

Judgment.—The sole question in this second appeal is whether the execution application dated the 22nd March 1926, is within time. The facts are as follows :

A money-decree was obtained against Umar Din, Ghulam Din, and the representatives of one Taj Din, deceased, on the 16th March 1918. It was not stated clearly in the decree that Taj Din's representatives were not personally liable. Three applications for execution were presented from 1919 to 1921. The fourth application for execution was presented on the 29th August 1921. It named all the judgment-debtors and asked especially for the attachment and sale of a graveyard which had been purchased by the deceased Taj Din. Various objections were taken to this application in the course of which it came to light that the decree did not clearly state that Taj Din's representatives were not personally liable. Accordingly, on the 3rd August 1922, the decree was amended to show that Ghulam Din, and Umar Din, appellant, were personally liable under it, while Taj Din's representatives were not, though they were liable to the extent of Taj Din's estate in their hands. After this, on the 10th August 1922, the decree-holder's counsel stated that he desired the execution application of the 29th August 1921, to proceed against the representatives of Taj Din to the extent of his estate in their bands, while he also prayed for execution against Ghulam Din and Umar Din personally by attachment of their moveable property. An order in these terms was made the same day, as it is clear that the application for execution, dated the 29th August 1921, was allowed to continue as an application for execution of the amended decree, which only made clear that Taj Din's heirs were not personally responsible.

Thereafter, Taj Din's representatives, on the 3rd October 1922, objected to the attachment and sale of the graveyard of Taj Din on the ground that it was wakf. Their objections were dismissed on the 10th April 1923, but on appeal to the District Judge they were accepted on the 31st October 1923. On second appeal to this Court the District Judge's order was set aside and the whole matter remanded to be re-decided. The objections of Taj Din's representatives were accepted on

the re-trial by the executing Court on the 20th April 1923. No order of any kind, however, was passed upon the execution application of the 29th August 1921, which had remained pending on account of the objections. Finally, on the 22nd March 1926, the decree-holder again applied for execution. The Executing Court held that the application was time barred. The District Judge held the contrary. He further held that in any case the old application of the 29th August 1921 still survived and, therefore, the execution could proceed.

In my judgment the question, whether the old application of the 29th August 1921, still survived, was not before the District Judge. It is true that it was never dismissed but was left in the air when the objections of Taj Din's representatives were accepted on the 20th April 1925. The decree-holder, however, did not apply for the revival of that application, but put in a fresh application on the 22nd March 1926, and the question is whether it is within time.

I hold that it is within time by reason of the application of the decree-holder, dated the 10th December 1924, to summon witnesses to repel the objections put in by Taj Din's representatives. In my opinion that application was a step-in-aid of execution, though it was not made in the execution application proper. There is much authority on the point: a ruling on all fours in *Muhammad Siddiq Khan* v. *Misri Lal* (1), a decision of the Allahabad High Court; *Brojendra Kishore Roy* v. *Dil Mahmud* (2), decision of the Calcutta High Court is practically to the same effect; *Sheo Sahay* v. *Jamuna Prasad Singh* (3) went further and held that the mere examination of a certain witness in order to resist an objection made by the judgment-debtor to the execution of the decree was a step-in-aid as contemplated by Art. 182, Limitation Act. This goes very far: see also *Kedar Nath Dey Roy* v. *Lakhikanta Dey* (4) and *Surajmal* v. *Sarjog Prasad Singh* (5). The latest ruling on the subject is contained in *Mathonkandi Kannan* v. *Thayyil Pakkuthi Avvulla Haji* (6) where it was definitely laid down that

in order that an application by the decree-holder should serve as a step-in-aid, it is not necessary that it should be made in a pending execution application.

The application of the 22nd March 1926 for execution is clearly within time on my finding that the application by the decree-holder to summon witnesses on the 10th December 1924 to resist an objection by the judgment-debtors, was a step-in-aid of execution within the meaning of Art. 182 Limitation Act.

I therefore dismiss the appeal with costs.

J.V. *Appeal dismissed.*

(1) A. I. R. 1922 All. 432.
(2) [1918] 22 C. W. N. 1027=44 I. C. 604.
(3) A. I. R. 1925 Pat. 459=4 Pat. 202.
(4) [1917] 21 C. W. N. 868=40 I. C. 1005=26 C. L. J. 115.
(5) [1917] 2 Pat. L. J. 5=3 Pat. L. W. 208=38 I. C. 540=(1917) P. H. C. C. 54.
(6) A. I. R. 1927 Mad. 288=50 Mad. 403.

A. I. R. 1927 Lahore 654

FFORDE AND ADDISON, JJ.

Basanta—Accused—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 839 of 1926, Decided on 15th February 1927, from an order of the Sub-Judge, Ambala, D/- 31st May 1926.

Penal Code, S. 302—Prolonged thrashing deliberately administered with knowledge that such thrashing must cause death—Assailants are guilty of murder although striking vital parts is avoided.

If a man is killed as a result of innumerable blows none of which in itself is sufficient to cause death and if the assailants have deliberately avoided striking any vital parts, under some circumstances the inference may be drawn that by avoiding dealing blows upon vital parts of the body they showed that they did not intend to cause death but, rather, carefully avoided causing death. But on the other hand, if the circumstances show that a prolonged thrashing has been deliberately administered with the knowledge of the assailants that such a thrashing must in the ordinary course of nature result in death, the assailants are guilty of murder. They may avoid striking a vital part deliberately so as to put themselves in a position, if the assault is brought home to them, to plead that they never intended to do more than administer a thrashing. [P 656 C 1]

Moti Sagar—for Appellant.

Abdul Rashid—for the Crown.

Fforde, J.— Surjan, Indar Singh. Basanta, Daulat and Amru have been tried by the learned Sessions Judge under the provisions of S. 302, read with S. 34, I. P. C., for having murdered one Khushal Singh on the 15th of February 1926, by

beating him to death with lathis. The learned Sessions Judge has convicted all five persons under the provisions of S. 325, read with S. 34, I. P. C. He also convicted Amru and Daulat under S. 323, I. P. C. of having assaulted one Arjan Singh. Surjan has been sentenced to two years rigorous imprisonment and a fine of Rs. 500, Amru, to two years rigorous imprisonment and a fine of Rs. 1,000 for the offence under S. 325, and to six months rigorous imprisonment for the offence under S. 323, I. P. C.; and Daulat, who is convicted of the same offences as Amru, has received the same punishment. Basanta has been given five years rigorous imprisonment and a fine of Rs. 1,000. Indar Singh has died in jail, and accordingly his case does not come before us for consideration. The convicts have appealed against their convictions and sentences, and there is also a revision application by the Crown to alter their convictions to S. 302, I. P. C., and to enhance punishment by the appropriate penalty.

The facts are set out at great length in the judgment of the trial Judge, but may be stated very shortly. On the afternoon of the 15th of February 1926 the deceased and Arjan Singh (P. W. No. 10) were working with Hazura Singh and Tare Singh in the latter's sugarcane field. They loaded a cart with sugarcane and were proceeding to drive away with their load when, in doing so, the wheel of the cart passed over a portion of Ishar Singh's wheat field. This man complained of the damage to his wheat crop and an altercation ensued. There was a certain amount of scuffling and Khushal Singh and Arjan Singh ran up to the spot. Ishar Singh thereupon went off to his village which is about a mile distant and narrated the incident. About half an hour or so later, the four appellants and Indar Singh came from their village armed with lathis. On arriving at the place where Kushal Singh was working they proceeded to attack him, whereupon he fled, accompanied by Arjan Singh. The appellants pursued him for about a mile, overtook him, and Basanta struck and felled him. As he lay on the ground Surjan, Basanta and Indar Singh proceeded to belabour him with their lathis. The other two, Daulat and Amru, attacked Arjan Singh who continued his flight until Arjan Singh, lambardar, came to his assistance and his assailants thereupon withdrew.

The appellants Surjan and Basanta and the deceased Indar Singh administered such a prolonged hammering to Khushal Singh, deceased, that he died on being removed to the village, within an hour or so of receiving the injuries. The medical evidence is to the effect that he died of heart failure owing to the prolonged belabouring which he received. Two ribs were broken penetrating the lungs with the result that both pleural cavities were found to contain blood. Two arm bones were also broken and the whole of the back and buttocks were found on post mortem examination to have received innumerable injuries. The head was not struck and no vital organs were ruptured. The medical witness explains that the liver and spleen were not injured because the man was lying face downwards when he received the blows. He has no doubt at all that the deceased succumbed to a prolonged ruthless thrashing sufficient to cause death to any but a young and a very healthy man, and his opinion is that even in the case of a young and healthy man of good physique, injuries such as the deceased sustained though they might not necessarily cause shock resulting in death would very likely do so. The deceased was a man of some 50 years of age, and he may be presumed of normal healthy physique, except that he had a somewhat enlarged spleen and liver which owing to the fact that none of the blows fell on the front of his body, were not affected by these injuries.

That Basanta, Surjan and Indar Singh did attack and cause the death of Khushal Singh has been established beyond any reasonable doubt. There are four eyewitnesses to the assault, namely Arjan Singh, P. W. 10 Mt. Kauro, P. W. 9, Thamman Singh, P. W. 7, and Gullu P. W. 8. In addition there is a boy named Rattan Singh who was called by the Court and who has corroborated the whole story of the assault, but who did not know who the assailants were. This boy belongs to a different village. There is also P. W. 5, Amar Singh, a kanungo, who states that he saw Surjan, Basanta and Indar Singh with others start from the village armed with lathis, and he alleges that he heard them declaring their intention of attacking the deceased.

The only question which remains for determination is: What is the offence which has been committed by the appellants respectively, Mr. Moti Sagar has very strongly urged that they cannot be convicted of murder as death was not caused by the individual act of any one of the appellants and the circumstances do not warrant the common intent to kill him. Mr. Moti Sagar argues that the mere fact that no vital part was struck in itself precludes the inference that death was intended. There is, no doubt that if a man is killed as a result of innumerable blows, none of which in itself is sufficient to cause death, and if the assailants have deliberately avoided striking any vital part, under some circumstances the inference may be drawn that by avoiding dealing blows upon vital parts of the body they showed that they did not intend to cause death, but, rather, have carefully avoided causing death. On the other hand, if the circumstances show that a prolonged thrashing has been deliberately administered with the knowledge of the assailants that such a thrashing must in the ordinary course of nature result in death, the assailants are guilty of murder. They may avoid striking a vital part deliberately so as to put themselves in a position, if the assault is brought home to them, to plead that they never intended to do more than administer a thrashing.

In the present case the hammering which the dece sed received at the hands of Basanta, Indar Singh and Surjan was such that in my opinion the only possible inference to draw is that the assailants either intended to cause such bodily injury as they knew would be likely to cause the death of Khushal Singh, or that they intended to cause him such bodily injury as was sufficient in the ordinary course of nature to bring about his death. It has been urged by both Mr. Moti Sagar and Mr. Cooper that death was really an accident which the assailant did not foresee and did not contemplate at the time of the assault. I do not think that such a view is possible upon the facts of this case. The very fact that the man died although no vital organ was struck shows that the beating which he received must have been a prolonged and merciless one. This has been established beyond any doubt by the medical evidence. The learned Sessions Judge has formed an opinion that a number of blows must have been delivered many hours after the death of the deceased and seems to have inferred that it is possible that the body of the dead man had been belaboured for the purpose of showing a number of marks so as to make the case against the appellants a more serious one. This view has been emphatically refuted by the medical evidence.

The doctor who performed the post mortem cut into the issues and was satisfied on his examination that all the injuries were occasioned while there was life in the victim. Moreover, it is a well established medical fact that injuries of the nature described could only be caused while the body was still warm and the theory of the learned Sessions Judge that these injuries might have been inflicted upon the corpse after the inquest report had been made is according to all medical opinion an impossible one. I have, no doubt, that if the learned Sessions Judge had been satisfied as he should have been satisfied upon the medical evidence that all these extensive injuries affecting practically the whole back area of the body had been inflicted before death actually supervened, he would have inferred that the intention of the persons who caused these injuries was to beat the man to death. A number of authorities have been cited all of which turn upon the particular facts of each individual case and cannot be of any assistance to us in weighing the facts of the case before us and drawing inferences from those facts.

So far as Basanta and Surjan are concerned I have no doubt at all that when they attacked the dead man they had a common intent to inflict such injuries as they knew would be likely to cause his death, and, accordingly in my judgment they should have been convicted of murder under S. 302, I. P. C.; and I would, therefore, dismiss their appeals and accept the revision application presented by the Crown, alter their conviction to one under S. 302. I. P. C., and sentence them to transportation for life. As Surjan at the time of the offence was only 17 years old and appears to have been acting under the influence of his father and uncle, his

case, no doubt, will receive consideration from the proper authorities if steps are taken to invoke the Local Government's prerogative of clemency. As far as Daulat and Amru are concerned, as they did not take part in the prolonged beating from which Khushal Singh died it cannot be inferred that they shared the common intent of the other appellants to murder him. They, however, must have had a common intent to cause grievous hurt as the determined character of their pursuit and attack upon the deceased and upon Arjan Singh shows. They have, therefore, been rightly convicted under S. 325, I. P. C., read with S. 34, for the assault upon the deceased and they have also been rightly convicted under S. 323 read with S. 34 for their attack upon Arjan Singh. The sentence imposed by the learned Sessions Judge upon these two appellants is not inappropriate under the circumstances and I see no reason to interfere. I would, therefore, reject the application of the Crown for enhancement in their case and dismiss their appeals.

Addison, J.—I concur.

R.D. *Order accordingly.*

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* A. I. R. 1927 Lahore 657

SHADI LAL, C. J., AND JAI LAL, J.

Santu Ram and *others*—Plaintiffs—Appellants.

v.

Mt. Dodan Bai—Defendant—Respondent.

Second Appeal No. 582 of 1923, Decided on 6th May 1927, from a decree of the Dist. J., Multan, D/- 19th December 1922.

* *Hindu Law—Widow—Debts contracted by husband, time-barred at his death—Widow can bind his estate by acknowledging or paying them.*

A Hindu widow is entitled to bind the estate of her husband by acknowledging or paying debts contracted by the husband which have become barred by time, and there is no difference between a debt which had become barred by time during the lifetime of the husband and the one which becomes barred after his death, as the duty of the widow to pay time-barred debts of her husband is based on her pious obligation to discharge all his liabilities: 11 *Bom.* 320, *Foll.*; 39 *Bom.* 113, *Dist.* [P. 658, C. 1]

Har Gopal—for Appellants.

V. N. Sethi—for Respondent.

Judgment.—On the 15th January 1921, the appellant instituted a suit against the respondent for the recovery of Rs. 2,659-10-0, principal and interest, due on a balance struck by the latter. The defendant raised various pleas, but the one with which we are now concerned was that the estate of her deceased husband in her hands was not liable for the payment of the debt in question. The allegation of the plaintiff was that the husband of the defendant had originally borrowed money from him and that the balance was struck by the defendant, his widow, after his death on that account. It has been found that when the husband died the amount due from him to the plaintiff had already become time barred. The legal question that we have to determine on this appeal is whether under the Hindu law a widow can acknowledge liability for a debt which was due from her husband, but had already become barred by time before his death so as to bind the estate of the husband in her hands. The learned District Judge has answered the question in the negative and has declined to give the plaintiff a decree against the estate of the deceased.

The main ground given by the District Judge in support of his view is that, as the husband of the defendant had allowed the debt to become time barred during his lifetime, it may reasonably be inferred that he had declined to pay it and had, therefore, repudiated liability for the same, and consequently, following *Bhagwat Bhaskar* v. *Nivritti Sakharam* (1), he held that the widow was not entitled to bind the estate for payment of such a debt. *Bhagwat Bhaskar* v. *Nivritti Sakharam* (1) did not relate to the payment of a debt and there had been an express repudiation of the contract by the husband in a suit which was brought against him in his lifetime, and consequently it was held that the widow could not compromise the matter by recognising the contract after her husband's death when the limitation for enforcing it had expired so as to bind the estate. The facts in the present case, are distinguishable. There had been no repudiation by the husband in this case and we do not think that the mere fact

(1) [1915] 39 Bom. 113=27 I. C. 356=16 Bom. L. R. 738.

that the debt had become barred by time in his lifetime amounts to a repudiation by him of liability therefor.

Counsel for the appellant contended that the present case was fully covered by *Chimnaji Govind* v. *Dinkar Dhondev* (2). The report of that case shows that the debt had become barred by time during the lifetime of the husband and the widow acknowledged it after his death. The estate of the husband was held to be liable for the debt owing to its acknowledgment by the widow. There is ample authority in support of the proposition that a widow is entitled to bind the estate of her husband by acknowledging or paying debts contracted by the husband which have become barred by time, and we do not see any difference between a debt which had become barred by time during the lifetime of the husband and the one which becomes so barred after his death as the duty of the widow to pay time-barred debts of her husband is based on her pious obligation to discharge all his liabilities. The consequence is that the plaintiff is entitled to a decree for the amount claimed against the estate of Jhangi Ram, the deceased husband of the defendant and, accepting this appeal with costs throughout, we modify the decree passed by the Courts below accordingly.

J.V. *Appeal accepted.*

(2) [1887] 11 Bom. 320.

A. I. R. 1927 Lahore 658

FFORDE AND ADDISON, JJ.

Alla Rakha—Accused—Appellant.

v.

Emperor—Opposite Party.

Cr. Apl. No. 1240 of 1926, Decided on 23rd February 1927, from an order of the S. J., Lyallpur, D/- 20th November 1926.

Penal Code, S. 364—Incriminating evidence not inconsistent with innocence of accused—Conviction is not proper.

In a prosecution under S. 364, where there was no incriminatory evidence whatsoever against the accused beyond the fact that he and the deceased left together and were last seen together, and that the one returned without the other :

Held : that although circumstances lead to a high degree of suspicion against the accused, they cannot be said to be inconsistent with any reasonable theory in accused's favour other than that the accused lured the deceased away for the purpose of having him murdered, or being exposed to the danger of being murdered, and hence no conviction could be safely had. [P 659 C 1]

Abdul Qadar—for Appellant.

Des Raj—for the Crown.

Fforde, J.—The appellant Allah Rakha has been convicted under the provisions of S. 364, I. P. C., of having kidnapped or abducted one Karm Din for the purpose of having him murdered or exposed to the danger of being murdered, and has been sentenced to transportation for life.

There is a good deal of evidence to establish the fact that the relatives of the appellant were on bad terms with Karm Din, and there is certainly sufficient motive for these relatives to do Karm Din an injury. There is, on the other hand, no evidence that the appellant himself was on bad terms with Karm Din. Though in most cases it may safely be presumed that where two families are on bad terms with one another all the members of both families may be deemed to share that enmity, yet in the present case not only is there no evidence that the appellant himself was unfriendly to Karm Din, but, on the contrary, it has been proved that the two for the last couple of months prior to the disappearance of Karm Din were on amicable terms.

At 3 a. m. on the 11th March 1926, the appellant and Karm Din went off together, the two of them having previously arranged that they would go to a place near Sukheke for the purpose of finding out whether certain animals which were there were those which had been stolen some three years before from Karm Din. The fact that this arrangement was made between these two was known to the family of Karm Din. There was no secrecy about it Some two days later the appellant returned unaccompanied by Karm Din, who has not been seen or heard of since. Beyond these facts there is no evidence whatsoever of any intention on the part of the appellant to kidnap or abduct Karm Din for the purpose of having him murdered or being put in danger of being murdered. There is no doubt, as the learned Sessions Judge has said, that the probabilities are that Karm Din is no longer alive, but there is nothing which leads us to draw the irresistible

inference that he was lured away by the appellant for the purpose of being killed or being put in jeopardy of death. A great many hypotheses might be raised as to what has become of Karm Din. It may be that other enemies of his murdered him after he had left the company of the appellant. It may be that he died of sudden illness and his body has been lying in an unfrequented spot, and it may have been by this time eaten by wild animals. It is possible that the relatives of the appellant, finding Karm Din at a distance from his home, themselves took the opportunity of murdering him and terrorized the appellant into keeping silence. As I have said there are many possible explanations of such a disappearance; but there is no incriminatory evidence whatsoever against the appellant beyond the fact that he and Karm Din left together and were last seen together, and that the one returned without the other. Although the circumstances of this case lead to a high degree of suspicion against the appellant, they cannot be said to be inconsistent with any reasonable theory other than that the appellant lured him away for the purpose of having him murdered or being exposed to the danger of being murdered.

We have been referred by Mr. Sawhney to a decision of this Court, in which a conviction was upheld under this section; but in that case there were a number of other circumstances in addition to the fact that the parties were last seen together. There was the discovery of certain incriminating articles; the selling of the pony upon which the abducted boy had been removed; and other circumstances which entirely distinguish that case from the one before us.

I am of opinion that upon the facts of this case no conviction could be safely had. I would accordingly accept the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty.

Addison, J.—I concur.

J.V. *Appeal accepted.*

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*A I R. 1927 Lahore 659

JAI LAL, J.

Chhunna Mal—Decree-holder—Appellant.

v.

Hanuman Bakhsh and *others*—Judgment-debtors—Respondents.

Misc. F. A. No. 168 of 1927, Decided on 27th June 1927, from an order of the Sub-Judge, 1st Cl., Delhi, D/- 11th December 1926.

(a) Compromise decree—Relief against forfeiture against penalty—Power of Court to relieve is same as in ordinary contract.

The principle has been well established that a decree which is based on a compromise is subject to the same incidents regarding the power of the Court to give relief against forfeiture against penalty as an ordinary contract between the parties and this in spite of the well-recognized doctrine that an executive Court is not entitled to go behind the decree, the ratio decidendi being that a consent decree cannot have greater validity than the compromise itself as it is a mere creation of the agreement between the parties and that the contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge: *A. I. R.* 1921 *Cal.* 356, *Ref.* [P 661 C 1]

* *(b) Contract Act, S. 74—Whether payment of larger amount in default of a condition provided in a compromise decree is penal depends on determination of the question whether the larger amount was actually due or not—Modus operandi of the test explained—Compromise.*

The true test for deciding the question whether the provision relating to the payment of a larger amount than the amount decreed on compromise on default by the judgment-debtor to perform any of the conditions of the decree is or is not a penal clause depends on a determination of the question whether or not the larger amount was actually due to the decree-holder at the time of the compromise in other words, whether the decree-holder is merely withdrawing a conditional concession granted by him to the judgment-debtor or whether he is attempting to recover an amount which was not actually due to him. The modus operandi for elucidating facts necessary to apply the test mentioned above is that if no information can be obtained either from the compromise or from the decree the parties can be allowed to produce evidence about the extent of the judgment-debtor's original liability but if the compromise and the decree are clear on the subject no other evidence is permissible to construe them: (*Case law discussed*). [P 662 C 2]

Sharda Ram—for Appellant.

Jagan Nath Aggarwal—for Respondents.

Judgment.—The appellant instituted a suit against the respondents for the recovery of Rs. 15,757-3-0 principal and interest on a book account. The defendants denied that the amount was due inter alia, on the ground of limitation.

On the 31st August 1925 the defendants presented an application to the Court alleging that the suit had been compromised and that the plaintiff had agreed to accept Rs. 10,000 in full satisfaction of his claim. Notice of his application having been given to the plaintiff the parties appeared before the Court and asked for an adjournment to settle the dispute. Subsequently they appeared on the 9th October 1925, and made a statement about the adjustment of plaintiff's claim. The statement by the defendants was as follows :

There is a dispute between us and the plaintiff in respect of the following items :

1. Rs. 15,757-3-0 the amount of the present suit.
2. About Rs. 750 for which the plaintiff has already obtained a decree against us.
3. Rs. 800 due to the plaintiff on another account.
4. Costs and interest on account of a previous decree.

We have settled about these disputes as follows :

1. Rs. 2,000 has already been paid to plaintiff.
2. Rs. 1,000 paid in Court.
3. Rs. 7,600 with interest at 9 annas per cent per month from the 9th August 1925, till payment would be paid on or before the 9th November 1925. If Rs. 7,000 with interest is not paid by the 9th November 1925, then the plaintiff shall be entitled to recover the entire amount of the suit and costs and interest at 8 annas per cent. per month from the date of institution till realization, we will be liable for the same.

The plaintiff having agreed to these terms a decree was passed accordingly. The defendants paid Rs. 7,000 in Court on the 9th November 1925, but the interest thereon was not paid till the 18th November. The plaintiff, thereupon, executed the decree for the full amount of his claim with costs and future interest, alleging that by virtue of the non-payment of the interest on the due date the defendants had made a default in the performance of the conditions mentioned in the decree and were, therefore, liable to pay the whole amount.

The executing Court has held that though the defendants undoubtedly broke the condition mentioned in the decree, the condition so broken being in the nature of a penal provision, the Court was entitled to relieve the defendants from the consequence of the default. It has further held that the payment of the interest on the 9th November 1925 was not the essence of th compromise between the parties and has, therefore, dismissed the plaintiff's application for execution of the decree, holding that the same has been fully satisfied. The decree-holder has appealed against the order of the Sub-Judge. Two questions arise in this appeal : (1) Whether, if in a decree which is in accordance with the compromise entered into between the parties, a penalty is provided for the non-performance of any condition mentioned therein, the Court is empowered to relieve the defaulting party from the consequences of the default. (2). Whether in this case there was a provision for providing the payment of a penalty.

With regard to the first point counsel on both sides cited the following authorities in support of their respective cases.

Krishna Bai v. *Hari Govind Kulkarni* (1), *Balambhat Ravjibhat* v. *Vinayak Ganpatrao* (2), *Surendra Nath Banerjee* v. *Secretary of State* (3) and *Thayyammalachi* v. *Rajali* (4) which were all cases in which relationship of landlord and tenant was created between the parties and a condition was added in the decree that if default is made by the tenant in the performance of specified conditions he would be liable to ejectment. Default having been made by the tenant the Courts relieved him from the consequences of such default and declined to eject him at the instance of the decree-holder; *Kandarpa Nag* v. *Binwari Lal Nag* (5) and *Supdu Dhodu* v. *Madhawrao Jivram Gujar* (6) in both of which the party who subsequently made a default was granted a decree on compromise for possession of land on payment to the other party of certain amounts on specified dates; on default of payment the decree for possession was to become void; default having been made in payment of such amounts the Court extended the time for the payment thereof, thus granting the defaulting party relief against forfeiture of his rights under the decree and *Narsinha Gopal* v. *Balvant Madhav* (7), *Nand Rani Kuer* v. *Durga Dass Narain* (8)

(1) [1907] 31 Bom. 15=8 Bom. L. R. 813.
(2) [1911] 35 Bom. 239=10 I. C. 746=13 Bom. L. R. 154.
(3) [1920] 24 C. W. N. 545=57 I. C, 643.
(4) [1911] 2 M. W. N. 327=12 I. C. 331=10 M. L. T. 326.
(5) A. I. R. 1921 Cal 356.
(6) [1920] 44 Bom. 544=57 I. C. 531=22 Bom. L. R. 780.
(7) A. I. R. 1922 Bom. 170=46 Bom. 463.
(8) A. I. R. 1924 Patna 387=2 Pat. 906.

Kishen Prosad v. *Kunj Behari Lal* (9) *Jamir Fakir* v. *Ram Lal Ghose* (10) all of which relate to money decrees in which the orginal suit was for a larger amount but a smaller amount was agreed to be paid by instalments and a proviso was added that on failure of payment of any instalment the full amount of the claim would become payable. Counsel also relied upon *Jaya Rao* v. *Venkatanarayana Chetty* (11), *Pasupaleti Achayemma* v. *Pabtamidi Papamma* (12) and *Thompson* v. *Hudson* (13), which bear on the point and some of which I will discuss presently. From an examination of the cases mentioned above it appears to me that the principle has now been well-established that a decree which is based on a compromise is subject to the same incidents regarding the power of the Court to give relief against forfeiture against penalty as an ordinary contract between the parties and this in spite of the well-recognized doctrine that an executing Court is not entitled to go behind the decree, the ratio decidendi being that a consent decree cannot have greater validity than the compromise itself as it is a mere creation of the agreement between the parties, and that the contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge : see *Kandarpa Nag* v. *Banwari Lal Nag* (5).

In the face of overwhelming authority to the contrary it is too late in the day now to contend that the rule enunciated above contravenes the important provision of the law that the executing Court is not entitled to go behind the decree but must execute it according to the express terms thereof.

When, however, the question is to be considered whether a particular decree provides a penalty to be imposed on default some difficulty arises as will appear from the following decided cases:— In *Nand Rani Kuer* v. *Durga Das Narain* (8) the suit was for the recovery of Rs. 20,900 odd and the compromise decree provided that on payment of Rs. 1,000 in cash immediately and Rs. 12,600 at a later date the claim would be discharged in full, but on failure to pay the above instalments the plaintiff would be entitled to realize the full claim of Rs. 20,900 odd with costs and future interest. Rs. 1,000 was paid on the date of the compromise but only Rs. 6,000 was paid on a date two months later than the date fixed and a prayer was made to the Court for an extension of time by one month more with regard to the balance. The Sub-Judge allowed an extension. The Patna High Court held that the Sub-Judge was entitled to extend the time giving relief to the defendant against forfeiture. In *Kishen Prosad* v. *Kunj Behari Lal* (9) the suit which was for Rs. 15,000 was compromised and a decree was passed accordingly. The decree provided that the defendant would pay Rs. 6,000 by instalments specified therein, that Rs. 9,000 had been remitted by the plaintiff and that, if the defendant failed to pay any of the instalments, the whole amount claimed would become payable. It was held that though S. 74, Indian Contract Act, applied to the case, still the compromise, and consequently the decree, did not contain a provision for the payment of penalty as the plaintiff had merely withdrawn a concession that he had given to the defendant on his performing certain conditions. The decree-holder was consequently held entitled to recover the whole amount claimed by him.

In *Jamir Fakir* v. *Ram Lal Ghose Chowdhury* (10) the original suit was for Rs. 908 but a decree was granted in accordance with a compromise made between the parties which provided that the plaintiff had remitted Rs. 508 and that the balance of Rs. 400 would be paid by instalments, and that on failure of payment of any of the instalments the full amount of Rs. 908 would be recoverable with interest at 36 per cent. per annum. A default having been made by the defendant, the decree-holder sought to claim the full amount of Rs. 908. with interest at 36 per cent per annum. The High Court of Calcutta held that the defendant was not entitled to any relief with regard to Rs. 508 as that amount was actually admitted to be due to the plaintiff but had been remitted by him on certain conditions ; that on failure by the defendant to perform the conditions the plaintiff was

(9) A. I. R. 1926 All. 278.
(10) [1916] 32 I. C. 697.
(11) A. I. R. 1925 Mad. 264.
(12) [1909] 2 I. C. 850.
(13) [1869] 4 H. L. C. 1=38 L. J. Ch. 431.

entitled to recover the full amount; and also that the provision as to interest at 36 per cent. per annum amounted to a penalty; and that the Court was entitled to give relief to the judgment-debtor so far as the payment of tke penal interest was concerned.

Similarly, on p. 620 of the report [47 B] in *Shankar Sakharam* v. *Ratanji Pramji* (14) there is a remark to the effect that in deciding whethor a particular condition to pay a larger amount than the decreed amount on default by the defendant is or is not a condition for payment of penalty the original liability of the defendant has to be determined; in other words it has to be decided whether the larger amount claimed by the decree-holder was or was not actually due to him when the decree was passed. The same view was expressed in *Thompson* v. *Hudson* (13).

Pasupaleti Achayemma v. *Pabbamidi Papamma* (12) breaks new ground as in that case it did not appear from the decree or the compromise whether the larger amount claimed by the decree-holder was due to him from the judgment-debtor, and the case was remanded by the Madras High Court for enquiry and report to the trial Court whether or not the larger amount payable on default was actually due to the decree-holder and after the receipt of the report it was held that as such amount was actually due when the compromise was entered into, the condition as to forfeiture did not amount to penalty.

It would thus be observed that in *Nand Rani Kuer* v. *Durga Dass Narain* (8) there was nothing in the compromise or the decree to show that the full amount of the claim was not originally due to the plaintiff and no enquiry was made to ascertain this, but the Court, by looking at the terms of the decree, held that, whereas a larger amount than the decreed amount was provided to be paid on default of payment on due date by the judgment-debtor the agreement amounted to a provision of penalty, while in other cases the Courts have based their decision on a determination of the question whether the larger amount payable to the decree-holder by virtue of the compromise was or was not actually due to him.

The rule that emerges from the cases already mentioned by me is that the true test for deciding the question, whether the provision relating to the payment of a larger amount than the amount decreed on compromise on default by the judgment-debtor to perform any of the conditions of the decree is or is not a penal clause, depends on a determination of the question whether or not the larger amount was actually due to the decree-holder at the time of the compromise; in other words whether the decree-holder is merely withdrawing a conditional concession granted by him to the judgment-debtor, or whether he is attempting to recover an amount which was not actually due to him.

The question then is: What is the modus operandi for elucidating facts necessary to apply the test mentioned above? Is it the compromise and the decree alone that are to be examined as was done in the Patna case, though the point was not expressly raised, or if no information can be obtained from either of these can parties be allowed to produce evidence about the extent of the judgment-debtor's original liability as was done in the Madras case? After careful consideration I have arrived at the conclusion that the latter course is permissible under the circumstances. Of course, if the compromise and the decree are clear on the subject, no other evidence is permissible to construe them. I am quite aware of the great inconvenience that is sometimes likely to arise by such enquiry as the whole object of the compromise will be defeated by sometimes lengthy enquiry in execution proceedings which the parties intended to avoid and this is well illustrated in this case in which a comparatively short delay in payment of a small amount will entail an examination probably of lengthy and disputed accounts; but if the rules relating to relief against forfeiture in ordinary contracts is to be applied to consent decrees there is no reason why the same procedure should not apply in order to enable a Court to decide whether relief can or ought to be given.

There is no dispute in the case before me that a default was made by the judgment-debtor. The real question is whether the amount claimed by the decree-holder was actually due to him: but there is no indication in the compromise or the decree whether the balance was

(14) A. I. R. 1923 Bom. 441=47 Bom. 607.

actually remitted by the decree-holder or whether the parties settled Rs. 10,000 as the real amount due to him. It will be on the determination of this question that the ultimate decision of this case will depend.

Another point raised by Mr. Sardha Ram for the decree-holder is that, even if it be held that the difference between Rs. 10,000 and the amount now claimed by the decree-holder is a penalty payable on default, still, under S. 74, Indian Contract Act, the decree-holder is entitled to some part thereof; and that he cannot be deprived of the entire penalty. This also is a matter which will have to be considered when the appeal comes up for final decision.

In consequence I remand the case to the Court below under O. 41, R. 25, with direction to enquire and report to this Court whether the original sum of Rs. 15,757-3-0 was not actually due to the decree-holder from the judgment-debtors, if not, how much out of this amount was due; and secondly, whether the decree-holder is entitled to claim any portion of the penalty (if it is a penalty) provided in the compromise and the decree. Report within three months. Ten days for objections. I have placed the burden of the first part of the issue remanded on the judgment-debtor.

R.D. *Case remanded.*

A. I. R. 1927 Lahore 663

DALIP SINGH, J.

Lachhman Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Chattar Kaur and *others*—Defendants—Respondents.

S. A. No. 416 of 1927, Decided on 8th June 1927, from the decree of the Addl. Dist. J., Lahore, D/- 28th October 1926.

(a) *Civil P. C., O. 22, R. 6—Dead person.*

A decree against a dead person is a nullity. [P 664 C 1]

(b) *Civil P. C. O 32, R. 1—Appeal by minor.*

An appeal by a minor without a next friend is not a nullity; *A. I. R.* 1926 *Lah.* 186 and 19 *Mad.* 127, *Foll.* [P 664 C 1]

(c) *Co-sharer—Suit against trespasser of common property—Any co-sharer can alone sue.*

One of several co-sharers can lodge a suit, without making the other co-sharers parties thereto, against trespassers on common property. [P 664 C 1]

Amar Nath Chopra—for Appellants.

Ganpat Rai and *Hazara Singh*—for Respondents.

Judgment.—In this appeal the facts are that the plaintiffs, 15 in number, sued the four defendants for a declaration that they, the plaintiffs, were the owners and in possession of a vacant site 86½ marlas in the abadi of Mauza Hudyara. While the suit was pending in the lower Court one Sant Singh, a plaintiff, died on the 27th August 1925. Sant Singh had also been acting as the next friend of one Atma Singh, plaintiff, a minor; and Atma Singh was thus left without a next friend in the suit. The suit, however, proceeded without the attention of the Court being drawn to these facts and the suit was dismissed by the trial Court on the 18th March 1926. The plaintiffs appealed to the learned District Judge and in that appeal Sant Singh appeared as an appellant and Atma Singh appeared as an appellant though, as stated above, Sant Singh was dead. The appellate Court accepted the appeal and remanded the case allowing the plaintiffs to put in fresh evidence under O. 41, R. 25. The review of this order was rejected except that the appellate Court explained its original order of remand. On remand the trial Court discovered that Sant Singh was dead and that his legal representatives had not been brought on the record within the time prescribed by law. Upon this the case was again taken up by the appellate Court and the appellate Court held that the appeal had abated so far as the interests of Sant Singh were concerned. He was further of opinion that the appeal would abate as a whole as the cause of action was a joint and indivisible one. An application for review of the order *re* Sant Singh was also rejected. The successor of the learned District Judge then proceeded to hold that the representatives of Sant Singh were on the record but that he was not competent to review the order of his predecessor. He further proceeded to hold that Atma Singh was not really an appellant at all because he had no next friend in the appeal and the appeal must, therefore, be taken to have been lodged without Atma Singh minor hav-

ing been made a party to it and without the appointment of the legal representatives of the deceased Sant Singh. He then proceeded to hold that the cause of action was indivisible and was joint and that one of several co-sharers could not lodge a suit about the common property without making the other co-sharers a party thereto and, therefore, the appeal abated as a whole. The appeal was accordingly dismissed with costs. From this order an appeal has been preferred to this Court.

The first point to decide is what is the effect of a decree passed against a dead man, as Sant Singh admittedly was, at the time when the original decree of the trial Court was passed. It is settled law that a decree against a dead person is a nullity and, therefore, the absence of an appeal by Sant Singh is no ground for holding that the appeal abates in toto. So far as Atma Singh is concerned I do not think that an appeal by a minor without a next friend is a nullity. A guardian of a minor can in the circumstances be appointed by the Court at any time : see *Ralla Singh* v. *Bishna* (1) and *Kamalakshi* v. *Ramasami Chetti* (2). But in any event it seems to me that there is no authority for the proposition that one of several co-sharers cannot lodge a suit without making the other co-sharers a party thereto against trespassers. No authority has been cited to me to the contrary. I, therefore, accept the appeal and remand the case back to the District Judge who will allow the plaintiffs to produce their fresh evidence according to the terms of the remand order and will then proceed to dispose of the appeal on the merits. Costs will be costs in the cause.

J.V. *Appeal accepted.*

(1) A. I. R. 1926 Lah. 186=7 Lah. 102.
(2) [1896] 19 Mad. 127.

A. I. R. 1927 Lahore 664

ZAFAR ALI, J.

Jiwan Singh and *others*—Plaintiffs—Appellants.

v.

Karam Din and *others*—Defendants—Respondents.

Second Appeal No. 2310 of 1925, Decided on 4th May 1927, from a decree of the District Judge, Gurdaspur, D/- 4th July 1925.

(a) *Adverse Possession—Waste land.*

Possession follows title in the case of waste land. [P 664 C 2]

(b) *Easement—Right to bury the dead cannot be acquired by prescription.*

Nobody can acquire by prescription a right to bury the dead in land belonging to other persons, such an easement being unknown to the law : *A. I. R.* 1921 *Cal.* 569 ; *A. I. R.* 1924 *Lah.* 492, *Foll* [P 664 C 2]

Des Raj Sawhney—for Appellants.

Judgment.—The land in dispute, about 26 kanals in area, is a portion of the shamilat of village Shankarpur, and it was shown in the revenue records of that village as in possession of the proprietors of the village before 1915. In the jamabandi of 1915, however, it was shown as a grave yard in the possession of Mussalmans of village Dhadiala which bounds with Shankarpura. The proprietors of village Shankarpura sued to recover possession of the land and their suit was decreed by the trial Court, but on appeal by only one of the defendants, the learned District Judge dismissed their suit. They appeal.

Some of the respondents have not been served and none is represented in this Court. Counsel for the appellants does not want an adjournment for fresh notice to the defendants who have not been served and submits that the appellants are prepared to suffer the consequences of the omission to serve those respondents with notice.

There can be no manner of doubt that the plaintiffs-appellants are the owners of the land and that as the land was lying waste, it was presumably in their possession. It cannot be said that the defendants are in adverse possession of that portion of the land where there are no graves. As held in *Gopal Krishna Sil* v. *Abdul Samad Chaudhri* (1), which was followed in *Mangat Ram* v. *Siraj-ul-Hasan* (2), nobody can acquire by prescription a right to bury the dead in land belonging to other persons, such an easement being unknown to the law. I therefore accept the appeal and, reversing the judgment and decree of the lower appellate Court restore that of the trial Court. This decree will have no effect as against the defendants-respondents who have not been served with notice of this appeal. No order as to costs in this Court.

R.D. *Appeal accepted.*

(1) A. I. R. 1921 Cal. 569.
(2) A. I. R. 1924 Lah. 492.

A. I. R. 1927 Lahore 665 (1)

JAI LAL, J.

Sher Singh—Defendant—Petitioner.

v.

Autar Singh and *another*—Respondents.

Civ. Rev. Pet. 740 of 1926, Decided on 7th June 1927, from an order of the 4th Sub-Judge, Attock, D/- 8th July 1926.

(a) *Civil P. C., O. 33, R. 1 (Expl.)—A person applying to sue as a pauper—Court must find that he is unable to pay Court fee for his suit.*

In arriving at the conclusion that an applicant is a pauper, the vital question for decision is whether the applicant does not possess sufficient property to enable him to pay the fee required by law for the plaint in the suit.

[P 665 C 1]

(b) *Civil P. C., O. 33, R. 1—Plaintiff allowed to sue as pauper but his pauperism challenged—Plaintiff dying during pendency of suit—Plaintiff's legal representative brought on record—Court must find both to be paupers.*

Where an order allowing a plaintiff to sue in forma pauperis is challenged but the plaintiff dies during the pendency of the suit and is represented by the legal representative, it is necessary for the Court to find that both the deceased and his legal representative are paupers in order to enable the suit to proceed in forma pauperis. [P 665 C 2]

Shamair Chand—for Petitioner.

Judgment.—This is a petition for revision of an order dated 8th July 1926 passed by the Subordinate Judge of Campbellpur granting permission to the respondent to sue in forma pauperis. The application for permission to sue was opposed by the defendants and the question of the extent and value of the property owned by the respondent was referred to the Tahsildar for report, who after enquiry reported on the 25th May 1926 that the respondent was a pauper. But in arriving at this conclusion the Tahsildar appears to have ignored the definition of a pauper in the explanation to R. 1, O. 33. The vital question for decision was whether the applicant did not possess sufficient property to enable her to pay the fee prescribed by law for the plaint in the suit. The Tahsildar came to the conclusion that the applicant owned some land but he has not given any finding as to its value. The Subordinate Judge himself did not discuss the matter but merely agreed with the report of the Tahsildar and granted the application.

There is another ground which necessitates further enquiry into the matter, The plaintiff died during the pendency of the suit and one Autar Singh, minor, has been brought on the record as her legal representative. The question arises whether it is not now necessary to ascertain whether Autar Singh himself is a pauper or not. The contention of the counsel for the petitioner is that under the circumstances it is not now necessary to find out whether Mt. Ram Rakhi was a pauper. Authority on this subject is conflicting, but I am inclined to the view that under the circumstances it is necessary for the Court to hold that both Mt. Ram Rakhi and Autar Singh are paupers in order to enable this suit to proceed in forma pauperis.

Accepting this petition I set aside the order of the Subordinate Judge and remit the case to him with directions to record a clear finding on the allegations made by Mt. Ram Rakhi and also to enquire whether Autar Singh is a pauper. The respondent has not appeared before me and under the circumstances of the case I would make no order as to costs in this Court.

J.V. *Petition accepted.*

A. I. R. 1927 Lahore 665 (2)

DALIP SINGH, J.

Indar Singh—Plaintiff—Appellant.

v.

Piara Singh and *another*—Defendants—Respondents.

Second Appeal No. 2953 of 1926, Decided on 16th May 1927, from a decree of the Sr. Sub-Judge, Gurdaspur, D/- 3rd August 1926.

(a) *Guardians and Wards Act, S. 31 (2)—Application stating reasons for sanction—Court granting sanction after inquiry — Absence of recitals as to necessity or advantage does not vitiate the sanction.*

S. 31 (2) is not mandatory in the sense that there must be strict compliance with its terms.

Where an application under S. 31 by the guardian of a minor for sanction, stated why it was for the benefit of the minor, and the Court after inquiry granted the sanction without reciting the necessity or advantage :

Held : that there was substantial compliance with the requirements of the section: 11 *C. L. J.* 197, *Foll.* [P 666, C 2]

(b) *Guardians and Wards Act, S. 31 (2)—Vendee is absolutely protected by sanction.*

A vendee from the guardian of a minor is entitled to rely on the Court's sanction absolu-

tely and is not bound to inquire into the benefit or necessity of the transaction : 11 *Cal.* 379, [P 666 C 2] *Foll.*

Mehr Chand Mahajan—for Appellant.

G. S. Salariya and *Sardha Ram* — for Respondents.

Judgment.—In this case the plaintiff brought a suit for possession of 13 kanals 4 marlas of land which he alleged had been sold by his guardian Achhar Singh with the sanction of the District Judge under S. 31, Guardians and Wards Act, without necessity or for the benefit of the minor and with the assistance or collusion of the vendee. The trial Court held that there had been misrepresentation to the District Judge regarding the quality of the land and its renting value, and accordingly decreed the suit. On appeal the learned Senior Subordinate Judge held that there had been no misrepresentation and that no such misrepresentation or fraud had been pleaded. He held further that the order of the learned District Judge did not recite the necessity or advantage to the minor of the sale, but he held that this did not invalidate the sanction ; and that the defendant-vendee was entitled to rely on the same, and, therefore, dismissed the suit. He held that there was no necessity for sale shown by the evidence, but that the sale was carried out for the benefit of the minor in good faith.

In second appeal it is contended by counsel for the appellant that sanction under S. 31 (2), Guardians and Wards Act, is mandatory, that the absence of the recitation of the necessity or advantage of the minor makes the sanction given wholly void, and that, therefore, the onus lay on the defendant-vendee to show the necessity or advantage to the minor. It was further contended on the authority of *Nallaka Venkataswami* v. *Rugum Viranna* (1) that in any event the existence of sanction only shifted the onus on to the minor plaintiff ; and that in this case it had been shown that there was no necessity and the sale was not to the advantage of the minor.

So far as this second point is concerned, I agree with the learned senior Subordinate Judge in holding that there was no necessity shown for the sale but I do not consider that the plaintiff has shown that it was not to his advantage and, therefore, even if *Nallaka Venkataswami* v. *Rugum Viranna* (1) lays down the correct law, I do not consider that the plaintiff has discharged the onus. Further, I am of opinion, following *Gangapershad Sahu* v. *Maharani Bibi* (2) that a vendee is entitled to rely on the sanction absolutely and it is not for him to inquire into the benefit or necessity of the transaction.

As regards the first point, I am opinion that S. 31 (2) is not mandatory in the sense that there must be strict compliance with its terms. The position of the section with reference to Ss. 28, 29 and 30 shows that the permission is not defined by the presence in it of a recitation. I, therefore, consider that the words are merely directory and that there was substantial compliance with the requirements of the section. As was held in *Rameshwar Singh* v. *Dhanpat Singh* (3) the application for sanction having stated why it was for the benefit of the minor the learned District Judge having after inquiry granted the sanction evidently accepted the reasons given in the application.

I, therefore, dismiss the appeal. The point, however, is not free from difficulty and I, therefore, make no order as to costs of this appeal.

J.V. *Appeal dismissed.*

(1) A. I. R. 1922 Mad. 135=45 Mad. 429.

(2) [1885] 11 Cal. 379=12 I. A. 47=4 Sar 621 (P. C.).

(3) [1910] 11 C. L. J. 197=5 I. C. 334.

A. I. R. 1927 Lahore 666

TEK CHAND AND AGHA HAIDAR, JJ.

Muhammad Din and *another*—Plaintiffs—Appellants.

v.

Mt. Sardar Bibi and *others*—Defendants—Respondents.

F. A. No. 174 of 1923, Decided on 5th May 1927, from a decree of the senior Sub-Judge, Jhang, D/- 13th October 1922,

(a) Co-sharer—One co-sharer alone obtaining proprietary right in land—Land becomes the property of grantee only.

A gant of proprietary rights in a land to one of several co-sharers will enure to the grantee only although the land was held jointly by them before the conferment of such rights : 5 *P. R.* 1918 and 8 *P. R.* 1915, *Rel. on.* [P 668 C 2.]

(b) *Transfer of Property Act, S. 41 — Bona fide vendee need not go behind revenue record if no circumstances creating suspicion of vendor's title are present—Record-of-rights.*

Where the revenue entries show a person as the sole proprietor of certain land and there are no other circumstances leading the purchasers of such land from the proprietor to go behind the revenue records and make any further enquiry the vendees are fully protected by the principle underlying S. 41. [P 669, C 1]

Shuja-ud-Din—for Appellants.

Niaz Muhammad and *Mohsin Shah*—for Respondents.

Judgment.—The plaintiffs Muhammad Din and Muhammad Hasan and defendant 1, Muhammad Alam, are the sons of one Ali Bakhsh, who was the original grantee of a square of land in chak 481 in the Shorekot tahsil of the Jhang District. It appears that this grant was made to him as an abadkar early in 1903, but he died soon after, leaving him surviving his three sons. Efforts seem to have been made to have mutation effected with respect to the tenancy in favour of all of his sons, but for some reason or other, which is not apparent on the record, the mutation was rejected. Ultimately the tenancy was forfeited to Government early in 1906. Later on Muhammad Alam, defendant 1, filed an application before the Colonization Officer, which is marked as Ex. P. 7 and is printed at p. 5 of the record. In this application he stated that on the death of the father all the three sons had succeeded to the tenancy and had been in possession of the square jointly cultivating it and also jointly paying the land revenue and water rates to the Government. He, therefore, prayed that the order of forefeiture be cancelled and the mutation be sanctioned in favour of the three brothers. There is nothing on the record to indicate what orders were passed in this application. It, however, appears that on the 4th June 1905, an order was passed by the Colonization Officer, alloting the land of Ali Bakhsh to Muhammad Alam alone. This order is printed as Ex. D-4/2 as a supplement to the paper-book. The other brothers do not seem to have taken any steps to have their names entered as abadkar tenants of the square. In the jamabandi of 1909-10 in the proprietary column, Government is shown as the malik and Muhammad Alam is entered as the malguzar dakhilkar. In the tenancy column it is stated that the land is under the personal cultivation of Muhammad Alam in partnership with his brother Muhammad Hassan. The revenue records also show that some time after 1909 Muhammad Alam alone acquired proprietary rights in the square from Government.

On the 16th October 1916, by sale-deed (Ex. P-6), Muhammad Alam, representing himself as the sole owner of the square, sold it to Waris (defendant 2) an Arain, resident of chak 478. for Rs. 2,500 Later on, by mutation dated the 29th September 1918, Waris, defendant 2, transferred 101 kanals 10 marlas out of the land to Umar Din, defendant 4; and by mutation, dated the 20th January 1919, he transferred the remaining 110 kanals 10 marlas to Jondu, defendant 3, receiving full consideration from each of the vendees.

On the 13th February 1922, Muhammad Din, brother of Muhammad Alam, instituted the present suit, claiming a decree for possession of one-third of the square alleging that the square had originally been granted to their father Ali Bakhsh and had descended from him to all the three sons, and that later on Muhammad Alam has acquired the proprietary rights not for himself but for the benefit of all the three brothers who had equally contributed towards the payment of the malkana and other dues for the acquisition of these lands. The third brother, Muhammad Hussain, was originally impleaded as defendont 5 but later on he applied to be made a plaintiff and the plaint was accordingly amended and the claim modified into one for two-thirds of the square. Muhammad Alam did not contest the plaintiffs' suit and proceedings were ex parte against him. The vendees Jhandu and Umar Din pleaded that the proprietary rights in the land had been granted by the Government to Muhammad Alam alone, that he was entered in the revenue records as the sole owner of the land, that the plaintiffs had no right whatsoever in it and that these defendants, being bona fide purchasers for value, were entitled to be protected in accordance with the principle enunciated in S. 41, Transfer of Property Act. Waris Muhammad, defendant 2, also filed pleas in similar terms. The lower Court has dismissed the plaintiffs' suit and they have appealed to this Court through Dr. Shuja-ud-Din.

The first question to be decided in the case is whether the plaintiffs had at any time any proprietary title in the land in question. The only documentary evidence on the record on which Dr. Shuja-ud-Din has placed reliance is the application, Ex. P-7, filed by Muhammad Alam, already referred to, in which Muhammad Alam had, some time in April 1916. admitted that, on the death of Ali Bakhsh, all the three sons had succeeded to the tenancy in equal rights, and that they were jointly holding the land. He also relies upon the oral testimony of the three witnesses produced by the plaintiffs in the Court below. Of these Ahmad Yar (P. W. 1) states that the expenses for the clearance of the jungle were contributed by the three sons of Ali Bakhsh and the amount of taccavi was also repaid by them in equal shares. Rahamat (P. W. 2) states that the hak malkana of the square in dispute was paid by the two plaintiffs and Muhammad Alam in equal shares ten or eleven years ago. We have examined the evidence of these two witnesses carefully and are of opinion that no reliance whatsoever can be placed on their testimony. It is significant that no documentary evidence is forthcoming to prove these payments and neither Muhammad Din, the original plaintiff, nor Muhammad Hassan, plaintiff 2, has gone into the witness-box to prove any contributions by any of them towards the payment of the malkana and other dues. The third witness is Muhammad Alam, defendant 1, himself who had now turned round and is whole-heartedly supporting the plaintiffs. In 1916 when he sold the land to Waris, defendant 2, he represented himself in the sale-deed as the sole owner of the square, but now he comes forward and states on oath that he was the owner of one-third only and that the remaining two-thirds was owned by his two brothers in equal shares. It is obvious that no reliance whatsoever can be placed on the statement of a witness of this type. We must, therefore, hold that the plaintiffs have failed to prove that any payments were made by them either towards the clearance of the jungle or towards the payment of the malkana dues to Government when the proprietary rights were acquired.

It is no doubt true that in the application, Ex. P-7, Muhammad Alam stated that on the death of Ali Bakhsh all his three sons succeeded to the tenancy and that till 1906, all three of them were holding it jointly. But the plaintiffs have not placed on the record any copy of the order that was passed on this application. Indeed, it appears that on the 4th June 1906 the Colonization Officer instead of granting this application and ordering the mutation to be effected in the names of all the three sons of Ali Bakhsh, allotted the land to Muhammad Alam alone and directed that possession be given to him and his name entered in the records. It is also significant that for some reason or other this tenancy had before April 1906 been forfeited to Government and it seems that a re-grant was made to Muhammad Alam alone. Under the circumstances any admission made by Muhammad Alam in his application above referred to loses all value and can throw no real light on the question now before us.

But assuming for the sake of argument that the two brothers were joint tenants of the land this circumstance will not carry the case of the plaintiffs any further. It is significant that the tenancy rights were subsequently acquired by Muhammad Alam alone, and even if it be assumed that at that time Muhammad Alam acquired these rights as representing all the members of the family, later on Government granted the proprietary rights to Muhammad Alam alone. Under these circumstances Muhammad Alam must be held to be the sole owner of the square. The proposition is too well established to require any lengthy discussion. *Lal* v. *Gauhar* (1) and *Matap Kaur* v. *Hakim Singh* (2) may be referred to in this connexion. We must, therefore, hold that the plaintiffs have failed to establish any title in them to the square in question.

But even if the plaintiffs had succeeded in establishing that they were co-sharers in the square with Muhammad Alam, they are not entitled to any relief against defendants 3 and 4 who are, as already pointed out, bona fide purchasers for valuable consideration. It is not shown that these vendees were fixed with the knowledge of the plaintiffs' claim to

(1) [1918] 5 P. R. 1918=44 I. C. 129.
(2) [1915] 8 P. R. 1915=23 I. C. 441=195 P. L. R. 1915.

this land. The revenue entries from 1906 onwards show Muhammad Alam alone as the original tenant and later as the occupancy tenant, and finally as the sole proprietor of the land. There were no circumstances which would have led these purchasers to go behind the revenue records and make any further enquiry.

Dr. Shuja-ud-Din has relied upon *Partab Chand* v. *Saiyida Bibi* (3), but that ruling is clearly distinguishable. In that case the property stood in the revenue records in the names of the minor sons of a Tahsildar who, under the departmental rules, was prohibited from acquiring any property in the Tahsil of which he held charge. The ostensible owners were children of tender years who had not money of their own. Under these circumstances it was held the vendee, who was fully cognizant of these facts, was bound to make further enquiries and to satisfy himself that the ostensible owners were the real owners. The facts in the present case are wholly different and, as we have said already, there was nothing suspicious about the title of Muhammad Alam. The vendees are, therefore, fully protected by the principle underlying S. 41, Transfer of Property Act. Even if, therefore, the plaintiffs had any title in the land, they are not entitled to succeed as against defendants 3 and 4 who are the real contesting respondents now.

We may also point out that the lower Court in this case has, in arriving at its conclusions, relied on certain documents which were on the revenue partition file, which seems to have been sent for in the lower Court, but no portions of which were exhibited in the present record. This was an entirely irregular procedure as has several times been pointed out by this Court. This partition file was not even sent for by the appellants in this Court and no documents were printed in the paper-book on which the lower Court had relied. We have, therefore, in arriving at our decision, excluded such of these documents as had been referred to by the lower Court.

The result is that the appeal fails and is dismissed with costs to defendants 3 and 4, Jhandu and Umar Din.

J.V. *Appeal dismissed.*

(3) [1901] 23 All. 442=(1901) A. W. N. 137.

A. I. R. 1927 Lahore 669

TEK CHAND, J.

Kalu Mal and *another* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petition No. 167 of 1927, Decided on 6th August 1927, for stay of pronouncement of judgment by the Addl. Dist. Mag., Amritsar.

Criminal P. C., S. 561-A—Civil case giving rise to case under Criminal P. C., S. 476—Criminal case proceeding up to stage of judgment—Judgment in Criminal case was ordered to be stayed till dispoial of appeal in Civil case.

Where proceedings under Criminal P. C., S. 476, were started out of a civil case and they proceeded to the stage of decision but in the meanwhile the parent civil case was appealed against and the appeal was pending and the question to be decided in both the proceedings was the same :

Held : that the pronouncing of judgment in the criminal case should be stayed till the disposal of the civil appeal. [P 670 C 2]

D. C. Ralli for *Dev Raj Sawhney*—for Petitioners.

Raj Krishna—for the Crown.

Order.—This is an application under S. 561-A, Criminal P. C., by Kalu Mal and Bansi Dhar of Amritsar, praying that order be issued to the Court of Sardar Bishan Singh, Magistrate, First Class, Amritsar, not to pronounce judgment in criminal trial No. 100/2 of 1925 (under S. 467/471, I. P. C.) till the disposal of first appeal No. 974 of 1925 by this Court. The relevant facts are these :

On the 23rd January 1925 the Senior Sub-Judge, Amritsar, dismissed a suit instituted by the present petitioner Kalu Mal and Bansi Dhar against the firm of Nand Lal-Radha Kishan. In his judgment the learned Judge found that a certain will propounded by the plaintiff was not genuine. Against this judgment and decree of the Senior Sub Judge a first appeal was lodged in this Court by Kalu Mal and Bansi Dhar on the 22nd April 1925. That appeal was admitted to a Division Bench on the 21st May 1925 and is still pending. Meanwhile, on the 12th December 1925, the Senior Sub-Judge took action under S. 476, Criminal P.C., and directed that a complaint under S. 467/471, I. P. C., be instituted against Kalu Mal and Bansi Dhar for having forged the will above mentioned and produced it in the civil suit. This

order was appealed against to the District Judge, Amritsar, but the appeal was unsuccessful. The petitioners came up in revision to this Court praying: (a) that the entire proceedings be quashed ; or (b) in the alternative, the enquiry into the complaint be suspended till the decision of the first appeal. This petition was dismissed by Mr. Justice Campbell on the 18th June 1926. The criminal proceedings were accordingly continued in the Court of Sardar Bishan Singh, Magistrate First Class, Amritsar. Charges were framed on the 5th November 1926, when the accused were called upon to enter upon their defence. After the prosecution witnesses had been further cross-examined the petitioners again moved this Court on the 28th March 1927, praying that further proceedings in the criminal case be stayed pending the disposal of the first appeal. This petition was dismissed in limine by Mr. Justice Campbell on the 30th March 1927. Evidence for the defence was then recorded by the Magistrate and arguments heard on the 21st July 1927 when judgment was reserved.

On the 28th July 1927, the accused petitioners again came up to this Court with the present petition under S. 561-A, Criminal P. C., praying 'that the lower Court be directed to suspend the pronouncement of its judgment till the decision of the first appeal. On their behalf it is contended that now that evidence against them has been recorded and the record of the criminal case is complete and there is no danger of evidence being lost or tampered with, the object of continuing the enquiry against them during the pendency of the civil appeal has been fulfilled. It is argued that if the Magistrate is allowed to proceed to judgment and if they are convicted, the result will be prejudicing their appeal in the High Court on the only material points recorded in that case.

The application is opposed on behalf of the Crown on the ground that the stay order, if now granted, will practically nullify the decisions of Mr. Justice Campbell on the two former applications.

After giving full consideration to these arguments I am of opinion that the interests of justice require that the prayer in the application be granted. In doing so I do not think that I am in any way acting contrary to the decisions of Mr. Justice Campbell or nullifying all that has been done since. The Sub-Judge who decided the suit was, in my opinion, fully justified on the findings in tha civil suit, in filing a complaint against the petitioners under Ss. 467 and 471, I. P. C., and if I may say so with all respect, the orders passed by Mr. Justice Campbell were the only proper orders that could be passed at that stage. If the enquiry in the criminal case had been suspended till the disposal of the first appeal important evidence which was then available might have been lost or destroyed and there was danger of the witnesses being tampered with ; and a variety of complications would have arisen when the proceedings re-started after the disposal of the first appeal. Now the situation is, however, entirely different. All the evidence for the prosecution and the defence has been recorded and the only thing that remains is to deliver judgment. No harm will, therefore, be done if the final order is not pronounced for some time. On the other hand, in my opinion, the refusal of this application will cause serious prejudice to the petitioners. There is no doubt that if they are convicted, they will be greatly hampered in the conduct of the first appeal. It is conceded that the main question which the High Court will have to determine in the first appeal is whether the will is genuine or not. Now this is the only matter that is the subject of enquiry in the criminal case. There can be no manner of doubt that the interests of justice require that this question be decided in the first appeal by the High Court before the criminal Court makes a pronouncement on it. At the same time it is necessary that the delivery of the judgment by the Magistrate be not stayed for an inordinate length of time. In order to ensure this I direct the Deputy Registrar to issue urgent notice to both the parties to the first appeal to put in lists of documents to be printed before the 1st September 1927 and to take steps to have the paper-book ready before the 15th October. An actual date for the hearing of the first appeal will be fixed as early in November as may be possible. If this is done the pronouncement of the judgment by the Magistrate will not be

delayed for more than three or four months.

The petitioners have stated in their application and in the affidavit that in the event of the first appeal being dismissed they will not insist on a de novo trial and that they would not object to the jurisdiction of the Magistrate to pronounce judgment even if he is transferred from Amritsar. In case the finding of the High Court in the civil case is against the petitioners, and if by the time that case is decided, Sardar Bishan Singh, Magistrate, is transferred from Amritsar, the Government Advocate is directed to move this Court to transfer the criminal case to the district to which he is attached, so that he may be able to deliver judgment there.

For the foregoing reasons I grant this application. The petitioners will remain on bail till the disposal of the criminal case by the Magistrate.

J.V. *Application granted.*

A. I. R. 1927 Lahore 671

HARRISON, J.

Sai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Cr. Misc. Petn. No. 183 of 1926, Decided on 17th December 1926, for transfer of the case from the Court of the Addl Dist. Magistrate, Shahpur.

Criminal P. C., S. 526—Two conflicting statements made before Sessions Judge — Sessions Judge ordering complaint under S. 476-A in respect of second statement only—Appeal from conviction to the same Sessions Judge—Sessions Judge ordering retrial—High Court quashed the proceedings—Maxims nemo debet bis vexari—*Criminal P. C., S. 556.*

A witness made two conflicting statements in a trial before a Sessions Judge who made a complaint to the District Magistrate stating that the second of the two statements was false. the Magistrate framed a charge in respect of the second statement only and convicted the accused : On appeal which was heard by the same Sessions Judge, re-trial was ordered.

Held : that the accused is entitled to a decision from a Judge who approaches his case with an open mind ; and that the proceedings should be quashed on the ground that the complainant and the appellate Court were one and the same and it would not be illegal but most inadvisable to submit the accused to a fresh trial because of the initial mistake of the Court in not framing the charge in the alternative and the principle of *nemo debet bis vexari* applies in the spirit if not in the letter. [P 672, C 1, 2]

Niaz Muhamad—for Petitioner.

Ram Lal—for the Crown.

Order.—This is an application for transfer. It does not disclose the real flaw in the proceedings. The facts are briefly that in a murder trial in which one Maula absconder was tried and eventually convicted, his appeal being dismissed by the High Court, Sai gave evidence to the effect that a man named Maula was one of the assailants, but that it was not the Maula before the Court but a man of different parentage. In the first and second trials, therefore, this man Sai named the accused, but gave his father's name as Amir on one occasion and Mohammad on the other. The Sessions Judge took action and sent a complaint to the District Magistrate under S. 476-A, Criminal P. C. In this it was stated that the last statement of Sai, accused, was

> decidedly false and was deliberately made with a view to help Moula son of Amir in the case under S. 304, I. P. C.

Paragraph 8 of the complaint runs as follows :

> That as Sai has given false evidence in the Court of Mr. Vishnu Bhagwan in his statement dated 2nd December 1924 (i. e. his statement in the last trial) he is guilty of an offence under S. 193, I. P. C.

A list of witnesses was sent with the complaint. The case was entrusted to Mr. Daulat Ram Budhwar by the District Magistrate. He proceeded to examine the witnesses, framed a charge to the effect that the last statement was false, and eventually convicted the accused and sentenced him to four years' rigorous imprisonment.

On appeal the learned Sessions Judge wrote an order to the effect that the Magistrate has relied on the finding of the Sessions Court and the High Court in the previous trial and that there was no data on the present record for a finding as to which of the two statements made by the accused was false. The judgment goes on :

> Possibly, if the Magistrate had framed an alternative charge that one or the other of the two statements of the accused was false, there would have been some reason for the conviction, but as the charge and the record stand at present, there is not an iota of evidence to substantiate the charge.

The Sessions Judge therefore accepted the appeal, set aside the conviction and directed that Sai should be retried. Sai

applied for transfer to the District Magistrate on the ground that Mr. Daulat Ram Budhwar had already made up his mind, and I think that it would have been well had the District Magistrate granted his prayer. He did not then, nor even when applying to this Court, take the ground that the same officer was the complainant and the appellate Court. He now applies for revision of the District Magistrate's order. I propose to deal with the matter on the ground which has not been raised, namely that it is impossible to allow the same Judge or the same Magistrate to be the complainant and the Court. It is urged, and truly, that the Sessions Judge's order is in favour of the accused in the sense that it gives him another chance, though a very poor one. It is not on the ground that the Sessions Judge is in any way biased that I take exception to the procedure, but merely on the ground of his identity with the complainant. He must have believed that the accused had committed an offence or it would be wholly impossible for him to lodge a complaint. That being so the accused is entitled to a decision from a Judge who approaches his case with an absolutely open mind.

There is a further objection that the real trouble in the case is that the charge was not in the alternative and the reason why the charge was not in the alternative was that the complaint was not in the alternative for it definitely stated that the last statement of the accused was false and asked for a decision on this point, and on this point alone. Naturally enough the Magistrate, even if he noticed the defect in the complaint of his superior officer, did not draw any attention to it and proceeded to try the complaint as lodged and to hear the witnesses whom he had been directed to hear. The Sessions Judge now realizes apparently that he was wrong in the form in which he put in the complaint. He does not order a fresh charge in the alternative which would require no further evidence at all but perseveres in the matter asking for a conviction on a finding that the last statement is untrue and directs the Magistrate to rehear the whole of the material evidence in the S. 304 case and directs him to come to a decision on the point which has been decided both by the Sessions Judge and by the High Court, and not to allow himself to be influenced in any way by those previous decisions.

To say the least of it, this would necessitate an enormous amount of unnecessary labour and a terrible waste of time. The District Magistrate complained of the expense already incurred in this case and that expense would be very much increased if the order of the Sessions Judge were carried out. This, however, is no sufficient ground for interference. The reasons why I think the proceedings should be quashed and not re-opened are, (1) that the complainant and the appellate Court are one and the same; and (2) that I do not think it right that the accused should have to submit to a fresh trial because the initial mistake was made of not framing the charge in the alternative. It would not be illegal, but I think most inadvisable to allow such a fresh trial and the principle of *nemo debet bis vexari* applies in the spirit if not in the letter. The accused has undergone one month's imprisonment and a great deal of trouble and anxiety and also considerable expense and I think he has been punished enough for any offence he may have committed. I accept the application and quash the proceedings.

R.D. *Proceedings quashed.*

A. I. R. 1927 Lahore 672

TEK CHAND, J.

Muhammad Khan and *another*—Accured—Petitioners.

v.

King-Emperor—Opposite Party.

Cr. Rev. Petition No. 377 of 1927, Decided on 28th June 1927, from the order of the Dist. Mag., Ferozepur, D/- 19th February 1927.

(a) *Public Gambling Act* (3 *of* 1867), *S.* 13—*Place accessible to public, open to their view and belonging to public body is public place.*

In order to bring a particular spot within S. 13, it is not necessary that the public should have a legal right to go to it. All that is necessary is that the public actually go there, whether as of right or on sufference of the proprietors: *A. I. R.* 1922 *All.* 542 and 14 *N. L. R.* 137, *Ref*; *Reg.* v. *Wellard* (1885) 14 *Q. B. D*, 63 : 30 *Bom.* 348; 17 *P. R.* 1882 *Cr.*, and 11 *P. R.* 1890 *Cr.*; *Dist.* [P 673. C 2]

A place which is in full view of the public as they pass to and fro, is also freely accessible for all classes of the public and belongs to public body, which has never enclosed it, is a public place within S. 13. [P 673 C 1]

(b) *Public Gambling Act. S.* 13—*Double punishment of fine and imprisonment is illegal.*

A person who offends against S. 13, can be punished either with imprisonment or with fine, but not with both. Double punishment of fine and imprisonment cannot be legally imposed : 25 *P. R.* 1880 *Cr. Foll.* [P 674 C 1]

Muhammad Din Jan—for Petitioners.

R. C. Soni for *Govt. Advocate*—for the Crown.

Judgment.—The petitioners Muhammad Khan and Ghulam Hassan and seven other persons were convicted by the Magistrate, 2nd Class, Ferozepur, under S. 13, Public Gambling Act 3, 1867. These two were sentenced each to undergo one month's rigorous imprisonment and to pay a fine of Rs. 10 and the others were sentenced to pay a fine of Rs. 25 each. Muhammad Khan and Ghulam Hassan oppealed to the District Magistrate, Ferozepur, who affirmed the conviction and sentencos against them. They have now come up in revision to this Court.

The first point urged on their behalf is that the place where they were found gambling is not a " public place " within the meaning of S. 13 of the Act. The findings of the learned District Magistrate are that the site concerned is in field No. 1500, which is the property of the Government and is now vested in the Municipal Committee of Ferozepur. A portion of this field is enclosed within a low boundary wall and is used as a cremation ground for Hindus. Outside this inclosure is a strip of land to which all classes of the public have free access. This strip is connected with the public road by a path leading through certain fields. The finding is that the owners of the fields through which the path goes might have a right to stop people passing, but as a matter of fact they never do so. It was on this strip of land just outside the cremation ground, that the petitioners and their companions were found gambling by the inspector who headed the raiding party. The District Magistrate found that tbis spot, besides

being in full view of the public, as they pass to and fro across the fields, is also freely accessible to all classes of the public and belongs to a public body which has never enclosed it.

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In my opinion, on these findings, the learned District Magistrate came to a correct conclusion that the place in question was a " public place " within the meaning of S. 13, Gambling Act. It is clear that the public have as a fact free access to this place without obstruction either by the municipality which owns field No. 1500 or by the owners of the other fields through which the pathway from the public road leads to it.

It is well settled that in order to bring a particular spot within S. 13, it is not necessary that the public should have a legal right to go to it. All that is necessary is that the public actually go there, whether as of right or on sufferance of the proprietors. In *Emperor* v. *Sukh Nandan Singh* (1) it was held that in the area occupied by a large grove, which belonged to a private individual but to which the public were allowed free access on certain occasions was a " public place " within the meaning of the section. Similarly in *Gajju* v. *Emperor* (2) it was held that the words " public place " signify a place to which the public resort as a matter of fact, whether of right or with the permission of the private owner. The meaning of a similar expression appearing in 14 and 15 Vict. c. 100, S. 29, was considered at length in *Reg.* v. *Wellard* (3), where Coleridge, C. J., defined a " public place " as a place where the public were in the habit of resorting and no one prevented them from so resorting to it. Grove, J., remarked that a " public place " was one where the public go, no matter whether they have a right to go or not. He said that " the right was not the question," but the determining factor was whether the public actually and in fact went there without let or hindrance. There is a number of reported cases of Indian Courts in which the same view has been taken, but I do not think it necessary to refer to all of them.

The learned counsel for the petitioners has referred me to three rulings, each of which seems to me to be distinguishable. In *Emperor* v. *Hussain Noor*

(1) A. I. R. 1922 All. 542=44 All. 265.
(2) [1919] 14 N. L. R. 137=47 I. C. 433=19 Cr. L. J. 917.
(3) [1885] 14 Q. B. D. 63=54 L. J. M. C. 14=51 L. T. 604=15 Cox. C. C. 559=49 J. P. 196.

Mahomed (4) the question was whether a railway carriage forming part of a special train running between Poona and Bombay was a "public place" within the meaning of the Bombay Prevention of Gambling Act, the wording of which is similar to that of the Indian Public Gambling Act. It is obvious that there is no analogy between a railway carriage forming part of a special train and the spot in question in the present case. The next ruling cited is *Kashi Ram* v. *Emperor* (5) where, in a brief judgment, it was held that gambling in a place near a public road and exposed to public view is not gambling in a "public place." No details are, however, given in the report as to the ownership and nature of the spot then in question. All that is stated is that the mere fact that the place was visible from the road was not enough to make it a "public place" within the meaning of the section. In *Mul Singh* v. *Empress* (6) a 'thara' forming part of a private house situate by the side of, but outside, a public street was held not to be a 'public place.' The facts of these cases were materially different from the present case. For the foregoing reasons, I am of opinion that the spot where the petitioners were found gambling, is a "public place" and I affirm the conviction.

The petitioners, however, have been sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs. 10 each. Section 13, however, provides that a person found guilty under that section shall be liable to a fine not exceeding Rs. 50 or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month. It is obvious, that a person who offends against this section can be punished either with imprisonment or with fine, but not with both. Double punishment of fine and imprisonment cannot be legally imposed: see *Empress* v. *Gokal* (7). The sentence imposed on the petitioners is consequently illegal. I therefore accept the revision to this extent that I modify the sentence to one of rigorous imprisonment for the period already undergone. The sentence of fine is set aside. The fine, if paid, will be refunded.

D.D. *Sentence modified.*

(4) [1906] 30 Bom. 348=8 Bom. L. R. 22.
(5) [1882] 17 P. R. 1882 Cr.
(6) [1890] 11 P. R. 1890 Cr.
(7) [1880] 25 P. R. 1880 Cr.

A. I. R. 1927 Lahore 674

ZAFAR ALI AND TEK CHAND, JJ.

Tola Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Cr. Appl. No. 228 of 1927, Decided on 9th May 1927, from the order of the S. J., Mianwali, D/- 21st December 1926.

(a) *Penol Code, S.* 84—*Accused must be insane at the time of the act complained of—He must be unable to know the nature and quality of the act—Antecedent and subsequent mental condition is not per se sufficient—It is relevant only to show that at the time of the act he was mentally incapable.*

To establish a ground of insanity it must clearly be proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. [P 676, C 2, P 677, C 1]

Accused's condition, antecedent and subsequent to the commission of the crime, is relevant only in so far as it might assist the Court in coming to a conclusion as to his mental capacity at the time when he did the act. The mere fact that on former occasions the accused had been occasionally subject to insane delusions or had suffered from derangement of the mind or that subsequently he had at times behaved like a mentally deficient person is per se insufficient to bring his case within the exemption. [P 676, C 2]

(b) *Penal Code, S.* 84—*Weakness of intellect or emotion is not sufficient under S.* 84.

The fact that the physical and mental ailments from which a man suffered had rendered his intellect weak and had affected his emotions and will cannot be sufficient to prove that his cognitive faculties had been impaired to a degree which is described in the last part of S. 84. [P 677, C 1]

It is not every kind of frantic humour or something unaccountable in a man's actions that points him out to be such a mad man as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing, no more than an infant, than a brute or a wild beast; *In re Edward Arnold*: 16 *St. Tr.* 695, *Foll.* [P 677, C 2]

(c) *Criminal P. C. S.* 401—*Accused suffering from epileptic fits—Exercise of mercy was recommended.*

Where the accused, convicted on a charge of murder, had and was suffering from epileptic fits, and owing to them he was of irritable temper, liable to lose self-control on the most trivial provocation, a recommendation of the exercise of the prerogative of mercy was made. 30 *P. R.* 1918; *A. I. R.* 1924 *All.* 413 *and* 23 *Cal.* 604, *Ref.* [P 677, C 2]

Des Raj Sawhney—for the Crown.

Tek Chand, J.—Tola Ram, appellant, aged 25, of Musa Khel, has been con-

victed by the Sessions Judge, Mianwali, under S. 302, I. P. C., for having murdered his father Ganda Ram on the 11th November 1926, and sentenced to transportation for life. He has appealed from jail and is not represented by counsel before us. We have carefully gone through the record and heard the Public Prosecutor in support of the conviction.

It has been established beyond doubt that the deceased Ganda Ram died as a result of the injuries inflicted on him by the appellant in the manner described by the prosecution witnesses. It appears that the appellant is a melancholiac who has been subject to occasional fits of epilepsy and was at the time suffering from vertigo. On the morning of the occurrence he went to Hakim Ram Singh (P. W. 14) and asked him to venesect him. As the hakim was himself unwell at the time, he told the appellant that he was unable to comply with his request. The appellant went again to him in the afternoon and repeated his request. The hakim told him to go to his shop and bring the lancet and knives so that the venesection might be performed. It appears that the appellant went to the shop, to take the lancet and knives and then came home to take a bandage. His father Ganda Ram had been suffering from fever for a number of days and was lying on a charpai, and his mother Asa Devi (P. W. 7) was busy spinning her wheel. She states that the appellant came in an excited mood and asked her to supply him with a bandage. She asked him to wait as she was spinning. On this the appellant kicked her twice. The deceased reprimanded the appellant and said : "Why are you beating your mother ? She cooks food for you". He also said to the appellant "Be you dead, be you dead ? Get away you have caused a great deal of trouble to us." On this the appellant got angry, caught hold of his father by the neck, threw him down from the charpai, sat on him and was going to throttle him, when Mt. Asa Devi raised a hue-and-cry and removed the appellant's hand from the deceased's throat. The appellant then got up, took hold of a sota and gave Mt. Asa Devi a blow on the head. He got more excited and gave his father Ganda Ram five or six blows on the head. Hearing the cry of Mt. Asa Devi, Tara Chand (P. W. 8) arrived on the scene, while the appellant was still beating his father. He caught hold of the appellant and snatched the sota from him. Nota Ram (P. W. 9) and Ganda Ram (P. W. 10) also reached the spot and helped Tara Chand in getting hold of the appellant and dragging him outside in the compound. They tied his hands and feet with his turban and sent word to the police. Tara Chand states that at that time the appellant's eyes were red with anger and that if they had not reached the spot would have murdered his mother also. Ganda Ram died immediately as a result of the injuries inflicted 'on him. His body was taken to the mortuary at Mianwali and Dr. Rahmat Ilahi (P. W. 1), Assistant Surgeon, conducted the post mortem examination. He discovered six injuries on the head and, removing the scalp, found the frontal bone fractured into 12 pieces. The right and the left parietal bones, the upper jaw and the left molar bone were also fractured. On the evidence, I have no doubt whatever that the deceased died as a result of the injuries inflicted by the appellant on his head with a sota in the manner described above.

The appellant, when questioned by the committing Magistrate whether he had killed his father and inflicted injuries on him with the intention of causing death, replied that he had

an attack of insanity at the time and, therefore could not say whether he inflicted any injuries to his father or not.

He stuck to this statement in the Sessions Court and stated that he was

some what in his senses when he asked his mother for his bandage,

but he did not remember whether he kicked his mother. He stated that when his mother told him to wait he sat down on the charpai, but does not remember what happened further.

The question to be decided is whether at the time of the attack on his father the appellant was, by reason of unsoundness of mind, incapable of knowing the nature of the act or knowing that he was doing what was either wrong or contrary to law. If the answer to the question is in the affirmative, the ap-

pellant's case will come within the exemption described in S. 84 I. P, C. If not, his conviction under S. 302 must be upheld.

Dr. Manohar Lal (D. W. 2) Sub-Assistant Surgeon, Mianwali, who was in charge of the Civil Dispensary at Musa Khel from 1920 to 1925 has deposed that the appellant used to go to him as an out-door patient and twice he gave him soothing injections of phoscine hydrobromide as he used to scream and cry out. As an out-door patient he used to complain of constipation and vertigo. From September 1922 to December 1923, he worked in the hospital as a water-carrier, where his "laborious work" was done by his father.

At night he used to cry and fall down from the charpai and used to get injuries on the head. He used to be unconscious at the time. He had a weak memory and never had sound sleep. In the presence of the witness he once threw a stone on one Behari at slight provocation. The witness also stated that he saw the appellant in a violent maniacal fit, when he went to treat him at his house. Data Ram (P. W. 6) deposed that about a year before the occurrence he once saw the appellant lying in the bazar "in convulsions and foaming at the mouth" and that five or six months later he found him in the jungle in a fit of epilepsy. Mt. Asa Devi (P. W. 7), who is the mother of the appellant, deposed to his having suffered from giddiness. She stated that at first he suffered from melancholia, but later on got fits of epilepsy when he used to go into convulsions and to foam at the mouth. She, however, admitted that on the day of the occurrence he had no fit of epilepsy. Tara Chand (P. W. 8) and Nota Ram (P. W. 9) also deposed to his having suffered from melancholia and epilepsy. Gopal Das (P. W. 12) who is the elder brother of the appellant, stated that in 1919, when he was studying in the seventh standard, he all of a sudden, threw his books aside and began to shriek. Later on he used to fall down from his charpai at night. He used to abuse people and give slaps to them and had fits of epilepsy usually after a month and sometimes at shorter intervals. Dr. Parma Nand (P. W. 1), Sub-Assistant Surgeon, who was in charge of the Mianwali Jail, where the appellant was confined after his arrest, stated that the jail register showed that on the 16th November 1926, the appellant got an attack of epilepsy, that he "was not in his senses and was speaking irrelevantly." On the 19th he had another epileptic fit and was furious and dangerous. On the 23rd there was an epileptic fit and post-epileptic mania. The register showed that he had fits of epilepsy on the 29th November and 12th April. Dr. Hottinger (P. W. 3), Civil Surgeon, stated that the appellant was under his observation on different dates after the 13th November. He was reported to have epileptic fits on five different days, but witness did not personally see him in a fit or in a state of post-epileptic maniacal excitement. On the occasion when the Civil Surgeon visited him, he always found him depressed and morose, his expression being dull and his speach slow and deliberate. On one occasion he gave irrelevant answers to his questions, but the witness thought that he was feigning at the time. Dr. Hottinger gave his considered opinion that the appellant had suffered from epileptic fits and owing to epilepsy he was of irritable temper liable to lose self-control on the most trivial provocation.

The above is a resume of the evidence relating to the mental and physical condition of the appellant. It must, however, be borne in mind that his condition, antecedent and subsequent to the commission of the crime, is relevant only in so far as it might assist the Court in coming to a conclusion as to his mental capacity at the time when he struck the fatal blow. The mere fact that on former occasions the appellant had been occasionally subject to insane delusions or had suffered from derangement of the mind, or that subsequently he had at times behaved like a mentally deficient person, is per se insufficient to bring his case within the exemption. As laid down by the Judges in answer to the questions put to them by the house of Lords in the celebrated *M C Naughten's case* (1),

> to establish a ground of insanity it must clearly be proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not

(1) [1843] 10 Cl. & F. 200=8 E. R. 718=59 R. R. 85.

to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.

This exposition of the law has since 1843 been accepted by the Courts in England and is the basis of the law in India as embodied in S. 84, I. P. C. A case can be brought within that section only if it is proved that : (a) at the time of committing the offence, (b) the accused was labouring under a defect of reason, (c) which had been caused by the unsoundness of mind, (d) such as rendered him incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

Can it be said that these four elements are present in the present case ? A careful consideration of the evidence leads me to the conclusion that, while it must be held that the appellant was subject to occasional fits of epilepsy and melancholia and suffered from giddines of the head, which had affected his nervous system so as to make him very irritable, it cannot be said that the cognitive faculties of his mind had been impaired to such an extent that he was non compos mentis at the time. He had no epileptic fit on the day of the occurrence ; he wanted the hakim to let out his blood, and had, like a sane man, gone to the hakim's shop and brought the lancet and knives. When he came home to take a bandage from his mother he was in his senses, but when his mother asked him to wait he became angry and hit her, and then, when his father remonstrated with him, he at once lost self-control and began to beat him in the manner described above.

It might be that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, but it cannot be said that his cognitive faculities had been impaired to a degree which is described in the last part of S. 84. On the occasion in question the loss of the power of self-control was not due to the want of consciousness of the nature and quality of his act, brought about by a diseased state of mind, but was obviously the result of the sudden rousing of passions, which he was unable to subdue at the time. It is clear that he struck the deceased not in a paroxysm of insanity, but in a fit of anger. An act, otherwise criminal, does not cease to be so, if committed under such circumstances. As observed by Tracy, J. in *In re Edward Arnold* (2), it is not every kind of frantic humour or something unaccountable in a man's actions that points him out to be such a mad man as is to be exempted from punishment ; it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing, no more than an infant, than a brute or a wild beast It is only such persons who are not the object of punishment.

I must, therefore, hold that the appellant is not exempt from criminal liability by reason of unsoundness of mind and his case does not fall under S. 84. I must affirm his conviction under S. 302, I. P. C.

At the same time I feel bound to say that this is a fit case in which a recommendation should be made to the Local Government under S. 401, Criminal P. C., to exercise the prerogative of mercy and effect a substantial reduction in the sentence of transportation for life passed against him. Numerous cases will be found in the law reports in which Courts have made similar recommendations in favour of persons found guilty under similar circumstances : vide inter alia, *Ramzan* v. *Emperor* (3) ; *Lachhman* v. *Emperor* (4), and *Queen-Empress* v. *Kader Nasyer Shah* (5).

I would, therefore, dismiss the appellant's appeal, but would, if my learned brother agrees, direct that a copy of this judgment be sent to the Local Government for taking action under S. 401, Criminal P. C.

Zafar Ali, J.—I agree.

R.K. *Appeal dismissed.*

(2) 16 St. Tr. 695.
(3) [1918] 30 P. R. 1918 Cr.=48 I. C. 492=20 Cr. L. J. 1.
(4) A. I. R. 1924 All. 413=46 All. 243.
(5) [1896] 23 Cal. 604.

A. I. R. 1927 Lahore 677

FFORDE AND CAMPBELL, JJ.

Kahan Singh and *others*—Defendants—Appellants.

v.

Gopal Singh and *others*—Plaintiffs—Respondents.

S.A. Nos. 2244 and 2757 of 1922, Decided on 31st January 1927, from the decree of the Addl. Dist. J., Hoshiarpur, D/- 5th July 1922.

Riwaj-i-am—Entry in, though unsupported by instances, casts burden of rebutting it on party challenging it.

A general proposition, that an entry in a riwaj-i-am, unsupported by instances is of little evidentiary value and insufficient to cast the onus of rebuttal upon the other side, is unwarrantable. An entry in the riwaj-i-am, though unsupported by instances, imposes the burden of proving that it was an incorrect statement of custom on the party who challenges it: *A. I. R.* 1916 *P. C.* 129 and *A. I. R.* 1927 *Lah.* 241, *Foll.* [P. 678, C. 2]

Fakir Chand—for Appellants.

G. S. Salariya and *Jagan Nath Bhandari*—for Respondents.

Campbell, J.—This was a suit by the collaterals in the fifth degree of one Kahan Singh for a declaration that a gift of land by Kahan Singh to his four daughters should not affect the plaintiffs' reversionary rights. The trial Court decreed the plaintiffs' claim. On appeal the Additional Judge gave the plaintiffs a decree for three-fourths of the land only, holding that one of the daughters Mt. Bholi, was entitled by custom to retain possession of the other one-fourth in that she was a daughter who had rendered services to the donor and was hence a person to whom a valid gift could be made by a sonless proprietor.

Both sides have come to this Court on second appeal. For the defendants-appellants it is urged, firstly, that the decision by the Courts below that the property gifted was ancestral is not supported by evidence, but this is not the case. The finding is one of fact, and there is evidence on the record to support it. Secondly, the defendant-appellants attacked the finding of the learned Additional Judge in regard to custom, but their learned counsel admits that unless the finding of the Additional Judge that the three other daughters namely, Mt. Hukman, Mt. Nikko and Mt. Sardho, did not render services to the donor can be got over, he is unable to rebut the entry in the riwaj-i-am stating the custom prevalent. This statement is to be found in the answer to question 90 on p. 219, Humphreys' Customary Law of the Hoshiarpur District, and is to the effect that amongst Sainis of that district, the tribe to which the present parties belong, in the absence of lineal male heirs a man can gift his whole property or any part of it to a daughter in return for services rendered.

There is a distinct finding by the learned Additional Judge that the three daughters, Mt. Hukman, Mt. Nikko and Mt. Sardho, did not render services to their father, the donor, and if there are statements of the witnesses on the record that they did, this simply means that the learned Additional Judge has refused to believe those witnesses. The finding is one of fact and cannot be interfered with in second appeal.

Appeal No. 2244 of 1922 by the defendants must, therefore, fail in my opinion.

The plaintiffs' appeal is No. 2757 of 1922 and this asks that the decision be set aside that Mt. Bholi is under custom entitled to retain possession of one-fourth of the gifted property. The learned counsel for the appellants has asked us to reject the evidence provided by the riwaj-i-am entry quoted above on the ground that it is unsupported by instances. We are unable to do so. The law has been laid down by their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1), and in a recent case, *Labh Singh* v. *Mt. Mango* (2), we have given our reasons for considering that certain subsequent decisions by this Court and by the Chief Court have gone unwarrantably far in laying down as a general proposition that an entry in a riwaj-i-am unsupported by instances is of little evidentiary value and insufficient to cast the onus of rebuttal upon the other side. The reliability of the riwaj-i-am with which we are dealing has not been assailed. In my opinion the entry in question imposed upon the plaintiffs the burden of proving that it was an incorrect statement of custom, and this burden has not been discharged.

I consider that appeal No. 2757 of 1922 must fail also, and I would dismiss both appeals with costs.

Fforde, J.—I concur in regard to both appeals.

G.B. *Appeals dismissed.*

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(1) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).
(2) A. I. R. 1927 Lah. 241=8 Lah. 281.

A. I. R. 1927 Lahore 679

BROADWAY, Ag. C. J., AND BHIDE, J.

Kesho Ram—Plaintiff—Appellant.

v.

Firm Piru Mal Dina Nath—Defendant—Respondent.

F. A. No. 2742 of 1923, Decided on 7th June 1927, from the decree of the Sr. Sub-Judge, Amritsar, D/- 31st August 1923.

(a) *Civil P. C., O. 13, R. 4—Document produced behind the back of a party and endorsed by Court—Party can call for proof thereof.*

Where a document was produced by a party behind the back of his opponent, on a day on which the case was not set down for hearing, the mere fact that the Court was induced to endorse the requirements of O. 13, R. 4 on it on that date cannot be regarded as a waiver on the part of the opponent to call for further proof of the document. [P 679 C 2]

(b) *Civil P. C., S. 34—Appeal.*

Where the lower Court has not considered the question of interest, the appellate Court may grant it. [P 680 C 1]

Fakir Chand and *Har Prasad* for *Vas Dev Kumria*—for Appellant.

M. L. Puri—for Respondent.

Facts.—The parties to the suit giving rise to this appeal are business people, the plaintiff living in Amritsar and the defendants at Batala in the district of Gurdaspur. They had considerable dealings, and the plaintiff instituted this suit claiming a sum of Rs. 5,456-9-0 as being the amount due on accounts. He also asked for future interest from the date of institution till realization of the decretal amount at the rate of 6 per cent per annum. The defendant-firm, while admitting former transactions and the execution of a balance, objected to an overcharge by way of interest and also pleaded that a sum of Rs. 2,300 had been paid by them which had not been credited in their account by the plaintiff. The trial Court came to the conclusion that there was no error in the calculation of the interest, but found that the defendants had succeeded in proving the payment of Rs. 2,300-0. Allowing this sum together with interest at the rate of six per cent per annum, it deducted the sum of Rs. 2,460-0 and granted the plaintiff a decree for Rs. 2,996-9-0. The judgment was entirely silent on the question of interest, although the matter had been put in issue.

Against this decree the plaintiff preferred this appeal, challenging the finding of the Court below as to the payment by respondents of Rs. 2,300 and further asking for the interest prayed for in his plaint.

Broadway, Ag. C. J.—(After stating facts, the judgment proceeded.) The main dispute before us relates to the payment of the sum of Rs. 2,300 as alleged by the respondents. Admittedly the onus of proving this payment was on them. In order to discharge this onus they led oral evidence, and five witnesses have deposed to the payment having been made in their presence. This evidence has been read by Mr. Fakir Chand for the appellant, and, after a careful consideration of it, it is a matter of some surprise to me that the Court below should have accepted it as proving the payment alleged by the respondents. The statements of the witnesses are bald ones and do not agree in some particulars. (The judgment here discussed the evidence of witnesses and proceeded.) It has been urged by Mr. Mukand Lal Puri, inasmuch as the account books of the defendant firm were placed on the record and endorsed by the presiding officer, as required by O. 13, R. 4, Civil P. C., the plaintiff should be held to have waived any objection as to proof of these accounts. An examination of the record, however, shows that these documents are endorsed as having been produced on the 15th May 1922. A further examination of the record shows that the case was not set down for hearing on the 15th May 1922. In the circumstances, it is obvious that the translation of account books was produced behind the plaintiff's back, and the mere fact that the Court was induced to endorse the requirements of O. 13, R. 4, Civil P. C. on it on that date cannot be regarded as a waiver on the part of the plaintiff to call for further proof of those documents.

It was next urged by the learned counsel for the respondents that, inasmuch as the endorsement had been made on this translation, his clients had been misled and, therefore, they should be allowed a further opportunity to produce evidence in support of their plea. Having regard, however, to the fact that it was the respondents who produced the documents on a date not fixed for the hearing of the case, I do not think that

they should be allowed any further opportunity to re-open their case.

In my judgment the evidence on the record, as given by the witnesses for the defendant-firm, is wholly unreliable, and I would, therefore, hold that the respondents have failed to prove that they made the payment of Rs. 2,300 as alleged by them.

On the question of interest, it has to be borne in mind that the parties are traders, and in these circumstances I see no reason for not allowing the interest prayed for. It has been argued that this question of interest is a discretionary one, and that an appellate Court will not lightly interfere with the discretion of the trial Court. In the present case, however, a reference to the very cursory judgment of the learned Senior Sub-Judge shows that he obviously lost sight of this question of interest and that it is only his silence that can be regarded as amounting to a refusal to grant interest. The matter has certainly not been considered by him and I would, therefore, accept this appeal and grant the plaintiff a decree for the amount claimed by him in full with costs throughout and with interest on the decretal amount from the date of institution till the date of realization at the rate of 6 per cent. per annum.

Bhide, J.—I agree.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 680

BHIDE, J.

Dial Chand—Defendant—Appellant.

v.

Lachhman Singh and *another*—Plaintiff and Defendant—Respondents.

S. A. No. 797 of 1927, Decided on 21st June 1927, from the decree of the Senior Sub-Judge, Gurdaspur, D/- 23rd December 1926.

Civil P. C., O. 21, R. 63—Order on an objection to attachment of property, whether passed summarily or after investigation comes within the scope of the rule—Limitation runs from date of such order—Limitation Act, Art. 11.

According to the wording of O. 21, R. 63, it is immaterial whether a claim or objection is decided after or without any investigation : 45 *Cal.* 785 and 66 *P. R.* 1916, *Rel. on*; *A. I. R.* 1922 *Lah.* 108 and 40 *All.* 325, *Dist.* [P 681 C 1]

L, a decree-holder, got a buffalo belonging to *G*, the judgment-debtor, attached. *D* objected to the attachment on the ground that the animal belonged to him. *L* stated that he did not wish to contest the objection and the animal was released. The animal was attached a second time, but the same objection was raised by *D* and allowed by the Court after enquiry. The plaintiff instituted a suit under R. 63 for a declaration that the animal belonged to *G*.

Held : that *L* having stated that he did not wish to contest the objection and the animal having been released from attachment, the objection must be taken to be decided and the period of limitation began to run from date of release from attachment. [P 680 C 2]

Shambu Lal Puri—for Appellant.

Cooper—for Respondents.

Judgment. — Plaintiff, Lachhman Singh, got a buffalo belonging to Ganga Ram, defendant (the judgment-debtor), attached in execution of his decree in the year 1924. Dial Chand, a brother of Ganga Ram, raised an objection that the animal belonged to him. The decree-holder thereupon stated that he did not wish to contest the objection. The animal was accordingly released from attachment on 15th May 1924. Subsequently the animal was attached a second time. The same objection was again raised and was this time enquired into and allowed on the 12th November 1925. The plaintiff thereupon instituted a suit on the same day for a declaration that the buffalo belonged to Ganga Ram, the judgment-debtor. The Court of first instance held that the suit was time barred and also decided it on merits against the plaintiff. An appeal was preferred to the Senior Subordinate Judge who differed from the Court of first instance on both points and decreed the claim. From this decision a second appeal has now been filed.

The only point taken up in second appeal is that of limitation. It is urged that the first objection of the defendant Dial Chand, with respect to the buffalo having been dismissed on 15th May 1924, limitation commenced to run from that date and, therefore, the present suit, instituted on 12th November 1925, was time barred. The learned Senior Subordinate Judge has held that at the time of the first objection the decree-holder had merely stated that he would not for the present proceed against the animal and would try some other property of the judgment-debtor and that, therefore, the objection was merely consigned to

the record-room without any decision. He was, therefore, of opinion that the period of limitation did not commence to run from 15th May 1924, as there was no decision of the objection giving rise to a suit under O. 21, R. 63, Civil P. C.

On behalf of the appellant it has been contended that the view of the learned Senior Subordinate Judge that the objection was not decided is not correct; for the decree-holder definitely stated that he did not wish to contest the objection and, therefore, the animal was released from attachment. This contention is supported by the record and is, in my opinion, sound. According to the wording of O. 21, R. 63, Civil P. C., 1908, it is immaterial whether a claim or objection is decided after or without any investigation: vide *Nagendra Lal* v. *Fani Bhusan* (1). On behalf of the respondent, *Firm Fateh Din Allah Ditta* v. *Qutab Devi* (2) and *Gokul* v. *Mohri Bibi* (3) have been cited. The first ruling is easily distinguishable as the objection in that case was not decided at all and the execution application was merely filed on account of the default of the decree-holder. The second case is based on the wording of the old Civil P. C., 1882. As pointed out in *Gopal Singh* v. *Ganpat Rai* (4), there was a significant change in the wording in O. 21, R. 63, Civil P. C., 1908, and an order, whether passed summarily or after investigation, comes within the scope of that rule. In the present instance the decree-holder having clearly stated that he did not wish to contest the objection, and the animal having been released from attachment on 15th May 1924, the objection must be, I think, taken to have been decided on that date. The period of limitation, therefore, began to run from that date and the present suit, which was instituted on 12th November 1925, was, therefore, obviously time barred.

I accept the appeal and dismiss the suit with costs throughout.

J.V. *Appeal accepted.*

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(1) [1918] 45 Cal. 785=44 I. C. 265=23 C. W. N. 375.
(2) A. I. R. 1922 Lah. 108=3 Lah. 7.
(3) [1918] 40 All. 325=44 I. C. 1005=16 A. L. J. 256.
(4) [1916] 66 P. R. 1916=130 P. L. R. 1916=35 I. C. 321=117 P. W. R. 1916.

A. I. R. 1927 Lahore 681

JAI LAL, J.

Haji Muhammad and *others*—Judgment-debtors—Appellants.

v.

Ghulam Hussain Khan and *another*—Auction-purchaser — Decree-holder — Respondents.

Misc. S. A. No. 754 of 1927, Decided on 2nd July 1927, from an order of the Addl. Dist. Judge, Lahore, D/- 17th December 1926.

(a) *Civil P. C., O. 21, R. 92 (2), proviso—Notice of application to set aside an auction-sale must be given to auction-purchaser—He is entitled to appeal if sale is set aside.*

An auction-purchaser is entitled to be heard against an application made to set aside the sale, and no sale can be set aside unless notice of such application is given to him, and therefore, he is entitled to appeal if the sale is set aside : 40 *All.* 425 ; 15 *C. W. N.* 685 and 1 *Lah.* 21, *Rel. on.* [P 682 C 2]

(b) *Civil P. C., O. 21, R. 92 (2)—Auction-purchaser need not be made a party in the application to set aside the sale, but he must be given notice of such application—(Obiter).*

There is no express provision of the law to the effect that the auction-purchaser should be made a party to an application to set aside the sale in this sense, that in such application he should be described as one of the parties against whom the application is made [P 682 C 1]

Jagan Nath Aggarwal—for Appellants.

J. G. Sethi—for Respondents.

Judgment.—The respondent Ghulam Hussain Khan purchased the property in dispute in an auction held by the Sub-Judge of Kasur in execution of a decree. The judgment-debtor having objected to the sale on the ground of material irregularity in publishing or conducting the same the Sub-Judge set it aside. The auction-purchaser thereupon filed an appeal in the Court of the Additional Judge of Lahore. This appeal has been accepted and the sale confirmed. This is an appeal by the judgment-debtor against the order of the Additional District Judge.

The only question that was raised before me on behalf of the judgment-debtor is that the auction-purchaser is not competent to appeal from an order setting aside a sale held in execution of a decree. A further point, which was raised before the District Judge and is again raised before me on behalf of the respondent, is that an auction-purchaser

is a necessary party to an application by the judgment-debtor to set aside a sale and as in this case he was not made a party, therefore, the Sub-Judge was not competent to entertain the application. The District Judge has held that the application made by the judgment-debtor to set aside the sale could not proceed because the auction-purchaser was not made a party to it within the period of limitation prescribed for making such an application. He has further held that there was no material irregularity in publishing or conducting the sale. In view of this second finding, strictly speaking, it is not necessary for me to decide whether it was incumbent on the applicant to make the auction-purchaser a party to the application to set aside the sale, but it appears to me that the view of the learned Judge is not correct and the law does not lay down anywhere that the application to set aside the sale should be in any particular form. All that is needed is that the auction-purchaser should be notified and given an opportunity to meet the allegations made in the application. This is quite clear from O. 21, R. 90 and the proviso to O. 21, R. 92. In the absence of any express provision of the law that the auction-purchaser should be made a party to the application in this sense that in the application he should be described as one of the parties against whom the application is made, I am unable to hold that the view of the learned Judge below is correct.

The next question is whether, if a sale has been set aside, the auction-purchaser is competent to appeal. Now, O. 21, R. 92, proviso, clearly provides that no order setting aside the sale shall be made unless notice of the application has been given to all persons affected thereby. It is quite clear to my mind that an auction-purchaser is affected by an order under R. 92 and is, therefore, entitled to a notice and consequently to show cause against the application to set aside the sale. It is a necessary consequence of a notice to him and of his right to show caust against the application that, if the decision is adverse to him, he is entitled to appeal. It was held in *Fazal Rab* v. *Manzur Ahmad* (1) that an auction-purchaser is entitled to a notice of an application under O. 21 R. 90, and that he has a right to appeal if the sale is set aside. Similarly in *Bibi Sharafan* v. *Muhammad Habibud-din* (2) it was held by the Calcutta High Court that an auction-purchaser is entitled to a notice under O. 21, R. 92, proviso. In *Khaira* v. *Salem Raj* (3) it was held that if an auction-purchaser is made a party to an appeal from an order refusing to set aside a sale after the period of limitation for the appeal has expired, the appeal must be held to be barred by time. It appears, therefore, from all these cases that the auction-purchaser is entitled to be heard against an application made to set aside the sale and that no sale can be set aside unless notice is given to him and, therefore, that he is entitled to appeal if the sale is set aside.

This was the only point that was argued before me. The rest of the matters decided by the District Judge are findings of fact and cannot be attacked on second appeal. I dismiss this appeal with costs.

J.V. *Appeal dismissed.*

(1) [1918] 40 All. 425=45 I. C. 773=16 A. L. J. 433.

(2) [1911] 13 C. L. J. 535=10 I. C. 148=15 C. W. N. 685.

(3) [1920] 1 Lah. 21=51 I. C. 935.

A. I. R 1927 Lahore 682

ZAFAR ALI AND COLDSTREAM, JJ.

Majhi—Accused—Appellant.

v.

Emperor—Opposite Party.

Cr. Appl. No. 393 of 1927, Decided on 1st July 1927.

(a) *Criminal P. C., S.* 164—*Certificate required by Cl.* 3 *appended to confession—Presumption is that precautions described in section were duly taken.*

Where there is no positive evidence that the precautions required by S. 164 were not taken and the certificate required by sub-S. (3) is duly appended to the record of the confession, the presumption is that the precautions described in the section were duly taken. The law does not anywhere state what or how many questions the Magistrate, who is about to record a confession, must make in order to satisfy himself in accordance with the directions in that section : *A. I. R.* 1922 *Lah.* 237, *Ref.*

[P 683 C 2]

(b) *Penal Code, S.* 302—*Accused's confession retracted on first opportunity—Confession due probably to promise of pardon and not corroborated by independent evidence—No motive for offence committed established by prosecution—Only evidence against accused being he was last seen in company of victim—Confession is inadmissible in evidence and accused cannot be con-*

victed on the remaining evidence—Evidence Act, S. 24.

M was convicted by the Sessions Court under Ss. 302 and 201, I. P. C., upon his own uncorroborated confession. M retracted the confession at the first opportunity alleging that the confession was put into his mouth by the police who tortured him in order to induce him to turn an approver. The prosecution never alleged that M was the only person concerned either in the murder or in the burial, but admitted that after the confession, efforts were made to induce him to become an approver. The prosecution evidence did not establish the existence of any motive on the part of M, and there was no independent evidence connecting him with the murder in material particulars except that G, the victim, with other co-accused who were acquitted of the charge of being the accomplices of M was seen in M's company shortly before the murder, that the corpse was found upon M's land and that M took the Magistrate to where the corpse was buried. The police, however, had known of the whereabouts of the corpse some days prior to M's confession.

Held : that in the circumstances M's confession was probably due to the promise of pardon and, therefore, should be excluded from the evidence against M, and that if the confession was excluded, the rest of the evidence could not establish M's guilt.

(c) *Evidence Act, S. 24—Accused retracting his confession—Court believing it to be true and voluntarily made—Conviction on such retracted confession although uncorroborated by independent evidence is not illegal.*

A confession retracted at the first opportunity is always open to suspicion. If, however, the Court believes it to have been made voluntarily and to be true, the absence of independent corroborating evidence will not prevent the Court from accepting it as sufficient in itself to establish the guilt and justify the conviction of the person making the confession. [P 683 C 2]

Malik Muhammad Amin—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—Majhi, an Awan, appeals against a conviction and sentence of death under S. 302, I. P. C., for the murder of Ghulam Hussain, a Sowar of the 11th Cavalry, then stationed at Sialkot on the nignt of the 16-17th June 1926. The sentence is also before us for confirmation under S. 374, Criminal P. C. Majhi has also been convicted under S. 201, I. P. C., on the charge of having buried the body of his victim.

In the beginning of June 1926, Ghulam Hussain took leave from his regiment. His home was at Kandan in the Shahpur District, but his wife, Mt. Sahib Zadi was living with her father in Jandran. Ghulam Hussain went straight to Jandran from Sialkot and after spending a night there went on to Kandan where he stayed for four or five days. He then returned to Jandran to fetch his wife. When he had been away a few days his brother Sultan Mahmud, who was living at Kandan, sent a messenger to Jandran for news of him. The messenger returned with Ghulam Hussain's mare and reported that he had been told by Ali Akbar, father of Mt. Sahib Zadi, and Mt. Suban, her sister, that Gulam Hussain was detained at Jandran in view of the approaching marriage of Ali Akbar's son. Ghulam Hussain before he went to Jandran, had borrowed a pair of shoes from a sepoy who was at the time on leave at Kandan. This sepoy's leave was about to expire and he wanted his shoes. After waiting about a week Sultan Mahmud again sent the mesenger to Ghulam Hussain at Jandran to fetch the shoes. The messenger again returned without Ghulam Hussain and with a message from Ali Akbar, Mt. Suban and Mt. Sahib Zadi that Ghulam Hussain had gone off towards Sargodha. Sultan Mahmud, becoming anxious, then went himself to Jandran. Here he was told by Ali Akbar and his daughters (Mt. Sahib Zadi and Mt. Suban) and Haidar Shah, a Sayad, who lived in Ali Akbar's house, that Ghulam Hussain had gone with one Ghulam Jilani, a Biloch, on a visit of condolence to Majhi, who lived at Chak No. 1, Rakh Dharima. Sultan Mahmud accordingly went to Rakh Dharima where he found Majhi and his brother Surkhru who told him that Ghulam Hussain and Ghulam Jilani had been there some days previously. In the course of subsequent enquiries he learnt that about the time when Ghulam Hussain had been at Rakh Dharima some persons had heard cries in Rakh Dharima. Believing that his brother had been murdered, Sultan Mahmud reported the facts at the Sargodha police station on the morning of the 11th July, stating that he was convinced that his brother had been murdered by Haidar Shah, Ghulam Jilani, Majhi and Surkhru at the instigation of Mt. Suban and Mt. Sahib Zadi. Majhi had been carrying on an intrigue with Mt. Suban and Ghulam Jilani was intimate with Mt. Sahib Zadi. Haidar Shah, who lived in Ali Akbar's house, had acted as a go-between for both the women.

The police made enquiries at Rakh Dharima and on the 18th July Majhi made a confession before Ch. Mushtaq Ahmad, Magistrate of Sargodha, who had been summoned by the police to Dharima. Majhi took the Magistrate to a place where he said the dead body of Ghulam Hussain lay buried. His confession was then recorded. In this confession Majhi stated that on the 16th June, Haidar Shah came to him at his jhuggi in Dharima and told him that Ghulam Hussain and Ghulam Jilani were coming to condole with him (Majhi) at the instance of Mt. Suban and Mt. Sahib Zadi. Ghulam Jilani and Ghulam Hussain arrived at noon. Haidar Shah and Ghulam Jilani took Majhi aside and told him that Ghulam Hussain had been decoyed there in order that he might be murdered. Majhi and Haidar Shah were at enmity with Ghulam Hussain whose marriage to Mt. Sahib Zadi they had opposed. At first Majhi refused to join in the murder as he had no enmity against Ghulam Hussain, but he was won over by a threat that if he did not assist Haidar Shah and Ghulam Jilani they would kill Ghulam Hussain themselves upon his land and so fix the responsibility upon him. After dark Majhi, Ghulam Jilani, Haidar Shah and Ghulam Hussain started for the village where it had been proposed that they should eat and sleep as there was not accommodation at jhuggi for them. When they were passing through a jungle Haidar Shah suddenly caught Ghulam Hussain by the arms from behind and Majhi caught him by the legs. Ghulam Jilani and his accomplices then strangled Ghulam Hussain. They hid his body in a heap of wood and then went into the village and had their meals. After sleeping for a while when all was quiet, they buried the dead body in a place about two squares from the jhuggi. Two days later Majhi noticed that the body was stinking and fearing discovery he disclosed the matter to Ali Mohammad, Nura, Surkhru and Surkhru's son Aurangzeb. With the help of these persons he disinterred the corpse and re-buried it in his land about 90 karms from his jhuggi.

After this confession had been recorded Majhi took the Magistrate to the place where the body had first been buried. After this Aurangzeb made a statement and pointed out the two burial places. The place where the body was said to be was then dug up and in it were found a wooden pole which, according to Majhi's statement, had been used for carrying the body and, some three feet below this, a dead body, which owing to its putrid state was not identifiable. With it, however, were some clothes which were subsequently identified, and there was a cloth knotted round the neck.

The police challaned Majhi, Ghulam Jilani and Haidar Shah under S. 302, and a fourth accused, Khuda Bakhsh, under S. 302 read with S. 109, I. P. C.

Before the committing Magistrate, Majhi, on the 8th January 1927, retracted his confession. He declared that the statement he had made to Ch. Mushtaq Ahmad had been put into his mouth by the police who had tortured him and disgraced his womenfolk. He also alleged that an attempt had been made to induce him to turn King's evidence but he had refused to become an approver.

At the trial he again alleged his innocence, adhering to the statement he had made before the committing Magistrate.

Finding that Majhi's retracted confession was not corroborated by independent evidence connecting the other accused with the murder the Sessions Judge acquitted them. He accepted Majhi's confession as one voluntarily made and true, and convicted and sentenced Majhi as stated in the beginning of this order.

Malik Muhammad Amin, who has appeared before us for the appellant, has taken us through all the evidence relating to Majhi's alleged share in the murder. His contentions are that the confession of the 18th July was inadmissible in evidence as the provisions of S. 164 (3), Criminal P. C., had not been duly observed by the recording Magistrate; that if admissible, the confession was irrelevant in view of S. 24, Indian Evidence Act; that, as evidence, the retracted confession was worthless as it was not corroborated in material particulars by independent evidence connecting Majhi with the murder; and that the confession had been disbelieved as against Majhi's co-accused and was manifestly untrue.

Malik Muhammad Amin has referred to *Farid* v. *Emperor* (1), and urged that the questions which Ch. Mushtaq Ahmad, according to his own evidence, put to Majhi before he recorded the confession were not such as to justify him in deciding that Majhi desired to make a confession of his own accord and not under any inducement or pressure. He has further urged that the circumstances established by the evidence were such as to raise a serious suspicion if not a certainty, that the confession had been made under threats or on the promise of a pardon.

We find no force in the objection based upon the provisions of S. 164, Criminal P. C. The certificate required by sub-S. (3), S. 164 was duly appended to the record of the confession and the presumption is that the precautions described in the section were duly taken. The law does not anywhere state what questions the Magistrate, who is about to record a confession, must make in order to satisfy himself in accordance with the directions in S. 164. Nor is it force here to decide whether the Magistrate asked a sufficient number of questions or whether the answer he got were or were not sufficient to justify the Magistrate's belief in the voluntary nature of the confession. There is no positive evidence that the precautions required by S. 164 were not taken.

A confession retracted at the first opportunity, as this one was, is always open to suspicion. If we believe it to have been voluntarily made and to be true, the absence of independent corroborating evidence will not prevent us from accepting it as sufficient in itself to establish the guilt and justify the conviction of the person who made it. On the other hand, we must be fully satisfied, before we act upon it, as to the relevancy of the confession under S. 24 Indian Evidence Act.

Having given the matter our earnest consideration we find ourselves not satisfied that in this case the confession relied upon by the prosecution was one which was relevant under S. 24, Indian Evidence Act. Our decision is not based upon mere surmise, but upon proved circumstances, such as the fact, admitted by the prosecution that, after the confession, efforts were made to induce Majhi to become an approver. Majhi had already fully inculpated himself and several others. It is difficult to see why Majhi should reject the offer of a pardon in the circumstances unless it were that he had come to know that after all he was not going to gain anything by his confession, and, therefore, repudiated it. That the police had known of the whereabouts of the corpse for some days before the confession was made is clear from the evidence of the prosecution itself. His nephew Aurangzeb was also confessing regarding his participation in the re-burial of the corpse. It is frankly admitted by Mr. Rashid who appears for the Crown that the evidence does not establish the existence of any motive on the part of Majhi and that there is no independent evidence connecting him with the murder in material particulars except that Ghulam Hussain, with others who have been acquitted of the charge of being his accomplices, was seen in Majhi's company shortly before the murder, that the corpse was found upon his land, and that he took the Magistrate to where it was buried. The prosecution does not allege that he was the only person concerned either in the murder or in the burial. The confession appears to us to have been made on a promise of pardon and we must, therefore, exclude it from the evidence against Majhi. It is admitted by Mr. Rashid that if the confession be excluded the evidence does not establish Majhi's guilt. Accepting the appeal we set aside the convictions and the sentence and order Majhi to be released.

J.V. *Appeal accepted.*

(1) A. I. R. 1222 Lah. 237=2 Lah. 325.

A. I. R. 1927 Lahore 685

JOHNSTONE, J.

Mt. Gurdevi—Defendant—Appellant.

v.

Kharaiti Mal and *others*—Plaintiff and Defendants—Respondents.

S. A. No. 277 of 1927, Decided on 28th June 1927, from the decree of the Sr. Sub-Judge, Gujrat, D/- 12th November 1926.

(a) Civil P. C., O. 32, R. 7—Compromise by minor's guardian without sanction cannot be set aside unless minor proves absence of benefit.

A decree based upon an unsanctioned compromise entered into by the guardian of a minor is voidable at the option of the minor and a suit to set aside such decree is competent. It does not, however, absolve the plaintiff from the necessity of proving that the compromise was not for his benefit : 2 *P. R.* 1912 and 36 *Mad.* 295 (*P. C.*), *Foll.* [P 686 C 2]

(b) Transfer of Property Act, S. 41—Auction-purchaser bona fide purchasing property acquires indefeasible right to such property—Execution—Sale—Rights of purchaser.

An auction-purchaser, who is a stranger to the suit, is not bound to look behind the decree of the Court and he acquires an indefeasible right to the property purchased by him in such sale. [P 687 C 1]

Gobind Ram Khanna—for Appellant.

Nand Lal and *A. R. Kapur*—for Respondents.

Judgment.—In 1905 Devi Ditta mortgaged a house for Rs. 80 to Anant Ram who sued for his money on 7th December 1909. Devi Ditta died during the suit and his brother Ganga Ram and the plaintiff were brought on to the record as his legal representatives. The plaintiff was a minor at the time and was represented by his mother. On 8th March 1910 the mother filed a petition admitting the claim for Rs. 87 with costs, and a decree was passed in favour of Anant Ram. The debt not being paid, the house was put to auction and sold on 28th July 1910 for Rs. 90 to another Ganga Ram, defendant 2. The mother then applied to have the confirmation of the sale stayed, undertaking to pay the decretal amount. Anant Ram raised no objection, but since the mother failed to pay, the sale was confirmed and the auction-purchaser obtained possession on the 30th August 1913.

On the 4th August 1914 Kharaiti Ram brought a suit through his maternal uncle Gopal Das to set aside the sale. This suit was dismissed on 27th August 1914 for default and was never restored. Eventually, on 27th January 1926, Kharaiti Ram, having now attained majority, instituted the present suit for possession pleading that the "compromise" made by his mother with Anant Ram had not been sanctioned by the Court and was not binding on him. The plaint, however, contained no prayer to set aside the decree obtained by Anant Ram The trial Court held that the proceeding of the mother was a compromise and should have been sanctioned by the Court, but it also held that it was not proved that the compromise was not for the minor's benefit. It further adverted to the fact that plaintiff had not asked for the setting aside of the previous decree or of the dismissal of the suit brought through Gopal Das, and for all these reasons it dismissed the suit.

The Senior Sub-Judge took a different view. He held that it was not necessary for the plaintiff to prove that the compromise was not for his benefit ; that the decree based on an unsanctioned compromise was a nullity and that the execution sale must be set aside. He observed, too, that Gopal Das had been grossly negligent in allowing the suit brought by him on behalf of the plaintiff. to be dismissed. The appeal was accepted and a decree for possession was passed in the plaintiff's favour.

The Courts below held that the arrangement between the mother and Anant Ram was a compromise, and although there is some doubt whether the confession of judgment ("Iqbal dawa" are the words used) by the mother amounted to a compromise, I do not think that the finding can be disturbed in second appeal. The provisions of O. 32, R. 7, Civil P.C., were not complied with and, therefore, the decree was voidable at the option of the minor, and the suit was competent. The learned counsel for the plaintiff cited *Ganesha Row* v. *Tulja Ram Row* (1), and urged that the lower appellate Court was right in decreeing the suit. This appears to me to be an incorrect view. The principle laid down in *Ganesha Row* v. *Tulja Ram Row* (1) did not absolve the plaintiff from the necessity of proving that the compromise was not for his benefit. And plainly the compromise was for the benefit of the plaintiff. The amount due under the mortgage was patently due, and the mother acted wisely in not contesting a suit which must succeed. The contention that the mother was claiming the property as her own has no force. In accordance with *Dalo Mal* v. *Sundar* (2), I would hold that the plaintiff had to prove that the compromise was not

(1) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).

(2) [1911] 2 P. R. 1912=42 P. W. R. 1912=11 I. C. 523=134 P. L. R. 1911.

for his benefit and, in view of what I have said above, that he failed to adduce the requisite proof.

There is moreover a still more serious obstacle in the plaintiff's path. The auction-purchaser had nothing to do with the decree-holder. It is, indeed, alleged that he was the decree-holder's karkun, but there is only one witness who says anything to that effect and the connexion was positively denied by both Anant Ram and the auction-purchaser. The latter was not bound to look behind the decree of the Court and he acquired under the sale an indefeasible right to the property.

I hold, therefore, that the plaintiff is not entitled to obtain possession of the property in suit and I accordingly accept the appeal, reverse the decision of the lower appellate Court and dismiss the plaintiff's suit with costs in all the Courts.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 687

FFORDE AND CAMPBELL, JJ.

Ishwar Das Dharam Chand—Defendants—Appellants.

v.

Dhanpat Rai Daulat Ram—Plaintiffs—Respondents.

F. A. No. 839 of 1922. Decided on 6th January 1927, from the decree of the Sr. Sub-J., Amritsar, D/- 28th February 1922.

Contract Act, S. 107—Right of resale—Measure of damages—Contract.

Plaintiff agreed to sell and defendant agreed to buy four cases of dyed brocade. The shipments were described as of May-June 1920. The plaintiffs duly notified the expected arrival of the goods by a letter. The defendants replied that they would like to know what was the date of the bill-of-lading. They also asked for the original design and shades of the goods. The plaintiffs wrote stating that the relative sample had been sent them by registered post, and ending up by pointing out that the bill-of-lading was not material as there was nothing stated in respect thereof in the particular contract between the parties. The defendants then by a letter pointed out that instead of supplying one design the plaintiffs had supplied five designs which the defendants refused to accept. In spite of defendants' refusal to reply to any correspondence further, the plaintiffs again wrote informing the defendants that the railway receipts for the goods had arrived, demanding the contract price and requesting the defendants to take immediate delivery within 24 hours. The plaintiffs did nothing further after this letter, but sent a notice to the defendants informing them that if they did not take delivery of the goods within one week the four cases would be sold by auction on the expiry of that period, and the defendants would be held liable for expenses incurred; and on defendants replying that the contract was already cancelled, they sold the cases by auction and brought a suit for recovery of damages based on the difference between the price realized for the goods at the auction sale and the contract price with interest.

Held: that there was nothing to show that the defendants assented to the appropriation by the plaintiffs. The contract between the plaintiffs and their importers had not been incorporated into the contract between the parties, either by the terms of the document of the 14th April or by necessary implication or by the custom of merchants. Accordingly the property in the goods not having passed to the buyer, there was no right of resale under S. 107. That being so, their only cause of action would be for compensation for breach of contract, and the measure of that damage would have to be based upon the difference between the market rates of the goods in question at the time of the breach and the price agreed upon by the parties. [P 689 C 1, 2]

Moti Sagar and *Mehr Chand Mahajan*—for Appellants.

M. L. Puri and *Sheo Narain Kapur*—for Respondents.

Fforde, J.—By a contract in writing, dated the 14th April 1920, the plaintiff firm agreed to sell and the defendant firm agreed to buy four cases of dyed brocade of the office of D. Raushan Lal at the rate of 22½ d. per yard. Each piece was to contain from 50 to 55 yards and each case was to contain 40 pieces. The sellers were to receive Rs. 200 per case as profit from the buyers. If there were more or less pieces in the case the profit was to be adjusted accordingly. The shipments are described as of May-June. The plaintiffs duly notified the expected arrival of the goods by letter dated the 22nd July 1920. In this letter the plaintiffs stated that interest would commence to run from the arrival of the steamer in Karachi. This notice was headed:

> Dyed brocade quality 0076 sold to you four cases May-June 1920 at Rs. 250 per case profit each containing 50 pieces;

and the numbers of the cases were then given as 204-206 and 208. This is the first piece of correspondence which took place in connexion with this transaction. The defendant's reply is dated the 27th-July 1920, in which they say that before

dealing with the letter of the plaintiffs of the 22nd they would like to know what was the date of the bill-of-lading. They also asked for the original design and shades of the goods, and they further raised the point that the profit on each case was to have been Rs. 200, and not Rs. 250. In reply to this letter the plaintiffs wrote, on the 29th July 1920, explaining the method in which the profit was calculated, stating that the relative sample had been sent them by registered post, and ending up by pointing out that the bill-of-lading was not material as there was nothing stated in respect thereof in the particular contract between the parties. The defendants then, by the letter of the 30th July, pointed out that instead of supplying one design the plaintiffs had supplied five designs which the defendants refused to accept. They also repeated that it was important that they should have the bill-of-lading as otherwise they could not be certain that the goods were not of a late shipment.

There was no further correspondence until the 3rd September 1920, when the plaintiffs wrote to say that they had enquired from their shippers and had ascertained that the goods in question were shipped at the right time. In answer to this the defendants referred the plaintiffs to their letter of the 30th July, to which they said they had nothing further to add. They concluded by saying that they would not pursue the correspondence on the matter any further as the plaintiffs themselves had cancelled the contract in the defendants' office. To this letter the plaintiffs replied on the following day, denying that the contract had ever been cancelled and claiming Rs. 1,000, this sum being made up of profit on the four cases and interest from the date of the arrival of the steamer at Karachi. On the same date the defendants replied acknowledging receipt of the plaintiff' letter, referring the plaintiffs to their own letter of the previous date, and stating that they had nothing more to add, and that any further correspondence on the subject would not be replied to. In spite of this intimation from the defendants the plaintiffs again wrote on the 30th September informing the defendants that the railway receipts for the goods had arrived at the bank, demanding the contract price, and requesting the defendants to take immediate delivery within 24 hours.

To the last letter there was no reply, and the parties are agreed that, so far as the defendants were concerned, they had repudiated the contract before the time fixed for performance. The plaintiffs' counsel states, as indeed the correspondence shows, that the plaintiffs had not accepted the repudiation of the contract, but were keeping it alive, and insisted upon performance in due course. According to the plaintiffs' counsel the date for acceptance was not later than the 1st October 1920. That being so, the plaintiffs, upon the defendants' refusal to accept delivery, should have brought their suit for damages for breach of contract based upon the difference between the market price obtaining at the date of the breach and the contract price. Instead of taking this course the plaintiffs did nothing further after the letter of the 30th September until the 29th December, when they sent notice to the defendants informing them that if they did not take delivery of the goods within one week the four cases would be sold by auction on the expiry of that period, and the defendants would be held liable for all expenses incurred. In reply to this notice the defendants wrote on the 30th of December pointing out that two out of the four cases were received late, the contract concerning them was cancelled, and that, as regards the remaining goods, neither the design nor the colour nor the floral design was in accordance with the sample; they stated that the goods could not be thrust upon them, and concluded by saying that if any steps were taken against them they would hold the plaintiffs liable for costs and damages. This letter is merely a repetition of the defendants' previous refusal to perform their part of the contract. Eventually on the 17th of January the four cases in question were handed to the auctioneer to be sold by public auction and were sold on the 25th January, realizing the sum of Rs. 6,192-1-3. On the 8th February 1921, the plaintiffs brought the present suit for recovery of Rs. 6,896-10-0, damages based on the difference between the price realized for the goods at the auction sale and the contract price with interest added thereto. The trial Court

gave the plaintiffs a decree for practically the amount claimed.

The defendants' main case is that the plaintiffs have not shown that they suffered any damage by reason of the defendants' breach of their contract. Mr. Moti Sagar argued that as there was no consent by the defendants to the appropriation by the plaintiffs of the four cases in question to the contract, the property in the goods did not pass, and accordingly that the measure of damage provided by S. 107, Indian Contract Act, is not the proper measure in this case. It has been argued by Mr. Puri for the plaintiffs that the contract in question must be read with the contract entered into between the ptaintiffs and their importers Messrs. D. Raushan Lal, and that in that contract there being a clause of resale upon default of the purchasers to accept delivery, that clause must be read into the present contract, and in the alternative he argues that even if this contract between the plaintiffs and their importers cannot be read into the contract between the present parties, the property in the goods in question passed to the defendants under S. 83, Indian Contract Act, inasmuch as, according to him, there was an appropriation of these goods to the contract by the plaintiffs and assent to the appropriation by the defendants. Mr. Puri, however, has not been able to point to any act by the defendants amounting to an assent to the appropriation by the plaintiffs. He relied upen the correspondence, which in my opinion does not evidence any such assent. I am, moreover, satisfied that the contract between the plaintiffs and their importers has not been incorporated into the contract of the 14th April 1920. This could only be done either by express terms embodied in the agreement of the 14th April, or by necessary implication from the conduct of the parties and their statements on the subject or by the established usage of the trade. In my opinion neither by the terms of the document of the 14th April, nor by necessary implication, nor by the custom of merchants, can the terms of the contract between the plaintiffs and their sellers be read into the agreement of the 14th April.

Accordingly the plaintiffs had no right to resell by agreement, and the property in the goods not having passed to the buyer, there was no right of resale under S. 107, Indian Contract Act. That being so their only cause of action would be for compensation for breach of contract, and the measure of that damage would have to be based upon the difference between the market rates of the goods in question at the time of the breach and the price agreed upon by the parties. The plaintiffs have not produced any evidence as to the price prevailing in the market at the time of the breach, which the plaintiffs allege occurred between the 30th September and 1st October. In this view of the case I do not think it is necessary to discuss the further question which would arise had the plaintiffs a right to measure their damage on the basis provided by S. 107, Indian Contract Act. I may mention, however, that although the time for the performance of the contract was the 30th September 1920, the sale did not take place until the 25th January 1921. Had there been in the plaintiffs a right of resale arising from contract or under the statute, the further question would have had to have been decided as to whether or not that right was exercised within a reasonable time from the date at which the defendants ought to have accepted delivery of the goods. This matter, however, in view of the conclusion I have come to is not necessary to pursue.

For the reasons I have given I am of opinion that the plaintiffs have failed to establish that they have sustained any damage by reason of the defendants' breach of their contract and the appeal must accordingly be accepted, the decree of the trial Court set aside and judgment entered for the defendants, dismissing the suit with costs.

Campbell, J.—I agree.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 689

BROADWAY, J.

Mahomed Ishaq and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Cr. Rev. Petn. No. 802 of 1927, Decided on 26th July 1927, from an order of the Dist. Magistrate, Rawalpindi, D/- 6th November 1926.

(a) Criminal P. C., S. 439—Petitions are entertained by Lahore High Court only if District Magistrate or Sessions Judge is first moved unsuccessfully.

The usual practice of the Lahore High Court is to decline to consider an application under S. 439 unless and until the petitioner satisfies the Court that the Sessions Judge or the District Magistrate has been moved in the matter unsuccessfully. Where such petition was made to the Lahore High Court, after moving unsuccessfully the District Magistrate sitting as a Court of appeal, but not the Sessions Judge, the High Court did not decline to entertain the petition. [P 690, C 1, 2]

(b) Criminal P. C., Ss. 112 and 113—Person appearing in Court in pursuance of an order under S. 112—Magistrate passing fresh order requiring more security and reading out such latter order under S. 113—Proceedings are not vitiated.

Certain persons appeared before a Magistrate in pursuance of an order to show cause why they should not be required to furnish security in the sum of Rs. 2,000. On that day the Magistrate passed an entirely fresh order under S. 112 in which the amount of security demanded was Rs. 5,000. It was this latter order that was read out to them as required by S. 113:

Held: that in the circumstances the proceedings were not vitiated in any way by the procedure adopted by the Magistrate. [P 690,C 2]

Abdul Aziz and *Muhammad Alam*—for Petitioners.

Raj Krishna—for the Crown.

Judgment.—The three petitioners in this case have been bound down under S. 107, Criminal P. C., to keep the peace for a period of one year. The order binding them down was made by Mr. Keough who was then a Magistrate in Rawalpindi. It is dated the 21st September 1926. The three petitioners filed an appeal against that order to the District Magistrate who dismissed the same on the 5th November 1926. They have now come up to this Court under S. 439, Criminal P. C., through Mr. Abdul Aziz and Dr. Muhammad Alam.

On behalf of the Crown Mr. Raj Krishna raised a preliminary objection to the effect that this petition was not competent, inasmuch as the petitioners should, in the first instance, have moved the Sessions Judge. Various authorities were cited, but it seems to me that the point is not a very clear one. The usual practice of this Court is to decline to consider an application under S. 439, Criminal P. C., unless and until the petitioner satisfies this Court that the Sessions Judge or the District Magistrate has been moved in the matter unsuccessfully. In the present case the District Magistrate was sitting as a Court of appeal, and no authority has been cited of this or any other Court which is parallel to the present case. In these circumstances, although perhaps it might have been better if the petitioners had moved the Sessions Judge before coming to this Court, I did not think that I should decline to hear counsel in the case and accordingly proceeded to do so.

Turning to the merits, it was urged by the learned counsel for the petitioners that the proceedings were against law and irregular, inasmuch as the Magistrate first passed an order under the provisions of S. 112, Criminal P. C., calling upon the three petitioners to furnish security in the sum of Rs. 2.000, that a copy of this order was duly served on them as required under Ss. 114 and 115, Criminal P. C., that in compliance with the summons and the said order they appeared before the Magistrate on the 23rd July 1926, and that when they so appeared, the Magistrate illegally and wrongly increased the amount of security demanded from Rs. 2,000 to Rs. 5,000. It was urged that the Magistrate was not competent to do this and that his action vitiated the entire proceedings. I am unable to accept this view. Under S. 112, Criminal P. C., the Magistrate recorded an order calling upon these three persons to show cause why they should not be required to furnish security in the sum of Rs. 2,000. A copy of that order was duly served and they duly appeared on the date fixed, that is, on the 23rd July 1926. On that date when these persons were in Court the Magistrate, as the record shows, passed an entirely fresh order under S. 112, in which the amount of security demanded was Rs. 5,000. It was that order that was then carefully read out to the three petitioners as was required by S. 113, Criminal P. C., and in the circumstances of the case I am unable to see that the proceedings were in any way vitiated by the procedure adopted by the Magistrate.

It was next contended that the security demanded was excessive and that ever since it has been furnished objections had been raised requiring an in-

vestigation into the means of the sureties. The order is now ten months old and the year will expire on the 21st September 1926. During these ten months or so the petitioners have evidently found no difficulty in procuring sureties for the amount demanded. The mere fact that the authorities have found it necessary from time to time to ascertain whether their sureties were worth the money they were binding themselves to pay is no reason for my interference.

Next it was urged that as there remain only two months and during the course of the last ten months the petitioners have been of good behaviour, it is not necessary to continue to keep them on security. In this connexion S. 125, Criminal P. C., gives the District Magistrate certain powers and if, as a matter of fact, the petitioners have mended their ways and are no longer the menace to the peace that they were held to be in September 1926, the District Magistrate has, I apprehend, the power to cancel the bond for the remaining period. This is a matter for him to consider on being moved by the petitioners, and I dismiss this petition.

J.V. *Petition dismissed.*

A. I. R. 1927 Lahore 691

BROADWAY AND BHIDE, JJ.

R. B. L. Panna Lal—Petitioner.

v.

Commissioner of Income-tax, Punjab—Respondent.

Civil Misc. Petition No. 604 of 1926, Decided on 1st July 1927.

Income-tax Act, Ss. 66 (2), 23 and 11—Accounts for different years mixed up—Profits assessed at flat rate of 10 P. C.—Assessee demanding reference — Question of law arises whether assessee is entitled to give evidence in rebuttal.

Where the income-tax officer assessed the income of the assessee at a flat rate of 10 per cent, as the accounts for the year in question could not be separated from accounts of the other years and the assessee applied for a reference under S. 66 (2), but a reference was refused on the ground that no question of law arose:

Held: the following point of law would arise for decision viz., that, whether in the case of a contract spread over a number of years when accounts for the year under assessment cannot be separated, the income-tax officer is legally justified in assessing profits at a flat rate without informing the assessee of the information or evidence on which the rate is based and without giving him any opportunity to produce evidence in rebuttal. [P 693 C 1]

Sardha Ram—for Petitioner.

J. N. Aggarwal—for Respondent.

Bhide, J.—The petitioner, R. B. Panna Lal, a contractor of Ambala, was assessed to income-tax for the year 1924-1925 in respect of certain contracts which commenced in 1922 and were finished some time in 1924. The petitioner produced his accounts, but the accounts for the year 1923 (which was the accounting year for the purposes of the assessment for 1924-1925, could not be separated. The income-tax officer also considered the accounts to be unreliable. He, therefore, "assumed profit at the standard rate of 10 per cent." for the purposes of his assessment. An appeal was preferred to the Assistant Commissioner who had the accounts re-examined. The Assistant Commissioner also found that the accounts for the year 1923 could not be separated. The assessee showed receipts and expenditure amounting to Rs. 2,57,946 and Rs. 2,54,775 respectively, during the entire period of the contracts and a net profit of Rs. 3,171 only. The Assistant Commissioner, however, considered items of expenditure amounting to Rs. 31,864 to be of a suspicious character as they were not supported by any details in the assessee's "books of original entry." The assessee produced certain other books giving details in respect of some of the larger items, but these books were produced only at a late stage and after several adjournments. If the items amounting to Rs. 31,864 were excluded altogether the contracts would have shown a profit of 14 per cent. The Assistant Commissioner concluded as follows:

In any case it is impossible to ascertain from the assessee's accounts what the income has been for one year and I, therefore, agree with the income-tax officer that the only way of ascertaining it is to apply the usual rate of 10 per cent. on the total payments received.

The petitioner then applied to the Commissioner of Income-tax for a review and, in the alternative, prayed that certain points of law may be referred to this Court under S. 66 (2) Income-tax Act. The Commissioner held that the points raised were questions of fact and not of law and, therefore, declined to

make any reference. The petitioner has now applied under S. 66 (3) of the Act for the issue of a mandamus to the Commissioner to refer the following alleged points of law to this Court for decision, viz : (1) whether the Assistant Commissioner was legally justified in assessing the petitioner's profits at a standard rate of 10 per cent. on the advances received during the calendar year 1923 on the ground that the accounts for that year could not be separated ; (2) whether the Assistant Commissioner has erred in law in holding items of expenditure amounting to Rs. 31,864 as inadmissible merely because no details were given in full in the cash-book.

It will appear from the order of the Assistant Commissioner referred to above that the second point does not really arise at all. It is true that the Assistant Commissioner was inclined to consider items of expenditure aggregating to Rs. 31,864 as suspicious, but he did not base his decision to assess the profits at the standard rate of 10 per cent. on that ground. The decision was merely based on the ground that the accounts for the year 1923 could not be separated. So the only point which requires decision is No. 1 stated above. The Commissioner of Income-tax apparently treated this as a question of accountancy and not of law. On behalf of the petitioner it is urged, on the other hand, that the question is one of law and not merely of accountancy. The following authorities were cited in support of the contentions : *In re Bishnu Priya Chowdhurani* (1) and *M. Sankar Iyer* v. *Commissioner of Income-tax, Madras* (Reports of Income Tax cases by P. R. Shrinivasan, Vol. 1, p.395). In the former case the assessee had declared that he had no bastu income, but his statement was disbelieved and his bastu income was assessed at Rs. 1,528-6-4, at the rate of $2\frac{1}{2}$ per cent. on the gross rental, without there being any evidence to show that the assessee had, as a matter of fact, derived any bastu income. It was held that when the assessee had declared that he had no bastu income at all, it was for the income-tax officers to prove that he had any such income but not for him to prove the reverse. The question whether, in the absence of any reliable data as to the income of an assessee from a certain source, the income-tax officer is justified in making an assessment based on a formula which had been found in practice generally applicable was referred to the High Court, but no opinion was expressed on it as the other point was considered sufficient for disposal of the reference. In *Sankar Iyer* v. *Commissioner of Income-Tax, Madras*, the assessee's accounts were held to be unreliable and his income was assessed at a certain figure by the income-tax officer without any materials before him. On application by the assessee, the High Court directed the Commissioner to state a case for the determination of the following question :

> Whether in cases where the income-tax officer, is not prepared to act on the accounts produced or the statement or evidence of the assessee, he can assess without any evidence on the record, or whether he is bound to inform the assessee as to how he proposes to assess him and the information on which he proposes to act and to call evidence so as to allow the aseessee an opportunity of showing that such information or evidence is incorrect and ought not to be acted upon.

It will appear from the above that the facts in both the cases are distinguishable. In the present case the assessee does not allege that he derived no income at all from any contracts, nor does the assessment proceed definitely on the ground that the accounts were unreliable. The Assistant Commissioner adopted a standard rate for the assessment merely because no separate accounts were available for the accounting year. This was apparently due to the manner in which the accounts were kept. The income-tax officer has pointed out, for instance, that expenditure in respect of certain items for two years was lumped together, (for example, motor hire, cartage, etc.) in a single item. As the assessee failed to produce correct and complete accounts for the accounting year, it seems to me that it was open to the income-tax officer to make an assessment to the best of his judgment : vide S. 23 read with S. 11 income-tax Act.

The Assistant Commissioner, however, gives no reasons for adopting what he calls the "usual" rate of 10 per cent. for the purposes of the assessment, and it is not known how that rate was arrived at. The ruling in *Sankar Iyer* v. *Commissioner of Income-tax, Madras*, referred to above, seems to support the contention that the petitioner ought to have

(1) A. I. R. 1924 Cal. 337=50 Cal. 907.

been given an opportunity of rebutting the evidence or information on which the rate was based. On behalf of the Commissioner of Income-tax the decision of this Court in Case No. 665 of 1925 (printed at p. 45 of the Income-Tax Manual, Vol. 11) were referred to in support of the assessment at a flat rate; but in that case the flat rate was apparently based upon a consideration of the dealings. In my view, the following point of law emerges for decision in the circumstances of this case:

Whether in the case of a contract spread over a number of years when accounts for the year under assessment cannot be separated, the income-tax officer is legally justified in assessing profits at a flat rate without informing the assessee of the information or evidence on which the rate is based and without giving him any opportunity to produce evidence in rebuttal?

I would, accordingly, accept the petition and direct the Commissioner of Income-tax to state the case and refer the above point of law to this Court for decision. Costs will follow the event.

Broadway, J.—I concur.

G.B. *Petition accepted.*

A. I. R. 1927 Lahore 693

HARRISON AND AGHA HAIDAR, JJ.

Phul Chand-Fateh Chand—Defendants—Appellants.

v.

Jugal Kishore-Gulab Singh—Plaintiffs—Respondents.

F. A. No. 1782 of 1922, Decided on 5th January 1927, from the decree of the Senior Sub-Judge, Delhi, D/- 26th June 1922.

(a) *Contract Act, S. 39—Goods to arrive in one lot or more according to contract—Buyer cannot hold seller liable for supplying them in two lots.*

Where, in a contract for sale of goods the actual wording of contract contemplated the arrival of the goods piece-meal or in one lot just as the shippers and the Railway Company might be able to deal with them, the buyer cannot contend that the seller is bound to give notice of the arrival of the entire goods which constitute the shipment at one time, and that if he writes to intimate the separate arrivals of the two portions which made up the whole he has committed a breach which entitles the buyer to disclaim all sort of liability under the contract when in fact there was only two days' interval and the seller informed his buyer as soon as these consignments arrived: *Lah. F. A. 2684 of 1922, Dist.* [P 694 C 2 & P 695 C 1]

(b) *Contract Act, S. 39—Refusal before due date does not disentitle a party from claiming performance within a reasonable time.*

A refusal before due date by seller to perform his part of the contract does not disentitle him from demanding performance from the buyer within a reasonable time if no action is taken by the other party on such refusal. [P 695 C 2]

The word "anticipatory" nowhere occurs in the section and the very wording of the section and the illustration thereunder make it clear that it applies to all such breaches which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches. [P 696 C 1]

(c) *Contract Act, S. 94—Buyer can ask delivery at seller's place.*

Under S. 94 the buyer should ask to have the goods made over to him at the seller's place of business and not at his own. [P 696 C 1]

(d) *Contract Act, S. 107—Practice—New plea.*

Plea of re-sale having taken place after reasonable time cannot be entertained for the first time in appeal. [P 696 C 2]

(e) *Contract Act, S. 107—Sale beginning on appointed day and continuing for two days to secure better price is not invalid.*

Where the auction took place on the advertised date, but in the hope of getting a better price the sale was continued for two days more:

Held: that the sale was not rendered invalid thereby. [P 696 C 2]

(f) *Contract Act, S. 107—Goods resold not being entirely those contracted for—Buyer is not liable for difference in price.*

Where the goods sold were not in their entirety those contracted for, the seller cannot succeed in recovering from the buyer the difference in contract price and price actually recovered: *A. I. R. 1926 Mad. 778, Expl.*; *A. I. R. 1924 Lah. 239, Dist.*; *A. I. R. 1925 Mad. 1258, Ref.* [P 697 C 2]

Tek Chand, M. L. Puri and *Hem Raj*—for Appellants.

Sardha Ram, G. S. Salariya and *Bishan Narain*—for Respondents.

Harrison, J.—The firm of Jugal Kishore-Gulab Singh sued the firm of Phul Chand-Fateh Chand for a sum of Rs. 18,533, being the difference between the price actually realized for 25 bales of piece-goods when sold in February 1919 and June 1919 and the contract price. The goods in question were to have been of three shipments, May, June and July; nine bales of May, eight of June and eight of July, and the plaintiff succeeded in proving his case, so far as the May and June shipments were concerned, but failed as regards July, it being found that there was a fatal defect in his case so far as this shipment was concerned, in that, instead of his having offered eight bales of July shipment he offered six of July

and two of August. A decree was, therefore, given for Rs. 11,651-10-0. Against this the defendant firm appeals and the plaintiff firm presents cross-objections regarding the balance of their claim.

The facts of the case are simple enough. The contract is clear. The defendant was bound to take delivery and make payment as soon as he was informed of the arrival of the goods, and the plaintiff, on the other hand, was under the contemporaneous obligation of accepting the money and delivering the goods. On the 25th and 27th September the plaintiff advised the defendant that the goods of the May shipment had arrived in Delhi. On the 30th September 1918 the plaintiff wrote again calling upon the defendant to take up the goods against payment within ten days and stating that if he failed to do so, he would dispose of the goods. In answer to this the defendant wrote a letter, on the 1st October 1918, alleging that he had sent his man several times to ask for delivery of the goods but without success and that

at last they had advised their bankers, Messrs. King, King & Co. to take delivery of the nine bales of Muslin on payment to you of the price thereof in full settlement. Therefore (the letter continues), please receive your money in full on account of the nine bales of muslin from Messrs. King, King & Co., and deliver the goods and the papers relating to costs to them within three days. If you fail to do so, you shall be liable for any loss that will be suffered by us as also by our customers. Please note this.

In answer to this a letter was written on the 3rd October 1918 in the following terms :

In reply to your notice, dated the 1st instant, regarding nine packages of mulls, we have to inform you that until you give us the delivery of the above goods (i. e., two bales described in the heading) your notice cannot be accepted in any case ; please note.

In the interval a letter, dated 2nd October 1918, was written by Messrs. King, King & Co. to the plaintiff which ran as follows :

We have received instructions from Messrs. Phul Chand-Fateh Chand to pay for the above draft, plus Rs. 2,475 as profit at Re. 1-6-0 per piece. Kindly send us the goods and memo. and receive the money.

No money was sent. To this the plaintiff did not reply, and on the 10th October he wrote again to the defendant calling upon him to take delivery :

We are ever ready to deliver the goods. Messrs. King, King & Co. sent us a letter only but not the money, hence please either send the money yourself or King, King & Co. and take the goods. Regarding original invoice please note you can see same at our shop.

The goods were sold in February and the question to be decided is whether the plaintiff was justified in acting as he did.

It is urged on appeal by Mr. Tek Chand that the contract was broken by the plaintiff, and that the defendant was in no way bound to do his part after receipt of the letter, dated 3rd October 1918. He contends that S. 39, Indian Contract Act, does not apply to the case, and that it is sufficient for him to show that the plaintiff was not willing and ready on one particular occasion to deliver the goods and, if this is established, his obligations ceased. He also takes exception to the invoices sent to him by the plaintiff, in that they referred to the consignment in two lots. He states that because a contract must be performed in its entirety, a man who has undertaken to deliver nine bales of a certain shipment is bound to give notice of the arrival of the total number of bales which constitute the shipment at one time and that if he writes, as the plaintiff did in this case, to intimate the separate arrivals of the two portions which made up the whole he has committed a breach which entitles the buyer to disclaim all sort of liability under the contract and that he can take the objection for the first time five years after the due date. Further, he contends that, if the plaintiff was justified in reselling the goods, the sale was belated, that the plaintiff has wholly failed to show that it was conducted within reasonable time and that, therefore, at the worst, he, the buyer, can only be liable to pay damages. Such is the case regarding the May shipment.

As regards the June shipment the same points are urged with this exception, that Messrs. King, King & Co. do not come into the correspondence, and that, on receiving a notice, dated 2nd December, from the plaintiff, the defendant wrote as follows on the 7th December :

We came to know that these goods have arrived since long and you give its arrival information now, hence we are not responsible for these goods owing to your negligence, which please note.

To this the plaintiff replied that as a matter of fact they had made a mistake and the goods had not arrived at all.

On the 11th February he wrote saying that they had come and the defendants must take delivery, to which the defendants replied on the 11th March, to the effect that the arrival notice was not given at a proper time and for this and other reasons they were not responsible. These goods were auctioned in the month of June.

We take first the question of whether the notice given by the plaintiff was sufficient and legal. The terms of the contract which are at p. 50 of the printed paper-book contain the following sentence:

> We shall receive invoice and pattern and take delivery of the goods as soon as we are informed of their arrival.

Counsel relies on an unprinted ruling of this Court, being No. 2684 of 1922, which he says is precisely the converse case. The facts are, in our opinion, quite different, for there it was a question of the goods having arrived in one shipment, the contract having been for two, and naturally it was held that the buyer was not liable and that he was entitled to receive goods in accordance with the terms of his contract. In our opinion the actual wording of his contract contemplates the arrival of the goods piecemeal or in one lot, just as the shippers and the railway company might be able to deal with them, and the fact that there was a two days interval, and that the plaintiff informed his buyer as soon as these consignments arrived, did not, in our opinion, constitute any sort of breach of the conditions inasmuch as he did receive the notice of the arrival of the whole of the consignment which was of the correct shipment.

It is contended that, however long the interval, the seller should have waited until all the goods had arrived rendering his buyer liable for godown rent in the interval in accordance with the terms of the contract and should have intimated the arrival of the goods as soon as they were complete and not before. There is, in our opinion, no force in this contention though the buyer would doubtless have been entitled to hold his hand and take no action until and unless the whole of the consignment had arrived and he was told of its arrival provided always the goods were actually shipped in May, it is wholly immaterial whether they were on board one, two or nine ships and came up from Bombay in one or several trains.

The second and the most important point is whether the plaintiff was or was not ready and willing to perform the contract; in other words, had he control over the necessary goods and was he prepared to give delivery on the buyer performing his part of the contract. There was previously litigation between the seller and his own seller, and it is quite clear and is not disputed that the goods were in existence and lying in the custody of the bank to be delivered on payment being tendered. That being so, it is clear that the plaintiff was ready and willing unless it be held that his letter of the 3rd October in some way debarred him from exercising his control over the goods. The first thing to be seen is what was the due date. The plaintiff himself had called upon the defendant to take delivery before the 10th October. The defendant wrote saying that he had deposited the necessary money with Messrs. King, King and Co. The plaintiff refused to give delivery except on certain conditions, but subsequently, on the 10th October, resiled from this position and called upon the buyer to perform. It is contended by Mr. Tek Chand that once the plaintiff had written this conditional refusal he had debarred himself for all time from performing or demanding performance of the contract. He does not rely upon S. 39, Contract Act, and contends that the contract had actually come to an end, and there could be no question of delivery at any later date. In our opinion this is a wholly impossible position, and even though the plaintiff was not willing on that particular date, the 3rd October, to give delivery except on conditions, which he was not justified in making, the due date had not expired and he was quite within his rights in demanding performance within a reasonable time. Even if the most extreme view be taken of this letter of the 3rd October, and it be treated as an absolute refusal, the position would in our opinion be governed by the terms of S. 39. There is much misunderstanding and much loose argument based on the unfortunate fact that the word "anticipatory" has somehow been associated with the section, and it is often said that the section only refers to anticipatory breaches in

the sense of breaches which occur before due date. The word "anticipatory" nowhere occurs in the section and the very wording of the section and the illustration thereunder make it clear that it applies to all such breaches which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches. The defendant admittedly took no action on receipt of the letter of the 3rd October. It was, therefore, open to the plaintiff to change his mind and to offer to deliver the goods unconditionally before the expiry of the due date, and this he did.

Further, before the defendant can challenge the conduct of the plaintiff, it is for him to show that he performed his part of the contract and made a proper and sufficient demand accompanied by the necessary sum of money, for the facts of this case show that the goods were lying in the custody of the Alliance Bank and could not be withdrawn until a certain draft was cleared by payment of money. It was, therefore, absolutely essential that money should accompany the demand. It was also necessary under S. 94, Contract Act, that the buyer should ask to have the goods made over to him at the seller's place of business and not at his own. There were, therefore, two fatal defects in the so-called demand, for Messrs. King, King & Co. asked to have the goods sent and further to have them sent without any money being paid.

This brings us to the question of whether the resale was defective. It is contended by Mr. Tek Chand that it never took place, that there was no real sale in the sense that there was no real purchaser, that there was a fatal flaw in the proceedings, in that the sale having been advertised for one day was twice continued on subsequent days without notice or proclamation, and finally that the sale was wholly bad as being belated.

In the pleas the sale was objected to as "fictitious, unwarranted and illegal." There is no definite plea that it took place after the expiry of reasonable time. Mr. Tek Chand contends that the word "illegal" covers all possible defects, and that the burden lay heavily upon the plaintiff to prove that all the conditions precedent as required by S. 107, Indian Contract Act, were fulfilled. On the other hand, it is urged, and we think with greater force, that it is wholly impossible for any man to meet a plea of this sort until it is made, that the question of reasonable time is one of fact depending upon the peculiar circumstances of the case, that had the plea been taken the plaintiff would have had to produce such evidence as would have satisfied the Court that the delay was not unreasonable and that the failure to take the plea is fatal to the defendant's case. The objection to the resale on the ground of its being fictitious appears to us to be entirely frivolous. Witnesses were produced with their books to show that they purchased some of the bales and objections were taken to them seriatim according to their position in life. The partners in the firm were objected to as not being munims and the munims as not being partners, and it was pointed out that both were unable from their own knowledge to prove both the sale and the entries in support of it. The objection regarding the adjournment is also in our opinion quite immaterial, for the buyer could in no way be injured by such adjournment. The auction took place on the advertised date, and in the hope of getting a better price the auctioneer went on and did more work than he need have done. The bids on the later days were precisely the same and a higher price could not be realized.

Regarding the June shipment there is no point which is not common to the May shipment except that of the date of the bill-of-lading. This was raised in this Court by Mr. Tek Chand, but counsel for the plaintiff was able to dispose of it by showing us on the record a copy of one of the original portions of the bill-of-lading which is made out in triplicate (Ex. P-39). The same objections were taken regarding the resale and counsel further contended that the great delay in the arrival of this shipment proves that it cannot have been a June shipment at all. This objection in our opinion is disposed of by the bill-of-lading itself, and it is noticeable that this objection was not taken at any stage of the case until to-day.

The cross-objections of the plaintiff deal with the July shipment, the claim regarding which has been disallowed because, instead of tendering eight bales

of this shipment the plaintiff tendered six of the July shipment together with two of August. The Subordinate Judge has held that this is a fatal flaw and has dismissed his case so far as it relates to this shipment. The invoices are to be found at pages 41 and 42 : the first describing the six bales of the July shipment and the latter the two bales of the August. To this invoice the defendant objected in a letter of the 9th October 1918, in which he took exception to the fact that there was a difference in pieces according to the contract terms meaning that the last bale No. 25 of the August shipment was 37 pieces short. To this the plaintiff replied on 14th October 1918 :

In reply to yours dated the 9th instant we have to bring to your notice that no number of pieces are entered in the contract and besides this there are eight cases in our one shipment of 18—25 and the total number of pieces in the above eight cases are correct.

This letter was apparently based on a note, Ex. P-75, made on the letter to which it was a reply :

No detail of pieces, etc., is given in our contract. One chalan comprises eight cases Nos. 18 to 25. Please check and examine the pieces contained in all the eight cases. They are all right.

Counsel now contends that as the bill-of-lading, which was quoted in the second notice showed that the shipment was of August and the buyer took no exception to this irregularity, he must be taken to have waived his right to object and this more especially as he did take exception to the shortage. He relies on *Nannier* v. *Rayalu Iyer* (1) and *Gulab Rai-Sagar Mal* v. *Nirbhe Rama-Nagar Mal* (2), but the correspondence read as a whole does not in our opinion support the plaintiff's contention. In his later letter he spoke himself of one shipment, when admittedly there were two of different months, and now interprets this as meaning

the two shipments which were converted into one by your kindly overlooking the irregularity regarding the second shipment.

This is quite impossible, and we think it clear that the buyer who wished to get out of the bargain overlooked the date which does appear on the invoice but not against any words indicating that it is the date of the bill-of-lading though doubtless in commercial circles this is understood. The point which he did notice and apparently thought was a good ground for putting an end to the transaction was that of shortage, and in our opinion the facts are not sufficiently similar to those contained in the two rulings to make them applicable, and while reading *Nannier* v. *Rayalu Iyer* (1) it is necessary to bear in mind that it is in continuation of and does not dissent in any way from *Parthasarathy Chetty & Co.* v. *Gajapathy Naidu & Co.* (3). Further, even if it were possible to hold that there has been a complete waiver it would still be for the plaintiff to show that the goods sold by him at the time of the resale were the actual goods, by tendering which he performed his contract. No tender of August goods was sufficient and valid, and there is no getting away from the fact that the goods sold were not in their entirety those contracted for, and therefore in a suit of this nature it is wholly impossible for the plaintiff to succeed.

The result, therefore, is that both the appeal and the cross-objections must be dismissed with costs.

D.D. *Appeal dismissed.*

(1) A. I. R. 1926 Mad. 778=49 Mad. 781.
(2) A. I. R. 1924 Lah. 289=4 Lah. 423.
(3) A. I. R. 1925 Mad. 1258=48 Mad. 787.

* A. I. R. 1927 Lahore 697

MARTINEAU AND DALIP SINGH, JJ.

Genesh Das Ishar Das—Plaintiffs—Appellants.

v.

Basheshar Lal Bansi Dhar—Defendants—Respondents.

F. A. No. 226 of 1922, Decided on 10th April 1926, from the decree of the 1st Cl. Sub-Judge, Delhi, D/- 26th October 1921.

Contract — Construction—Contract for sale—Delivery to be taken when goods arrived—Damages for non-delivery should be calculated with respect to the date of actual arrival of goods.

Where a contract for the sale of goods provided that, as soon as goods were received the sellers were to inform the buyers who were to remove the goods on payment of the money to the bank, that if the buyers were to remove the goods after "due date" they would be liable for interest and godown rent, and that the buyers were to pay the godown rent from the time when the goods arrived.

Held : that the time for performance was to be the time when the goods actually arrived and the due dates expressly mentioned in the contract can only mean the date of arrival and, therefore, for the calculation of the damages for

non-delivery regard must be had to the actual dates of the arrival of the goods and not to the dates on which the goods might have been expected to arrive. [P 698 C 2]

Sardha Ram and *Jagan Nath Bhandari*—for Appellants.

Moti Sagar and *Nanwan Mal* for *Raj Krishna*—for Respondents.

Judgment.—The parties are cloth merchants of Delhi. On the 21st November 1916 the defendants agreed to sell to the plaintiffs 75 cases of white shirting D-1, of the office of R. J. Wood & Co., of the November, December, January, February, March and April shipments. The plaintiffs sued for damages for non-delivery of 33 cases of the February, March and April 1917 shipments, and for interest in addition, claiming Rs. 17,300 in all. The defendants said that the 33 cases not delivered comprised 5 of the November shipment, 4 of December, 4 of February, 8 of March, and 12 of April. They pleaded that as the persons who had agreed to sell the goods to them did not supply them the plaintiffs were not entitled to damages, and they also denied that the plaintiffs had suffered any loss.

The lower Court, while finding that the contract between the parties was not contingent on the receipt of the goods by the defendants from their sellers, has dismissed the suit on the ground that the plaintiffs did not suffer any damage, inasmuch as the rates prevailing on the dates of the breach of contract were less then the cost price. The plaintiffs have appealed.

In the contract printed on p. 7 of the paper-book the defendants mentioned that they had bought in the market the goods which they sold to the plaintiffs, but there is nothing to show that it was intended that they were not to be liable to supply the goods to the plaintiffs unless they themselves received the goods from their own sellers, and we agree with the lower Court's finding on this point.

The first question is what were the due dates for the performance of the contract. The lower Court has held that they were those on which the goods ought to have been received in the ordinary course. Mr. Sardha Ram, for the plaintiffs-appellants contends that the due dates were the dates on which the goods actually arrived in Delhi, and he lays stress on the conditions in the contract that as soon as goods were received the defendants were to inform the plaintiffs, who were to remove the goods on payment of the money to the bank, that if the plaintiffs were to remove the goods after "due date" they would be liable for interest and godown rent, and that the plaintiffs were to pay the godown rent from the time when the goods arrived.

Mr. Moti Sagar, for the defendants-respondents, argues that these conditions indicate only the way in which the contract was to be performed, but, in our opinion, the agreement, that when the goods arrived the defendants were to send intimation to the plaintiffs who were then to pay for them and take them away and were to be liable for godown rent from the time of the arrival of the goods, shows that the time for performance was to be the time when the goods actually arrived and the due dates expressly mentioned in the contract can only mean the date of arrival. The argument that the buyers would not be bound to take up the goods if they arrived after much delay is of no avail in construing the contract, which has to be taken as it stands and we are of opinion that appellants' interpretation is the correct one. We hold, therefore, that for the calculation of the damages regard has to be had to the actual dates of the arrival of the goods, and not to the dates on which the goods might have been expected to arrive.

The next question is on what dates the goods arrived. We have the evidence of Mr. Grey, the General Manager of Messrs. R. J. Wood & Co., who has filed a statement, P.W. 1/1 prepared from his godown book showing the dates of arrival of the railway receipts of the various shipments, and we see no good reason for not accepting that statement. It is contended that the plaintiffs have not proved when the goods were shipped, but Mr. Grey was not questioned in regard to the dates of the shipments, and we think that the goods of the particular shipments mentioned in his register should, in the absence of evidence to the contrary, be taken to have been shipped at the proper time. The railway receipts for goods of the February shipment are shown in the statement put in by Mr. Grey as having arrived

* See also A. I. R. 1927 Lahore 648.

from the 2nd July to the 4th October 1927; the railway receipts for goods of the March shipment are shown as having arrived from the 3rd September to the 7th December 1917; and those for the goods of April shipment from the 3rd September 1917 to the 4th March 1918. Allowing ten days as the lower Court has done, for the goods to reach Delhi from Bombay we take the 14th October 1917 to be the due date so far as the February shipment is concerned, the 17th December 1917, to be the due date for the March shipment, and the 14th March 1918 to be the due date for the April 1917 shipment.

The number of cases of the several shipments in respect of which the plaintiffs are entitled to compensation has then to be determined. The lower Court is wrong in thinking that the plaintiffs ultimately cancelled the contract for the February shipment. In their letter, P. 19, dated the 29th June 1917, they cancelled, not the contract, but eight cases, for which the defendants had sent them an invoice and pattern, on the ground that they were late. In the invoice D. 18, sent to them by the defendants on the 25th June while the shipment was mentioned as the February shipment, the goods of which had under the contract to be shipped by the 10th March, the date of the bill-of-lading was given as the 13th April. On the face of the invoice therefore the goods had been shipped late. We cannot agree with the argument that the plaintiffs were bound to accept them as goods of the April shipment, seeing that the defendants had appropriated them to the February shipment, and we must hold that the plaintiffs were justified in rejecting them and are entitled to damages for non-delivery for all the twelve cases of the February shipment. Out of the March shipment four cases were delivered to the plaintiffs, and they are entitled to damages in respect of the remaining eight. Admittedly none of the goods of the April shipment were delivered.

It remains to assess the damages. The contract price per piece was 17s. 3d. which at the rate of a 5-1/32d. per rupee (the rate of exchange current from the 29th August 1917 to the 31st March 1918 (see page 13 of the paper-book A) was equivalent to Rs. 12-2-6. To this has to be added Re. 1-3-5 for expenses which the buyers had to bear under the contract, and Rs. 2 for the sellers' profit, making a total of Rs. 15-5-11. The market rate on or about the due date in respect of each shipment is shown by entries in the books produced by P. Ws 3 and 9 who have stated that they keep regular books.

The market rate on the 12th October 1917, two days before the due date for the February shipment, is shown as Rs. 24-4-0 per piece (p. 15). Deducting Rs. 15-5-11 from this the plaintiffs' loss comes to Rs. 8-14-4 per piece. On the 12 cases of the February shipment, each of which contains 50 pieces, the loss amounts to 5,328-2-0.

The market rate on the 16th December 1917, the day before the due date for the March shipment, was also Rs. 24-4-0 (p. 22). The plaintiffs' loss in respect of eight cases of this shipment amounts Rs, 3,552-1-4.

The market rate on the 14th March 1918, which was the due date for the April shipment, was Rs. 25-1-0 (p. 16). The plaintiff's loss is Rs. 9-11-1 per piece and on 12 cases it amounts to Rs. 5,316-10-0.

The damages to which the plaintiffs are entitled in respect of the shipments of February, March and April 1917 thus amount to Rs. 14,695-13-4. They have, however, limited their claim in appeal to Rs. 11,500.

We accordingly accept the appeal and give the plaintiffs a decree for Rs. 11,500 with full costs in this Court and proportionate costs in the lower Court.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 699

TEK CHAND, J.

Miran Bakhsh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Cri. Rev. Petn. No. 1038 of 1927, Decided on 30th July 1927, from an order of the Sub-Judge, Ferozepore, D/- 13th June 1927.

(a) *Public Gambling Act, Ss. 3 and 4—Persons prosecuted, some under S. 3 and others under S. 4—Joint trial is not illegal.*

The trial of a person under S. 3, along with a number of other persons found in the gaming house under S. 4 is not illegal: 6 *P. R.* 1919 *Cr.* and *A. I. R.* 1922 *Lah.* 458, *Foll.* [P 700 C 1]

(b) Public Gambling Act, S. 6—Search warrant illegal—No presumption under the section can be made.

The effect of a search warrant being illegal is that no presumption such as arises under S. 6 can be made in favour of the prosecution. [P 700, C 2]

(c) Public Gambling Act, S. 3—Search warrant defective—Conviction is not vitiated if based on legal evidence.

A conviction under S. 3 based upon legal evidence is not vitiated merely because of the defects and irregularities in the warrant: 35 *All.* 1; 28 *All.* 210; and *A. I. R.* 1924 *All.* 214, *Foll*; *A. I. R.* 1924 *Lah.* 247, *Expl.* [P 701, C 1]

M. A. Ghani—for Petitioner.

R. C. Soni—for the Crown.

Judgment. — The petitioner Miran Bakhsh Kamboh of Ferozepore City has been convicted under S. 3, Public Gambling Act, for being the owner and occupier of a house used as a common gaming house, and sentenced to three months' rigorous imprisonment. He has filed a petition for revision, and various grounds have been urged on his behalf.

In the first place it is contended that the trial of the petitioner under S. 3 along with a number of other persons (who were found in the alleged gaming house) under S. 4 was illegal. The law on the point has been authoritatively laid down by a Division Bench of the Chief Court in *Bhana Mal* v. *Emperor* (1) which has been followed by the High Court in *Khilinda Ram* v. *Emperor* (2). I find no force in this contention and overrule it.

Secondly, it is contended that it has not been established that the house in question was a common gaming house within the definition of that expression as given in the Public Gambling Act. Both the Courts below, however, have found as a fact that the petitioner was keeping this house as a gaming house for the purpose of making profit or gain and that instruments of gaming were kept and found in the house. This is a finding of fact and, there being evidence on the record in support of it, I do not feel justified in interfering with it in revision.

The third ground taken is, that the warrant issued for the search of the house was defective inasmuch as the name of the occupier given in the warrant was Miran Bakhsh, caste Daula, whereas the petitioner is Miran Bakhsh, caste Kamboh, and that it has been found that there is another person living in the same neighbourhood who is Daula by caste and who answers the description as given in the warrant. The learned Sessions Judge has remarked that this was a mere clerical mistake and that there can be no doubt that the warrant was really meant for the petitioner as is clear from the boundaries given in the plan which was attached to the warrant. The plan, however, is not signed by the Suprintendent of Police who issued the warrant and seems to have been prepared by L. Diwan Chand, Inspector, who alone has signed it. I cannot, therefore, accept the view that the plan is a part of the warrant and that the two taken together must be considered to contain sufficient particulars as to identify the person whose premises were to be searched. I must, therefore, hold that the warrant under which the search was effected was defective, and, indeed Mr. Soni for the Crown has practically conceded that this is so.

The main question, however, is whether, in view of the fact that the warrant under which the search was effected was defective and did not contain all the necessary particulars as required by law, the conviction of the petitioner is illegal. After hearing Mr. Ghani for the petitioner and Mr. Soni for the Crown, I am of opinion, that the petitioner's contention on this point must fail. Granting that the search of the petitioner's house was illegal, this circumstance alone will not be sufficient to quash the conviction. The effect of search being illegal is that no presumption, such as arises under S. 6 of the Act, can be made in favour of the prosecution. If there is sufficient legal evidence on the record to establish that the house was a gaming house and the petitioner was occupying it within the meaning of that expression as used in the Act, the conviction will not be set aside merely because of the irregularities in the search warrant. The law on this point has been clearly laid down in *Hargobind* v. *Emperor* (3) and *Emperor* v. *Abdus Samad* (4), both of which are cases under the Public Gambling Act and in *Ali*

(1) [1919] 6 P. R. 1919 Cr.=49 P. L. R. 1919 =49 I. C. 779=9 P. W. R. Cr. 1919.
(2) A. I. R. 1922 Lah. 458=3 Lah. 359.
(3) [1913] 35 All. 1 = 17 I. C. 576 = 10 A. L. J. 355.
(4) [1905] 28 All. 210=(1905) A. W. N. 257.

Ahmad Khan v. *Emperor* (5), which is a case under the Excise Act in which a similar point arose. I, therefore, hold that the irregularities and defects in the warrant did not vitiate the conviction. Mr. Ghani has cited a Single Bench judgment of this Court reported as *Raja Ram* v. *Emperor* (6). There were, however, several other illegalities committed in that case which vitiated the conviction. I do not think that the learned Judge who decided that case intended to lay down that a conviction under S. 3 based upon legal evidence would be vitiated merely because of the defects and irregularities in the warrant.

I, therefore, uphold the conviction of the petitioner under S. 3 of the Act and, having regard to the evidence on the record, and the facts as found by both the Courts below, I do not feel inclined to interefere with the sentence. The petition is, accordingly, dismissed.

J.V. *Petition dismissed.*

(5) A. I. R. 1924 All. 214=46 All. 86.
(6) A. I. R. 1924 Lah. 247.

A. I. R. 1927 Lahore 701

JAI LAL, J.

Hanuman Bakhsh and *others*—Defendants—Petitioners.

v.

(*Firm*) *Balmukand-Kanhaya Lal*—Plaintiffs—Respondents.

Civ. Rev. Petn. No. 435 of 1927, Decided on 29th June 1927, from the decree of the Dist. J., Delhi, D/- 4th November 1926.

(a) *Principal and agent—Agent must sue his principal for specific amount and not for accounts.*

An agent is not ordinarily entitled to institute a suit for accounts against his principal. His suit must be for the recovery of the specific amount alleged to be due to him from the principal; *A. I. R.* 1924 *P. C.* 198; *A. I. R.* 1926 *Pat.* 141; *A.I.R.* 1925 *Bom.* 425; and *A.I.R.* 1926 *All.* 582, *Dist.*; 60 *P. R.* 1899, *Rel. on.* [P 702 C 1]

(b) *Principal and Agent—Suit for accounts by principal—Money found due to agent—Principal withdrawing suit—Agent cannot object.*

In a suit by principal against agent for accounts, although balance is found due to the agent, a decree for the amount found to be due to the defendant from the plaintiff cannot be granted in favour of the defendant and consequently he cannot object to the withdrawal of the suit by plaintiff. for accounts. [P 702 C 1]

Jagan Nath Aggarwal—for Petitioners.
Sardha Ram—for Respondents.

Judgment.—The firm of Balmukand-Kanhaya Lal, the respondents before me, instituted a suit for accounts and recovery of the amount found to be due after the rendition of accounts against Hanuman Bakhsh, etc., the appellants. It was alleged that the relationship of principal and agent existed between the plaintiffs and defendants. The defendants denied the existence of this relationship, but the Court found against them and granted a preliminary decree for accounts. In the judgment it is stated that the preliminary decree was for accounts and a commissioner was appointed to examine the accounts of the parties and to report what was due from the defendants to the plaintiffs or vice versa. The decree which was prepared in consequence of this judgment merely said that a decree was passed against the defendants for accounts in favour of the plaintiffs. After the accounts had been gone into and the report of the commissioner received, it was found that there was a balance due to the defendants from the plaintiffs and the Court passed a final decree for the amount found due in favour of the defendants. This decree was, however, set aside by this Court and the case remanded for further enquiry. The plaintiffs then appeared in Court and withdrew the suit which was consequently dismissed. The defendants thereupon appealed to the District Judge on the ground that the plaintiffs were not entitled to withdraw the suit as it was a suit for accounts in which a decree could be given against the plaintiffs in favour of the defendants. The learned District Judge, however, dismissed the appeal on a preliminary objection, holding that no appeal lay from an order allowing the plaintiffs to withdraw the suit. This is an appeal from the decree of the District Judge. A prayer is made in the grounds of appeal that in case this Court holds that no appeal lies then the appeal be treated as a petition for revision. The learned counsel did not contend that an appeal lay to this Court and consequently treated the memorandum of appeal as a petition for revision, and the question being one relating to the jurisdiction of the Court I permitted this course.

On the merits it is contended that having regard to the nature of the suit and the fact that a preliminary decree had been passed, the Court was not competent to allow the suit to be withdrawn. The main ground urged in support of this contention is that in a suit like the present the Court is bound to pass a decree in favour of the defendant on payment of proper Court-fees for any amount that may be found due to him on taking accounts. It is, however, conceded by the learned counsel that an agent is not ordinarily entitled to institute a suit for accounts against his principal, and that his suit must be for the recovery of the specific amount alleged to be due to him from the principal. That being so there is a clear distinction between this suit and the suit of a partner against the other partner for rendition of partnership accounts, or by a co-sharer for partition of joint property. In such suits the defendants are entitled to institute similar suits against the plaintiffs, and consequently it has been held that the defendants have the same interest in the suit as the plaintiffs and a decree can, therefore, be passed in their favour against the plaintiffs. Consequently *Lachmi Narayan Marwary* v. *Balmukund Marwary* (1); *Bhatu Ram Modi* v. *Fogal Ram* (2); *Tukaram Mahadu* v. *Ramchandra Mahadu* (3); and *Devi Chand* v. *Parbhu Lal* (4) do not, in my opinion, support the contention of the counsel for the petitioner, as they all relate to suits between partners or co-sharers. *Jowahar Singh* v. *Haria Mal* (5) was cited by counsel for the respondents as authority in support of the proposition that an agent cannot sue his principal for accounts. I hold, therefore, that in the present suit a decree for the amount found to be due to the defendants from the plaintiffs could not be granted in favour of the former and consequently they cannot object to the action of the plaintiffs in withdrawing the suit for account. It was open to them to file a suit for the recovery of the amount alleged to be due to them from the plaintiffs and to apply that both the suits be tried together, but they have not done so and are now attempting to obtain a decree against the plaintiffs in the suit instituted by the latter. This, in my opinion, they are not entitled to. This petition must, therefore, be dismissed with costs.

J.V. *Petition dismissed.*

(1) A. I. R. 1924 P. C. 198=4 Pat. 61=51 I. A. 321.
(2) A. I. R. 1926 Pat. 141=5 Pat. 223.
(3) A. I. R. 1925 Bom. 425=49 Bom. 672.
(4) A. I. R. 1926 All. 582.
(5) [1899] 60 P. R. 1899=6 P. L. R. 1900.

A. I. R. 1927 Lahore 702

TEK CHAND, J.

Shankar Lal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Cr. Rev. Petn. No. 650 of 1927, Decided on 16th July 1927, from an order of the S. J., Delhi, D/- 16th March 1927.

(a) *Criminal P. C., Ss.* 190 *and* 200—*Magistrate taking cognizance of noncognizable offence on police report—Proceedings so initiated are neither illegal nor irregular—If defective, such defect is curable under S.* 537.

A conviction by a Court of Sessions cannct be set aside on revision simply on the ground that there is a defect in the initiation of proceedings in the commitment Court or some irregularity in the commitment proceedings. Magistrates are entitled to take cognizance of noncognizable offences upon a report made in writing by a police officer without examining the officer on oath. [P 703, C 2]

(b) *Criminal P. C., S.* 537—*Prosecution under S.* 504, *Penal Code—Accused aware of words complained of—Such words not mentioned in the charge—Accused not prejudiced by the technical defect—Conviction is proper.*

In a prosecution under S. 504, if the accused is aware of the words complained of but the Magistrate does not specifically mention the objectionable words in the charge, the accused not being misled by the technical defect in the charge, his conviction is not vitiated. [P 704. C 1]

(c) *Penal Code, S.* 504—*Accused without justification using the expression* pahle munh se bakko *towards police come to serve notice on him was held guilty under S.* 504.

Where an accused person without any justification used the offensive expression *pahle munh se bakko* towards a police official come to serve a notice upon him, as instructed by the district authorities :

Held : that the use of the expression was intentionally insulting and likely to provoke a breach of the peace and hence he was guilty under S. 504. [P 705, C 1]

Duni Chand—for Petitioner.

Des Raj Sawhney—for the Crown.

Judgment.—The petitioner Shankar Lal was tried by a Magistrate of the First Class, Delhi, for an offence under Ss. 186 and 504, I. P. C. The charge under S. 186 was held to be unproved,

but the petitioner was found guilty under S. 504 and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 500. On appeal the learned Sessions Judge maintained the conviction, but reduced the sentence to one of fine Rs. 500 only.

The petitioner has preferred a petition for revision to this Court and the case has been fully argued by Mr. Duni Chand on his behalf and Mr. Sawhney for the Crown. Mr. Duni Chand has assailed the judgment of the learned Sessions Judge on three grounds. Firstly he contends, that the offence under S. 504 is a non-cognizable one and that proceedings under it could only have been initiated on a formal complaint filed by Head Constable Mohammad Amin who is the person alleged to have been "intentionally insulted with intent to provoke a breach of the peace." He argues that as in the present case there was no such complaint, the entire proceedings were illegal, if not void ab initio and for this reason, as well as because of the further fact that the complainant was not examined in accordance with the provisions of S. 200, Criminal P. C. the conviction must be set aside. Secondly, it is urged that the insulting words which the petitioner is alleged to have used and which are the foundation of the charge under S. 504 ought to have been specifically mentioned in the charge sheet and that this not having been done, the proceedings were materially irregular. Thirdly, it is argued, that the evidence for the prosecution does not support the finding of the learned Sessions Judge as to the abusive language alleged to have been used.

In support of the first contention Mr. Duni Chand has relied upon a Full Bench decision of the Bombay High Court reported as *King-Emperor* v. *Sada* (1) and a Division Bench judgment of the Madras Court, *In re Perumal Naick* (2). He has also invited my attention to *Dilan Singh* v. *Emperor* (3). The last of these rulings, however, does not support the contention of the learned counsel. In that case it was held that a conviction by the Court of Sessions cannot be set aside on revision simply on the ground that there is a defect in the intiation of the proceedings in the commitment Court or some irregularity in the commitment proceedings. It was specifically ruled that S. 537, Criminal P. C. would cure such a defect. According to this ruling, therefore, even if there was any technical defect in the initiation of the proceedings against the petitioner, such a defect would not vitiate the entire proceedings, but would be cured by S. 537 Criminal P. C. The second ruling *In re Perumal Naick* (2), no doubt supports the learned counsel's contention; but this ruling was considered and specifically overruled by the Madras Court in the Full Bench decision *Public Prosecutor* v. *Ratnavelu Chetty* (4). In that case the Full Bench ruled that by virtue of Ss. 190 (i) (b) and 200, Criminal P. C., Magistrates mentioned in S. 190 are entitled to take cognizance of non-cognizable offences upon a report made in writing by a police officer without examining the officer upon oath. The question was considered at considerable length in that decision, and after a review of the authorities the learned Judges held that in noncognizable offences a report in writing by a police officer was sufficient for the initiation of proceedings by a Magistrate. The Bombay Full Bench decision in *King-Emperor* v. *Sada* (1) was discussed and was found not to lay down any rule contrary to what was laid down by the Madras Court. The view taken by the Madras Court is substantially supported by a Division Bench decision of this Court reported as *Emperor* v. *Ghulam Hussain* (5), where the learned Chief Justice, and LeRossignol, J., after considering the definition of "complaint" as given in S. 4 (h), Criminal P. C., and the provision of S. 190, held that there was nothing illegal or irregular in a Magistrate taking cognizance of a non-cognizable offence on a report in writing made by a police officer. Having regard to these authorities which have my respectful concurrence, I am of opinion that there is no force in the first point raised by the learned counsel and his contention in this behalf must, therefore fail.

(1) [1902] 26 Bom. 150=3 Bom. L. R. 586 (F. B.).
(2) A. I. R. 1925 Mad. 672.
(3) [1913] 40 Cal. 360=17 I. C. 570=13 Cr. L. J. 826.
(4) A. I. R. 1926 Mad. 865=49 Mad. 525 (F. B.).
(5) A. I. R. 1925 Lah. 237.

The second question to be decided is whether there is any defect in the frame of the charge which would vitiate the conviction. On this point again, I am unable to agree with the learned counsel for the petitioner. The head constable, Muhammad Amin, was examined on oath as a witness at the trial and in his statement he has given in detail the alleged abusive language to which he took exception. These words were also mentioned in the report of the police on which the proceedings were started by the Magistrate. The accused was, therefore, perfectly aware of the words complained of, for using which he was being tried. The failure of the Magistrate to specifically mention the objectionable words in the charge has, therefore, caused no prejudice to the petitioner. It is conceded that he was not taken by surprise in his defence and there is no reason to suppose that he was in any way misled by this technical defect in the frame of the charge. I therefore find no substance in the second contention and accordingly overrule it.

Coming now to the merits of the case: we find that P. W. 1, Muhammad Amin, Head Constable, states that shortly before the Ramlila which was to be celebrated some time in October 1926. he was given printed notices (Ex. P-A.) and ordered to serve them on all shopkeepers in the Chandni Chauk and occupying balakhanas abutting the chauk. After serving the notices on various persons he went to the shop of the petitioner called the Delhi Swadeshi Stores, Limited, and presented a copy of the notice to him and asked him to receive it and give an acknowledgment. On this the petitioner replied: "*Pehle munh se bakko kiya hai*". The witness replied that the notice was being distributed under the orders of the Deputy Commissioner. The petitioner enquired whether the notice was addressed to the shopkeepers in general or to him in particular. On the witness saying that the orders were to serve the notices on all shopkeepers, the petitioner refused to sign the notice and added rudely: "*Tum jaise police ke kutton ne Hindustan ko tabah kar rakha hai*". On this the witness moved off. This incident is alleged to have occurred at about 1 or 2 p. m. The head constable made a report to his superior officers at 5 p. m. (Ex. P. B.). To corroborate the statement of P. W. 1, Muhammad Amin, the prosecution produced P. W. 2, Kanhaya Singh, constable, who had accompanied Muhammad Amin to the shop of the petitioner. This witness states that when Muhammad Amin presented a copy of the printed notice to the petitioner and asked for his signature the latter said: "*Munh se bakko*" on which Muhammad Amin raplied that the notice was one passed by the District Magistrate and that he had been ordered to serve it on shopkeepers. The accused then said that there was no notice addressed to his shop and declined to take a copy of it. He added "*Aise aise hukam Deputy Commissioner ke bison ate rahte hain main is per dastkhat nahin kurta.*" On this the witness and Muhammad Amin began to move off when the accused shouted "*Hindustan ka tum logon ne nas kar rakha hai.*" Hearing this, Kanhaya Singh says he and P. W. 1 ruturned to the kotwali.

It will be seen that this witness P. W. 2, does not corroborate the first witness with regard to the use of the highly objectionable and offensive words "*police ke kutton ne*" which the first witness states the petitioner used. The petitioner in his statement denied having used this expression. After carefully considering the matter, I am of opinion, that on the materials on the record it will be unsafe to hold that this expression was used by the petitioner. If such highly offensive and provocative language was used by the petitioner, I cannot believe that it would have escaped the notice of P. W. 2 Kanhaya Singh who himself is a police constable and who would have been greatly offended by being called "police ka kutta." It seems to me that due weight has not been given to this aspect of the matter by the Courts below. I therefore do not find it established that this expression was used by the petitioner.

It remains, however, to see under what circumstances the petitioner used the other expression "*pahle munh is bakko*" towards P. W. 1. In his statement the petitioner states that he did not talk disparagingly of the District Magistrate or of the police, but that when P. W. 1 presented the notice to him and said that the order was one of the

District Magistrate, he replied that he would not sign it till such time as the order was specifically addressed to him. On this P. W. 1 addressed him rudely and he replied in the same tone. In his defence the petitioner produced two witnesses who state that P. W. 1 first used the following expression towards the petitioner "*Congress walon ke demagh se garmi abhinnahin nikil.bai*" on which the petitioner told him not to do *bakwas* and to go away. It is significant that though Muhammad Amin and Kanhaya Singh were cross-examined at considerable length on behalf of the defence, no question was put to them to ascertain if P. W. 1 had used this objectionable expression towards the Congress workers. In these circumstances I agree with the Courts below in rejecting the defence evidence and in holding that it is not proved that the police constables first rudely addressed the petitioner. On the record it seems to me to be fully established that the petitioner without any justification first used the offensive expression "*pahle munh se bakko*" towards P. W. 1. There can be no manner of doubt that the use of such an expression towards a police official, who has been instructed by the district authorities to serve a notice upon shopkeepers in the bazar, was intentionally insulting and was such as was likely to provoke a breach of the public peace. It is obvious that a person using such an expression without any justification brings himself within the purview of S. 504, I. P. C.

Mr. Duni Chand, for the petitioner, has argued that P. W. 1, Muhammad Amin, was not in uniform at the time of the occurrence and that the use of such expression in such circumstances would not necessarily amount to an offence under S. 504. There is, however, no doubt that the petitioner, at the time of the occurrence, was fully aware that P. W. 1, Muhammad Amin, was a police official. He had gone to serve a notice which had been issued by the district authorities to maintain peace and order during the Ramlila celebrations and he was accompanied by P. W. 2, Kanhaya Singh, constable, who was admittedly in uniform. There is, therefore, no foundation for the suggestion that the petitioner was ignorant at the time that the persons who had come to serve the notice were police constables.

I therefore maintain the conviction; but, having regard to my finding that the prosecution have failed to establish that the petitioner used the more offensive expression "tum jaise police ke kutton ne", I find him guilty of having used the words "pahle munh se bakko" I think that the fine of Rs. 500 imposed by the learned Sessions Judge is excessive. In my judgment a fine of Rs. 50 would be sufficient in a case like this. I accordingly accept the petition for revision to this extent as to reduce the amount of fine from Rs. 500 to Rs. 50. In all other respects the petition is rejected. It appears from the record that the full amount of Rs. 500 has been paid, so I direct that Rs. 450 out of it be refunded to the petitioner.

J.V. *Sentence reduced.*

A. I. R. 1927 Lahore 705

BROADWAY, J.

Phula Singh and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Crl. Rev. Petn. No. 814 of 1927, Decided on 11th August 1927, from an order of the S. J., Ambala, D/- 27th April 1927.

Penal Code, Ss. 97 and 99—Person dispossessed of property can have no right in respect thereof.

Right of private defence does not exist in cases in which there is time to have recourse to the protection of public authorities and, therefore, a person, when dispossessed of land, can claim no right of defence of property as against the complainant assuming him to be a trespasser who had just entered the land : *A. I. R.* 1924 *Pat.* 143, *Foll.* [P 706 C 1 2]

Faqir Chand—for Petitioners.

Raj Krishna for *Govt. Advocate*—for the Crown.

Judgment.—The facts of this case are that one Sundar Singh sold 11 bighas of land to Phula Singh and two other persons in 1924, but for some reason or other failed to give them possession, with the result that Phula Singh and his co-vendees were compelled to institute a suit for possession. They succeeded in obtaining a decree and were

given symbolical possession on the 11th April 1925. Sundar Singh died towards the end of 1925, whereupon Narain Singh and certain other persons claimed to be entitled to this land as Sundar Singh's heirs. One of these persons, Chanchal Singh, had actually instituted a pre-emption suit *qua* this land which had been dismissed, and, I understand, has been dismissed up to this Court. It will thus be seen that the vendees, Phula Singh, etc., were in legal, though symbolical, possession of this land.

On the 18th of July 1923 Narain Singh and his companions proceeded to plough the land and sow chari therein. Phula Singh, etc., came to know of this, and in the afternoon of the same day went down and forcibly evicted Narain Singh, etc. The police station is some eight miles away and Narain Singh reported the matter on the 21st, while Phula Singh put in a complaint in the Court of a Magistrate three days later, owing to the fact that the intervening days were holidays. The Magistrate convicted both sides, but on appeal the learned Sessions Judge has acquitted Narain Singh and his friends, but has upheld the conviction of Phula Singh, etc.

These latter have come up to this Court through Mr. Fakir Chand who has contended that his clients (the petitioners) were entitled to turn out, forcibly, Narain Singh and his friends, inasmuch as the petitioners were entitled to the land and were in actual possession. Various authorities have been cited dealing with the question of the right of defence of property, but it seems to me that the more appropriate is one cited by counsel for the Crown, *Jassu Ram* v. *Emperor* (1). There the complainant had managed to get possession of a certain plot of land and was in use and occupation of the same. Some time later Jassu Ram and others, claiming to be entitled to the land, forcibly removed the complainant from the said plot. It was held that they had no justification for doing so and that they could not claim a right of defence of property as against the complainant assuming him to be a trespasser. In the present case it is true that Narain Singh, etc., had entered upon this property in the morning and the present petitioners ousted them in the afternoon, and it is for this reason strongly urged by Mr. Fakir Chand that Narain Singh, etc., could not be regarded as trespassers in peaceful possession. While there is something to be said for this position it seems to me that once the present petitioners had lost possession of the land they should have proceeded to the police station and obtained the assistance of the police instead of themselves ousting the trespassers. At the same time I consider that the offence committed by them is of such a nature as does not require any heavy sentence. While I maintain the conviction, I reduce the sentence in the case of each petitioner to the period of imprisonment already undergone, and direct that they be discharged from their bail-bonds.

N.D. *Sentence reduced.*

(1) A. I. R. 1924 Patna 143.

A. I. R. 1927 Lahore 706

TEK CHAND, J.

Ranjha Mal and *another*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Crl. Rev. Petn. No. 696 of 1927, Decided on 22nd July 1927, from the order of the Sessions Judge, Ferozepore, D/-24th March 1927.

(a) *Punjab Minor Canals Act* (1905), *S.* 10—*An officer is not entitled to set fire to reeds on private property—Penal Code, S.* 332.

Section 10 of the Act does not authorize the Collector to enter upon the property of private individuals and to set fire to plants or trees growing thereon in order to facilitate the deposit of soil or silt excavated from the canal bed. Therefore, an officer doing any of the above acts cannot be said to be acting in the discharge of his duty as a public servant within S. 332, I. P. C. [P 707 C 2]

(b) *Penal Code, S.* 99—*Exercise of right against public servant—Apprehension of death or grievous hurt must exist.*

Under S. 99, I. P. C., the right of private defence against an injury apprehended to be done by a public servant extends only to those cases in which there is a reasonable cause of apprehension of death or of grievous hurt being caused by the act of such public servant. [P 707 C 2]

Amolak Ram Kapur for *Nand Lal*—for Petitioners.

D. R. Sawhney—for the Crown.

Judgment.—The petitioners Ranjha and Girdhari along with a number of other persons were tried under Ss. 147, 332 and 353, I. P. C. Some of the accused were acquitted, but Girdhari was convicted under Ss. 332 and 147 and sentenced to undergo rigorous imprisonment for three months and pay a fine of Rs. 100. Ranjha was convicted under S. 353 and sentenced to undergo rigorous imprisonment for three months and pay a fine of Rs. 100. Five other persons were found guilty under Ss. 353 and 147 and sentenced to various punishments. On appeal the learned Sessions Judge held the charge under S. 147 unproved and acquitted all the convicts except Girdhari and Ranjha. He found Girdhari guilty under S. 332 only and Ranjha under Ss. 332 and 109 and sentenced each of them to pay a fine of Rs. 200. Ranjha and Girdhari have come up in revision to this Court and I have heard lengthy arguments on their behalf as well as for the Crown.

The first question to be decided is whether Girdhari, petitioner, has been rightly convicted under S. 332, I. P. C. The findings of the learned Sessions Judge are that S. 14, Minor Canals Act, is inapplicable to the present case, inasmuch as no rule or bye-laws have been issued by the Local Government as required by that section. He has held that the villagers had been summoned by Mushtaq Ali, Sub-overseer, for consultation about the removal of the reeds and negotiations were going on with them for the purpose. He has also found that on the villagers refusing to voluntarily burn their reeds due to the presence of certain receptacles for storing of bhusa and the existence of some sheds in the neighbourhood, Mushtaq Ali was going to set fire to the reeds when Girdhari Lal gave a blow with a stick to Mushtaq Ali with a view to prevent him from setting fire to the reeds. Now in order to substatiate the charge under S. 332, it must be established that Mushtaq Ali was acting in the discharge of his duty as a public servant. For the Crown it had not been shown under what provision of the law it was competent to Mushtaq Ali to set fire to the reeds belonging to the villagers. Before me it is conceded that the reeds were the private property of the villagers, but it is urged that the act of Mushtaq Ali came under S. 10, Minor Canals Act. A reference to the provisions of that section, however, shows that it has no applicability to the facts of the present case. It does not authorize the Collector to enter upon the property of private individuals and to set fire to plants or trees growing thereon in order to facilitate the deposit of soil or silt excavated from the canal bed. For that purpose power is given to the Collector to take action under S. 14; but, as already remarked, the necessary requirements of S. 14 have not been fulfilled in this case and, as rightly pointed out by the learned Sessions Judge, that section is inapplicable. S. 10 gives the Collector powers of control, management and direction for the efficient maintenance and working of canals, notwithstanding the existence of any rights in or over a canal or watercourse. The phraseology of this section leaves no doubt that it does not authorize the Collector to enter upon the private property of a neighbouring proprietor and deal with it as he likes. I am, therefore, of opinion that the conviction under S. 332, I. P. C., cannot be sustained.

At the same time I have no doubt that the act of Girdhari petitioner clearly falls under S. 323, I. P. C., Mr. Amolak Ram for the petitioner contends that on the finding of the learned Sessions Judge Girdhari petitioner must be held to have acted in the exercise of the right of private defence of property, inasmuch as he wanted to protect the reeds belonging to him and the other villagers from being set on fire by Mushtaq Ali. There is, however, no force in this contention, as under S. 99, I. P. C., the right of private defence against an injury apprehended to be done by a public servant extends only to those cases in which there is a reasonable cause of apprehension of death or of grievous hurt being caused by the act of such public servant. It is obvious that the present case does not fall within the exception mentioned in S. 99. I am, therefore, of opinion that even though Mushtaq Ali was acting beyond the powers that were legally vested in him, the petitioner Girdhari had no jurisdiction for taking the law into his own hands and giving a lathi blow to him. I, therefore, hold that Girdhari is guilty under S. 323, I. P. C.

Having regard to the fact that the canal authorities, and particularly Mushtaq Ali acted in a manner which was not in accordance with law and under circumstances which greatly provoked the villagers, I think the fine of Rs. 200 imposed on the petitioner is excessive. I would reduce it to Rs. 50.

Ranjha, petitioner, has been convicted for abetting the offence of Girdhari. The evidence against him is that of Mushtaq Ali and his companions. Having regard to the fact that these witnesses have grossly exaggerated the affair and have tried to implicate as many persons as they could, I am not prepared to hold that there are sufficient materials on the record to convict Ranjha of abetment of the offence committed by Girdhari. I would, therefore, accept his petition for revision and acquit him.

The result is that the petition is accepted to this extent that Ranjha is acquitted and the conviction of Girdhari is altered from one under S. 332 to that under S. 323, I. P. C., and the sentence of fine imposed on him is reduced to Rs. 50. The whole of the fine paid by Ranjha and the excess paid by Girdhari will be refunded.

D.D. *Sentence reduced.*

A. I. R. 1927 Lahore 708

TEK CHAND, J.

Jamna Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Crl. Rev. No. 692 of 1927, Decided on 24th June 1927, from the order of the Dist. Magistrate, Gurdaspur, D/- 27th March 1927.

Penal Code, Ss. 186 and 225-B—Escape from lawful custody does not amount to obstruction, but it constitutes an offence under S. 225-B.

Escape from lawful custody of a process server does not amount to obstruction to a public servant in the discharge of his duties, nor does the act of a person in running away and shutting himself up in a room and refusing to come out constitute voluntary "obstruction", but it constitutes an offence uuder S. 225-B 2 *B. H. C.* 128 (*F. B.*), *Foll.* [P 708 C 2 ; P. 709 C 1]

Shambu Lal Puri—for Petitioner.

Judgment.—The findings of the Courts below are that in execution of a decree obtained against him by one Bhanu Shah, Jamna Das petitioner was arrested by Kesho Ram, process-server, on the 25th April 1926, and that after his arrest he managed to escape from custody, went inside his house, shut himself up there and refused to come out. On these findings he has been convicted under S. 186, I. P. C., and sentenced to two months' rigorous imprisonment and a fine of Rs. 100.

On revision the first point urged is that the evidence of the process-server Kanshi Ram does not support the finding that the petitioner had actually been arrested before he went inside the house and locked himself up there. In his report, made on the back of the warrant on the 25th April 1926, the process-server stated that he had actually arrested the petitioner before he managed to make his escape. When examined in Court, he admitted this report as correct, but stated that when he showed the warrant to the petitioner he at once ran away and shut himself up in his house. In this deposition he did not state that he had actually arrested the petitioner. The evidence given in Court by Bhanu Shah (P. W. 1), the decree-holder, and the other witnesses who were present at the time of the occurrence, is that the petitioner ran away after he had actually been arrested by the process-server. Though the process-server is now trying to go back upon his report, there is sufficient evidence on the record to support the finding of the Courts below that the petitioner had actually been arrested before he made good his escape. I, therefore, overrule this contention.

The next question is whether the act of the petitioner in escaping from the custody of the process-server and going inside on some pretext or the other, locking himself there, and refusing to come out, constitutes voluntary obstruction of a public servant in the discharge of his public functions within S. 186, I. P. C. In my opinion the question must be answered in the negative. It was held, as long ago as 1865, by a Full Bench of the Bombay High Court in the case of *Reg.* v. *Poshu* (1), that escape from lawful custody does not amount to obstruction of a public servant in the discharge of his duties, and I am not aware of any case in which a contrary view has been

(1) 2 B. H. C. 128 (134) (F. B.).

taken. Nor can it be said that the further act of the petitioner, in running away and shutting himself up in a room and refusing to come out, is voluntary "obstruction." Such conduct is no more than mere passive resistance or an attempt to evade the process of the Court. It cannot by any stretch of reasoning be described as obstruction. I am, therefore, unable to uphold the conviction of the petitioner under S. 186, I. P. C.

At the same time it seems to me that the petitioner in escaping from lawful custody is clearly guilty under S. 225-B, I. P. C. The facts found are, as already stated, that the petitioner had been arrested in execution of a warrant legally issued by a competent Court and, after his apprehension, he escaped from the custody of the process-server. These acts constitute an offence under S. 225-B, I. P. C. It is no doubt true that the petitioner was not tried under that section, but all the material facts were stated in the complaint and were duly deposed to by the prosecution witnesses and it cannot be said that the petitioner would in any way be prejudiced by the alteration of the finding by this Court. I, therefore, convert the conviction of the petitioner to one under S. 225-B, I. P. C.

The petitioner was in jail for 27 days and is now on bail, and I do not think it is a case in which he should be sent back to jail. I, therefore, reduce the period of imprisonment to the period already undergone, but maintain the sentence of fine of Rs. 100. In default of payment of the fine the petitioner must suffer rigorous imprisonment for one month as ordered by the trial Court.

With this modification, the petition is dismissed.

N.D. *Petition dismissed.*

A. I. R. 1927 Lahore 709

TEK CHAND, J.

Mussadi Lal and *another*—Accused—Petitioners,

v.

Emperor—Opposite party.

Crl. Misc. Petn. No. 104 of 1927, Decided on 4th July 1927, for transfer of the case from the Court of the Dist. Mag., Gurgaon.

Criminal P. C., S. 526—Question to be considered is whether accused reasonably thinks that he would not have a fair trial.

In dealing with applications for transfer, the High Court has to consider not whether any real bias exists in the mind of the presiding Judge against the accused, but the question is whether circumstances do not exist which, though they may be susceptible of explanation, are nevertheless calculated to create in the minds of the accused a reasonable apprehension that they would not have a fair and impartial trial. In determining whether the apprehension is reasonable or not the Court has not to come to a conclusion on abstract principles but has to bear in mind the degree of intelligence of the accused, *Sergeant* v. *Dale* (1877) 2 *Q. B. D.* 558 and *The King* v. *Sussex Justices Ex parte Mc. Carthy*, (1924) 1 *K.B.* 256, *Foll.*, *A.I.R.* 1923 *Lah.* 264; *A. I. R.* 1925 *Lah.* 361 and *Lah. Cr. M.* 8 *of* 1926 *Ref.* [P 710, C 1]

Where the accused had a reasonable belief that they had by various acts of theirs incurred the displeasure of the District Magistrate and other local authorities, and that they would not have a fair and impartial trial in that district and the belief was strengthened by the fact that the Superintendent of Police conferred with the District Magistrate with regard to their cases before the prosecutions were actually launched and there was the further circumstance that legal practitioners at the place evaded taking up the cases of accused,

Held: that the cases of accused ought to be transferred. [P 710, C 1]

Shamair Chand—for Petitioners.

C. H. Carden Noad—for the Crown.

Order.—Mussadi Lal and Makhan Lal, petitioners, have filed appplications for transfer to another district of three criminal cases pending against them under S. 153, I.P.C., Ss. 353, 147 and 332 I. P. C., and S. 32, Act 5, 1861 respectively in the Court of Mr. Brayne District Magistrate of Gurgaon. The applications are supported by affidavits filed by Mussadi Lal and are opposed on behalf of the Crown. The learned Government advocate has placed before me a copy of the reply to the allegations made in the affidavit that has been furnished to him by the District Magistrate.

After hearing Mr. Shamair Chand for the petitioners and Mr. Carden Noad for the Crown, I have come to the conclusion that the interests of justice require that these cases should be tried in another district. In my opinion it is amply borne out that the petitioners have a reasonable belief that they have by various acts of theirs incurred the displeasure of the District Magistrate and other local authorities, and that they will not have a fair and impartial

trial in that district. This belief is strengthened by the fact, which is admitted by the District Magistrate, that the Superintendent of Police conferred with him with regard to these cases before the prosecution was actually launched. There is also the further circumstance which appears from the statement of Mussadi Lal in his affidavit, that legal practitioners at Gurgaon have "evaded taking up the cases of the petitioners." This allegation is not contradicted in the reply submitted by the District Magistrate.

While coming to this conclusion, I wish, however, to make it clear that I have no doubt whatsoever that the learned District Magistrate appears throughout to have acted in perfect good faith in the discharge of his administrative duties as the head of the district, and there is absolutely nothing to indicate that there is any real bias in his mind against the petitioners. But, as has been pointed out over and over again, in dealing with such applications what this Court has to consider is not whether any real bias exists in the mind of the presiding Judge against the accused but the question is whether circumstances do not exist which, though they may be susceptible of explanation, are nevertheless calculated to create in the minds of the accused a reasonable apprehension that they would not have a fair and impartial trial. In determining whether the apprehension is reasonable or not we have not to come to a conclusion on abstract principles, but have to bear in mind the degree of intelligence of the accused. As observed by Lush, J. in the leading case of *Sergeant* v. *Dale* (1) in such matters

> the law has regard not so such perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away every thing which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is essential to social order and security.

The point has been emphasized by Lord Hewart, C. J., in the recent case of *The King* v. *Sussex Justices Ex parte Mc Barthy* (2) in the following words:

> The trial of a case should be conducted in an atmosphere which does not create even a suspicion that there has been (or is likely to be) an improper interference with the course of justice .....A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

The question has been discussed at considerable length by Broadway, J., in *Sardari Lal* v. *Crown* (3) and by the learned Chief Justice in *Amar Singh* v. *Sadhu Singh* (4) and I do not propose to discuss the authorities at any length. I may, however, refer to an unpublished decision in *Pandit Madho Parshad* v. *Crown* (Criminal Misc. No 8 of 1926, in which the late Mr. Justice Martineau, under somewhat similar circumstances, ordered the transfer of a criminal case from the Court of the District Magistrate, Gurgaon, to the Hissar District on the 5th of March 1926.

I accordingly accept these petitions and direct that the three cases aforesaid be transferred from the Court of the District Magistrat, Gurgaon to that of the District Magistratee, Rohtak, who will try them either himself or send them to such other comptent Magistrate as he may think fit.

D.D. *Petition accepted.*

(1) [1877] 2 Q. B. D. 558=46 L. J. Q. B. 781 =37 L. T. 153.
(2) [1924] 1 K. B. 256.
(3) A. I. R. 1923 Lah. 264=3 Lah. 443.
(4) A. I. R. 1925 Lah. 361=6 Lah. 396.

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* A. I. R. 1927 Lahore 710

TEK CHAND AND COLDSTREAM, JJ.

Santa Singh —Accused—Petitioner.

v.

Emperor —Opposite Party.

Crl. Rev. Petn. No. 1101 of 1927, Decided on 12th August 1927, from the order of the Dist. Mag., Amritsar, D/- 20th June 1927.

* (a) *States Protection Act* (1922), *S.* 3— *Truth of allegations may be proved in mitigation of the penalty.*

Where a person is charged under S. 3 of the Act, he has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty to be imposed in the event of conviction and that for the purpose of making good that plea it may be necessary for him to show that the offensive allegations were true. [P 712, C 1]

* (b) *Criminal Trial—Accused can set up inconsistent pleas.*

An accused person cannot be barred from setting up inconsistent pleas: 16 *Cr. L. J.* 76 and *A. I. R.* 1923 *Cal.* 717, *Rel. on.* [712, C 2]

Muhammad Alam—for Petitioner.

Abdul Rashid—for the Crown.

Coldstream, J.—Santa Singh, petitioner, is being prosecuted in the Court of the District Magistrate, Amritsar, under S. 3, of the Indian States (Protection against Disaffection) Act, 1922 to be referred to hereinafter as the Act of 1922, in respect of a writing under the title, "Patiala's Zulum No. 1" published on 26th January 1927 in the newspaper called the Sacha Dhandora, Amritsar, of which the petitioner is alleged to have been at the time the editor, printer and publisher.

A charge was framed against Santa Singh on the 16th of June. Santa Singh put in a written statement denying that he was the editor, printer and publisher of the Sacha Dhandora and that he was in any way responsible for the publication of the offensive article. He also denied that the article had brought the Maharaja of Patiala into hatred and asserted that the object of the writer of the article was simply to draw the attention of Government to the existing state of affairs and to provoke Government to an enquiry. The allegations were true and would be proved to be true, and their publication was in the public interest.

Santa Singh put in a list of 45 witnesses whom he wished to be summoned in his defence. On the 20th June the District Magistrate recorded an order under S. 257, Criminal P. C., refusing to summon any of these witnesses on the ground that the only purpose for which they were summoned was vexatious. Against this order Santa Singh had petitioned under the provisions of S. 439 of the Code.

The petition came before Broadway, J. For the petitioner counsel relied upon *Emperor* v. *Rajpal* (1), arguing that evidence proving the truth of the allegations would be relevant as showing the intention of the writer as well as relevant on the question of sentence to be passed in the event of conviction. On behalf of the Crown the petition was opposed by the learned Government advocate who contended that the judgment cited was not a correct exposition of the law. In view of this contention Broadway, J., referred the matter to a Division Bench and the petition is accordingly before us. We have heard Mr. Muhammad Alam for the petitioner and the Government advocate for the Crown.

(1) A. I. R. 1926 Lah. 195=7 Lah. 15.

The learned District Magistrate has held that the petitioner's application for the summoning of his witnesses could only be for the purpose of vexation, because, as the District Magistrate puts it, it was

> obviously no answer to the charge of an offence defined as this offence is defined, to plead that the allegations made were true

and he saw no reason to call witnesses whose evidence could not affect the point to be decided. He remarked that in this case he would not accept the position that truth could be considered in mitigation of the offence since the accused out of his own mouth and by the cross-examination of his counsel stood before him as an illiterate yokel who, whether he was or was not the publisher of the Sacha Dhandora, was in any case in no position to examine with due care and caution the evidence in support of what he was alleged to have published, and to say that, having examined it, he believed himself to be publishing what was true.

To establish the charge as framed by the District Magistrate against the petitioner in this case it has to be proved that by publishing the article the petitioner : (a) did bring into hatred or contempt the Maharaja of Patiala, or (b) did excite disaffection towards him, or that by publishing the article he (c) intended to bring the Maharaja into hatred or contempt ; or (d) intended to excite disaffection towards him. The prosecution, who have closed their evidence, have not attempted to prove (a) or (b) and it will be for the Magistrate to decide whether the petitioner intended to bring the Maharaja into hatred or contempt or excite disaffection towards him. There can be no doubt that intention is an essential ingredient of the offence described in the Magistrate's charge and Mr. Muhammad Alam, who has referred to a number of rulings under S. 124-A and 153-A, I. P. C., has argued that the question of the truth of the allegations made in the article must be regarded as a relevent matter not only on the question of punishment but as relevant to show the intention of the publication and therefore relevant on the question of whether any offence was committed. I do not think it proper at the present stage of this prosecution, or necessary in view of

the order I propose to pass, to express any opinion either as to the correctness of the learned Magistrate's view that a plea of truthfulness cannot be an answer to a charge under S. 3 of the Act of 1922 or to discuss the soundness of the principles ennunciated by Martineau, J., in *Emperor* v. *Raj Pal* (1). That judgment was in a case under S. 153-A, I. P. C., which is a different offence from the one made punishable under S. 3 of the Act of 1922.

I do not think that the District Magistrate acted rightly in refusing to allow the petitioner an opportunity of proving the truth of the allegations in the article, for the publication of which he is being prosecuted. There can be no doubt that the offence with which he is charged may be visited with penalties of varying severity, imprisonment which may be simple or rigorous, for one day or for five years, with or without fine or with fine alone, and it cannot be disputed that the petitioner has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty to be imposed in the event of conviction and that for the purpose of making good that plea it may be necessary for him to show that the offensive allegations were true. The learned Government advocate is unable to cite any authority in support of his contention that in a case of this kind such a plea in mitigation of his offence is not open to the accused.

Before Broadway, J. Dr. Muhammad Alam stated that the alternative defence set up by his client (namely the denial that accused was in any way responsible for the publication of the offensive article) was a foolish one. Dr. Muhammad Alam has during the present proceedings before us filed a written statement (which has been placed on the record) explaining that what he said before Broadway, J. was said on the understanding that the accused had really signed a declaration under the Press and Registration Act ; his present instructions are that the accused still denies that he signed any such declaration and Dr. Muhammad Alam desires us to record his statement that

> in case it is not proved against him (that he signed a declaration) the petitioner considers his defence to be a valid one.

The effect of this action by Dr. Muhammad Alam is to revive both defences and the learned Government advocate protests against the proposal that the petitioner should be allowed to put forward two pleas apparently hopelessly inconsistent, namely (a) that the petitioner did not publish the offending article and (b) that the circumstances in which it was published mitigate the offence, and he urges that the District Magistrate's order should be upheld in view of this inconsistency. There is, however, good authority for the view that an accused person cannot be barred from setting up inconsistent pleas. I need refer here only to two rulings of Division Benches of the Calcutta High Court *Kali Parsad Banerjee* v. *King-Emperor* (2) and *Nagendra Chandra Dhar* v. *King Emperor* (*A. I. R.* 1923 *Cal.* 717), in the latter of which it was remarked that, while there can be no doubt that by setting up an inconsistent defence the case for the accused becomes considerably weaker, there is nothing illegal in setting up an alternative and inconsistent defence. For these reasons I would set aside the order of the District Magistrate.

It is possible that the District Magistrate, after reviewing the matter with reference to each witness cited, may still find that some of the witnesses named have been cited for the purpose of vexation or delay or for defeating the ends of justice. If so he may of course refuse to issue process against those witnesses after recording the grounds for his refusal ; or it may happen that after calling and hearing some of the witnesses the District Magistrate may find himself convinced that the remainder have been cited merely for the purpose of vexation etc. In this case it would be open to the District Magistrate to refuse to summon them after recording his reasons. Dr. Muhammad Alam states that he withdraws the application for summoning His Highness the Maharaja of Patiala. As regards witnesses outside the jurisdiction of the Court (for instance, prisoners in the Patiala jail) he proposes to ask for proceedings under S. 503, Criminal P. C.

Tekchand, J.—I agree in the order proposed.

D.D. *Order set aside.*

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(2) [1915] 16 Cr-. L. J. 76=26 I. C. 668.

A. I. R. 1927 Lahore 713

TEK CHAND, J.

Gurditta Shah and *another*—Accused —Appellants.

v.

Emperor—Opposit Party.

Crl. A. No, 591 of 1927, decided on 8th August 1927, from an order of the 1st Cl. Magistrate, Attock, D/- 31st May 1927.

Criminal P. C., S. 162, *Proviso—Proviso applies to witnesses called by the prosecution only.*

The proviso to S. 162 applies to statements made by persons who are called as witnesses for the prosecution only and not if they are summoned by the Court at the suggestion of the defence. [P 714 C 2]

G. C. Narang and *B. R. Puri*—for Appellants.

D. R. Sawhney—for the Crown.

Judgment.—The appellants, Gurditta Shah, aged 40 years of Fatehjang and his servant Ghaman Singh Gorkha aged 24 have been convicted by the, Magistrate, First Class, (with enhanced powers) Attock, under Ss. 307 and 307/109, I. P. C., respectively. Gurditta Shah has been sentenced to rigorous imprisonment for 5 years and a fine of Rs. 500 and Ghaman Singh to rigorous imprisonment for 18 months. Both convicts have appealed.

The case for the prosecution is that Gurditta Shah had obtained a decree for Rs. 375 against P. W. 5, Shahia, of Mauza Sadkal, in execution of which he had got issued a warrant for the arrest of the judgment-debtor. On the morning of the 20th November 1926, he, with his servant Ghaman Singh Gorkha and Kasam shah process-server, went to mauza Sadkal to effect the arrest of Shahia. On reaching the village, they discovered that Shahia, having got information of their arrival, had gone away to the house of P. W. 1, Shera. The appellants and Kasam Shah followed him there and got hold of him and began to beat him with fists and kicks. He beseeched them not to do so, but they would not listen. In the meantime, P. W. 10 Mt. Gauhri, wife of Shera, came up from outside and finding the appellants beating Shahia remonstrated with them, whereupon Gurditta Shah appellant loaded his gun and fired at her, causing her serious injuries. She fell down immediately and became unconscious. On this, Gorkha shouted out to Gurditta Shah to fire at Shahia also. Meanwhile several neighbours including Gulab Khan lambardar arrived on the scene. They secured the gun Ex. P. 1 and the Jhola Ex. P. 2 from Gurditta Shah. On opening the gun a live S. G. cartridge was found in the left barrel and a spent cartridge in the right. From the Jhola were recovered 8 live cartridges and one spent cartridge. Gulab Khan lambardar took all these articles in his possession. Soon after, Mt. Gauhri's husband Shera, who was away from the house, returned on getting information of the occurrence. He went to the thana and made the first information report Ex. PA at about 9-30 A. M. Shahwali Khan Sub-Inspector reached the spot at about 11 A.M. and after taking possession of the gun, cartridges and the jhola arrested both Gurditta Shah and Ghaman Singh. Mt. Gauhri recovered consciousness soon after and was taken to the hospital at Fatehjang, where she was examined by P. W. 8, Dr. Muhammad Niwaz, Assistant Surgeon. She was found to have a lacerated wound 7" × ¼" the edges of which were burnt. The crest of the illum was smashed on the left side and 8 small pieces of the fractured iliac bone were removed from the wound. He also examined Ghaman Singh appellant and found nine simple injuries on his body, some caused by a blunt weapon and others received during a scuffle. One of the injuries was a contused wound 1" × 1/6" below the left eye with swelling of surrounding hurt and congestion of the left eye. Gurditta Shah was found to have two superficial scratches behind the right ear and in front of the left knee, probably caused by having been thrown down in a scuffle.

The appellants, in their defence, admitted that they with the process-server went to Sadkal to effect the arrest of Shahia. As Gurditta's father Kalu Shah had been killed in a dacoity committed at his house two years before, he had taken out a license for a gun. The path from Fatehjang to Sadkal passes along a pond where a large number of ducks are usually found. The party had a mind to have a shoot there and for this purpose the gun, which was carried by Ghaman Singh, appellant, was loaded near the pond. No ducks, how-

ever, could be found and the gun remained loaded till they reached the village. On their arrival there Shahia, judgment-debtor, was pointed out to the process-server, Kassam Shah, who told him that he had come to arrest him under a warrant issued by the Senior Sub-Judge, Jhelum, in execution of a decree obtained against him by Gurditta Shah appellant. Kasam Shah caught hold of him and Gurditta Shah assisted him in arresting Shahia. But Shahia raised a hue-and-cry and a number of persons collected there. Some of them caught hold of Gurditta Shah and felled him to the ground, while others grappled with Ghaman Singh, beat him with kicks and fists and hit him with a stick on his eyebrow. They dragged him towards the kitchen of Shera and tried to snatch the gun from him. During the struggle the gun went off accidentally and hit Mt. Gauhri, wife of Shera, who was standing close by.

The learned Magistrate has accepted the story put forward by the prosecution and has rejected the defence version of the occurrence. (The judgment then dealt with the evidence of the witnesses and proceeded.) After fully considering the matter, I have reached the conclusion that P. Ws. Haidar, Dadu and Abas Khan did not see the the firing at all and cannot be relied upon to ascertain the circumstances in which Mt. Gaurhi was struck. I am also of opinion that Mt. Gaurhi and Shahia have given an incomplete and inaccurate account of the occurrence and their statements cannot be implicitly relied upon. They have suppressed the true facts as to the origin of the fight, the names of the persons who took part in it and the manner in which the two appellants were injured.

The only witness produced by the defence to support the theory that the gun went off accidentally in the struggle between the appellants and the alleged assailants is D. W. 4, Hari Chand, Sahukar of Mouza Kharala Kalan, who stated that he had gone to the village Sadkal to demand payment of the debt due to him by one Amir and that on his way back he looked into the house of Shera where he saw a number of persons beating Gurditta Shah and Ghaman Singh, who had been felled to the ground. The assailants were trying to snatch the gun from the hands of the Gorkha when it went off. I have carefully considered the evidence of this chance witness and have no hesitation in rejecting it as being wholly unworthy of credit.

The only witness whose evidence remains to be considered is Kasam Shah, process-server. He was not produced by the prosecution but was summoned by the Court at the suggestion of the counsel for the defence. I do not think it necessary to discuss his evidence at length as I am of opinion that he is a thoroughly unreliable witness. His statement before the Court is materially discrepant with the report which he made to the Sub-Judge on the day of the occurrence. The learned counsel for the appellants has strongly relied on Ex. D.-6, the statement which this witness made to the police during the investigation and has argued that what he stated there fully supports the defence version. The learned Magistrate allowed the statement to be brought on the record, but declined to consider it on two grounds: firstly, that it was not duly proved as required by law; and secondly, that it was inadmissible under S. 162, Criminal P. C. Inasmuch as the deponent Kasam Shah was not called at the trial as a prosecution witness, the appellants' counsel has attacked the Magistrate's reasoning and has urged that the document has been wrongly ruled out. In my opinion, the learned Magistrate was in error in holding that the statement was not duly proved. Though Kasam Shah stated that the statement Ex. D-6, as read out in Court, did not appear to be his statement, it is fully established by the evidence of D. W. 9 Shahwali Khan, Sub-Inspector, that Ex. D-6 is a correct record of what Kasam Shah stated before him. The facts in *Labh Singh* v. *Emperor* (1) which is relied on by the Magistrate, are wholly distinguishable. At the same time, I think he was right in holding the statement to be inadmissible under S. 162, Criminal P. C. The proviso to that section permits the use for certain purposes of statements made in the course of police enquiry by persons who are called as witnesses for the prosecution and by none others. Kasam Shah is admittedly not a prosecution witness, but was summoned by the Court at the

(1) A. I. R. 1925 Lah. 337=6 Lah. 24.

suggestion of the defence. The proviso to S. 162 is, therefore, inapplicable and I hold that Ex. D-6 was rightly held to be inadmissible.

In view of the mass of lies that have been told by the prosecution witnesses the learned counsel for the appellants has argued that the appellants are entitled to an acquittal. I am, however, not prepared to accept this contention. It is admitted that Mt. Gaurhi was injured as a result of the firing of the gun, which belonged to Gurditta Shah. The defence states that the gun was in the hands of the Gorkha and went off by accident. The onus of proving that she was struck accidentally or in the exercise of right of self-defence lay upon the appellants; but as shown above they have failed to discharge it by any reliable evidence. Nor am I prepared to accept the suggestion that it was the Gorkha who fired the gun. I have no doubt that Mt. Gaurhi and Shahia have told the truth to this extent that the gun was loaded and fired by Gurditta Shah. A perusal of the evidence leaves the impression on my mind that what actually happened was that the appellants were obstructed in their attempt to effect the arrest of Shahia, that a number of villagers joined him in offering resistance and probably beat them and in the scuffle they were injured. At this Gurditta Shah loaded the gun and fired it to frighten away the villagers, but hit Mt. Gaurhi, who happened to be close by. There seems to be no reason why any of the appellants should have intended to kill Mt. Gaurhi against whom they had no enmity of any kind. Nor is there any reliable evidence to establish the ingredients of an offence of attempt to murder. Indeed the learned Public Prosecutor has frankly conceded that, on the record, the appellants cannot be convicted under S. 307. In my opinion, the act of Gurditta Shah, appellant, in negligently firing the gun and injuring Mt. Gaurhi falls under S. 338, I. P. C. I accordingly accept his appeal, alter the conviction from one under S. 307 to that under S. 338, I. P. C. In view of the fact that Gurditta Shah has been in custody since November 1926, I sentence him to rigorous imprisonment for six months and a fine of Rs. 250 or in default of payment of fine to imprisonment for a further period of three months. Out of the fine, if realized, Rs. 125 will be paid to Mt. Gaurhi.

As against the second appellant Ghaman Singh, all that the prosecution witnesses have stated is that after Mt. Gaurhi had been fired at, he urged Gurditta Shah to fire at Shahia also. Gurditta Shah, however, did not fire or attempt to fire a second time. There is no evidence whatever to connect him with the first firing which resulted in hitting Mt. Gaurhi and I fail to see how he could be convicted of abetment of Gurditta Shah's act. In my opinion, Ghaman Singh has been wrongly convicted. I accordingly accept his appeal, set aside the conviction and direct that he be set at liberty forthwith.

R.K. *Appeal accepted.*

A. I. R. 1927 Lahore 715

JAI LAL, J.

Basakha Singh—Plaintiff—Appellant.

v.

Sohan Singh and *another*—Defendants—Respondents.

S. A. No. 1053 of 1927, Decided on 2nd July 1927, from the decree of the Dist. Judge, Ferozepore, D/- 3rd March 1927.

Punjab Tenancy Act, S. 77 (3)—Mortgagee leasing out mortgaged land to mortgagor for a term—Suit for possession by mortgagee after the expiry of the term is cognizable by civil Court.

A suit for possession against the mortgagor by the mortgagee who has leased the land to the mortgagor, after the term of the lease is over, is not a suit for ejectment of tenant by landlord and as such is cognizable by civil Court. [P 716, C 2]

The terms of S. 77 (3) cannot be held to include a suit the claim in which arises out of a contract of mortgage merely because between the mortgagor and mortgagee there subsists also the relationship of landlord and tenant. In order to bring the case between the purview of S. 77 (3) the claim in the suit must be directly referable to the lease or the conditions on which the tenancy is held : 41 *P. R.* 1894 and 126 *P.R.* 1906, *Rel. on.* [P 716, C 2]

J. B. Sethi—for Appellant.

Nihal Singh—for Respondents.

Judgment.—The allegation in the plaint is that in December 1924, the respondents mortgaged the land in suit with possession to the plaintiff, the appellant before me, that on the 12th of

January 1925, the land was given for cultivation to the defendants for one harvest for Rs. 31-8-0 and that the defendants had neither paid the rent nor had they given possession of the land to the plaintiff, but were repudiating the existence of the mortgage. Possession of the land was claimed as a mortgagee. The defendants denied the existence of the mortgage or the fact of their having taken the land from the plaintiff for cultivation for one harvest as alleged by him. The trial Court decreed the suit. The District Judge on appeal by the defendants has held that the suit was triable by the revenue Court and has dismissed it.

It may be mentioned that no objection to the jurisdiction of the Sub-Judge was taken before him, nor was it taken in the grounds of appeal to the District Judge. But it appears to have been taken for the first time at the hearing of the appeal before the learned Judge. The question, however, is one of law and no objection can be taken to the jurisdiction of the learned Judge to entertain it at that stage. The important question, therefore, is whether the suit was cognizable by the civil Courts or by the revenue Courts. In this connexion it is to be borne in mind that the allegation of the plaintiff in the plaint is that the land was given to the defendants for one harvest only. It is not the case of an ordinary tenant at will or of an occupancy tenant who has incurred forfeiture of the tenancy owing to his having failed to perform any conditions of the tenancy. According to the allegations made in the plaint the relationship of landlord and tenant has ceased to exist by efflux of time. The plaintiff, therefore, expressly claims possession not as a landlord from a tenant but as a mortgagee from the mortgagor. It is, no doubt, true that according to the plaint the relationship of landlord and tenant was not created by the same transaction by which the mortgage was effected but was created a few weeks later. This, however, does not affect the question in the peculiar circumstances of this case. It is admitted that on the date of the suit, if the allegation of the plaintiff is true, that the tenancy was for one harvest only, the time fixed had expired.

Under these circumstances it looks to me that the suit was cognizable by a civil Court as it was not a suit by a landlord to eject a tenant. In *Khusba Singh* v. *Arjan Singh* (1) it was held that where the relationship of landlord and tenant originally existed but the plaintiff alleged that the defendant had repudiated that relationship, and in fact at the time of the suit it did not exist, the plaintiff must be deemed to be suing on the ground that the defendant is in wrongful possession of the land and such a suit is cognizable by the civil Courts. On p. 474 of *P. R.* 126 *of* 1906. [*Jamiat Mal* v. *Khair Muhammad* (2)], the following remark was made :

> The primary relationship between the parties was that of the mortgagor and mortgagees. The relationship of landlord and tenant was a subsidiary one, the main object of the lease being to secure under the name of rent the interest due on the mortgage debt, and allow the mortgagor to remain in cultivating possession of the land, though the mortgage was in terms a mortgage with possession.

It was also remarkable that the terms of S. 77 (3), Punjab Tenancy Act, cannot be held to include a suit the claim in which arises out of a contract of mortgage merely because between the mortgagor and mortgagee there subsists also the relationship of landlord and tenant, and that in order to bring the case between the purview of S. 77 (3), the claim in the suit must be directly referable to the lease or the conditions on which the tenancy is held. As I have already stated the primary object of the plaintiff in this case, according to the allegations made in the plaint, is to establish his right as a mortgagee and to obtain possession of the land as such. He does not admit that at the date of his suit the relationship of landlord and tenant still subsisted. In view of the above I hold that the suit was cognizable by the civil Courts.

I may mention that it is very doubtful even if it be held that the suit was cognizable by a revenue Court whether a good case had been made out to dismiss it. S. 100, Punjab Tenancy Act, appears to apply to the facts of this case and, were it not for the fact that I have held that the suit was cognizable by the civil Courts I would have considered the question of taking action under that section.

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(1) [1894] 41 P. R. 1894.
(2) [1906] 126 P. R. 1906=108 P. W. R. 1906=93 P. L. R. 1907.

I accept the appeal, set aside the decree of the District Judge and remand the case to him with directions to hear the appeal on the merits. The costs of this appeal will abide the result.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 717

TEK CHAND AND AGHA HAIDAR, JJ.

George Gowshala—Plaintiff — Appellant.

v.

Balak Ram—Defendant—Respondent.

S. A. No. 2800 of 1923, Decided on 22nd June 1927, from the decision of the Dist. Judge, Lahore, D/- 4th August 1923.

(a) *Limitation Act, S. 5—It is the appellant's duty to explain every day's delay.*

It is settled law that in order to have the benefit of S. 5 it is the duty of the appellant to explain the delay for every day that elapses beyond the period allowed by the Limitation Act for filing an appeal. [P 717 C 2]

(b) *Limitation Act, S. 12—Deduction of time spent in obtaining copy of the first Court's judgment may be allowed.*

The High Court may allow the deduction of time spent in obtaining copy of the first Court's judgment where the appellant had applied for the same before expiry of the period for filing the appeal, though he is not entitled to the deduction as of right. [P 717 C 2]

Fakir Chand—for Appellant.

Dev Raj Sawhney—for Respondent.

Tekchand, J.—A preliminary objection is raised on behalf of the respondent that no properly constituted second appeal was presented by the appellant within the period prescribed by law and that it should be dismissed as barred by limitation.

The relevant facts are these: The learned District Judge decided the appeal to his Court on the 4th August 1923. Against this decision a second appeal was presented in this Court on the 29th November 1923, unaccompanied by a copy of the judgment of the Court of first instance. Under R. 2 which was added to O. 42, Civil P. C., by the Lahore High Court in 1919, it is necessary to file a copy of the judgment of the first Court along with the memorandum of second appeal. The appellant applied for a copy of the first Court's judgment on the 2nd November 1923, and the copy was actually supplied to him on the 5th January 1924. The appellant, however, did not file it in this Court till the 14th January 1924.

Under the law the appellapt is not entitled as of right to deduct the period spent in obtaining a copy of the first Court's judgment, but having regard to the fact that the appellant had actually made an application for a certified copy of that Court's judgment on 2nd November 1923, before the limitation for filing the second appeal had expired, we are prepared to make an allowance of the time actually spent in obtaining that copy, namely, up to the 5th January 1924. If the appellant had filed the copy on the 5th January or very soon afterwards we would have held the appeal to be within time. But the appellant further delayed the filing of the copy for nine days and no explanation whatever is offered for this delay. No affidavit has been filed by the appellant nor was the learned counsel able to suggest any reason why the copy was not filed till the 14th January 1924. As the appellant was not present in person, we enquired from Mr. Faqir Chand if he wanted time to consult him and to file an affidavit. Mr. Faqir Chand, however, preferred to have the matter decided on the present materials. He conceded that on the record no sufficient cause can be put forward to explain the delay from the 5th to the 14th January.

He, however, argued that having regard to the working of S. 5, Limitation Act, it was not necessary for him to give any explanation for this delay, if the Court was of opinion that on the day on which the statutory period of 90 days expired he had sufficient cause for not presenting the appeal. After hearing him we are of opinion that there is no force in this contention. It is settled law that in order to have the benefit of S. 5 it is the duty of the appellant to explain the delay for every day that elapses beyond the period allowed by the Limitation Act for filing an appeal. It cannot for instance be said that the existence of sufficient cause for not filing the appeal for a week after the statutory period would justify the laches of the appellant in delaying the presentation of the appeal for a fortnight. In the present case, no explanation is forthcoming for the delay beyond the 5th January 1924. A valuable right has been secured

to the respondent due to the negligence of the appellant and in the absence of sufficient cause we have no jurisdiction to extend the time.

For these reasons we are of opinion that the preliminary objection must prevail and the appeal dismissed as time barred with costs.

Appeal dismissed.

N.D.

A. I. R. 1927 Lahore 718

DALIP SINGH, J.

Yusaf Alim Hakimji—Plaintiff—Appellant.

v.

Muhammad Din and *Sons*—Defendants—Respondents.

S. A. No. 1793 of 1925, Decided on 23rd May 1927, from a decree of the Dist. Judge, Rawalpindi, D/- 6th April 1925.

(a) *Co-sharers—Non-partible property can be joint.*

Whenever a property is found to be not partible, it does not necessarily follow that the property cannot be joint.

(b) *Specific Relief Act, S. 55—Special damage need not be shown where property is not partible.* [P 718, C 2]

In a suit for injunction against a co-owner relating to the erection of structures on the joint property, if the property is not partible, there is no occasion for the plaintiff to show any special damage. It is sufficient for him to show that he has been deprived of the user of the property as it stood originally.

[P 718, C 2, P 719, C 1]

(c) *Co-sharer—Exclusive possession.*

Because a co-sharer has built a platform some time ago and thereby has to a certain extent secured exclusive use of the ground under the platform, he is not entitled to raise a further structure on the platform which may still further deprive other co-sharers of the use of the joint property : *A.I.R.* 1921 *Lah.* 157 and *A.I.R.* 1927 *Lah.* 416, *Dist.* [P 719, C 1]

(d) *Specific Relief Act, S. 54.*

Laches disentitles a person to the discretionary relief of an injunction.

Hargopal—for Appellant.

Aziz Ahmad—for Respondents.

Judgment.—The facts in this appeal are given in my order remanding the case, dated the 3rd February 1926. The case was again remanded to the learned District Judge because he has omitted to give reasons for his findings. The learned District Judge has now given those reasons and counsel for the appellant has contended against the finding that the platform and the staircase were built in 1922, and that the learned District Judge has confused an earlier staircase and platform with the platform and staircase now in dispute. It is clear from the witnessess for the defendants and from the documentary evidence put in that the platform was built in 1922 and the staircase in dispute was not built until July 1924.

The finding of the District Judge on this point is vitiated by ignoring and misreading the evidence. Counsel for the respondent has not seriously contested that the platfrom was built in 1922, but that the staircase was built in 1924.

It appears that when the staircase was built on or about the 12th July 1924, the plaintiff first moved the cantonment authorities and when that authority refused to take action he moved the Court for redress. As regards the platform, however, counsel for the appellant can only say that it is possible that the plaintiff had not observed this platform when it was built. This is to my mind extremely unlikely considering the size of the platform. The learned District Judge has further held, and it has not been contested before me, that both the parties agreed that the property is not partible. Counsel for the respondents contends that this finding means that the property is not joint. For this proposition he relies on *Sartaj Kuari* v. *Deoraj Kuari* (1) and *Bachoo* v. *Mankorebai* (2). The contention is that whenever a property is found to be not partible it necessarily follows that the property cannot be joint. With this contention I am wholly unable to agree. The rulings cited do not bear out this proposition at all.

Next, counsel for the respondents contends that it was for the plaintiff to show special damage. Now, from the finding of the trial Court and of the learned District Judge as interpreted in my order of remand, it seems to me clear that the property was joint of the plaintiff and the defendants and other persons and if the property is not partible there is no occasion for the plaintiff to show any special damages. It is sufficient for him to show that he has been

(1) [1888] 10 All. 272=15 I.A. 51=5 Sar. 139 (P.C.).

(2) [1905] 29 Bom. 51=6 Bom. L. R. 268.

deprived of the user of the property as it stood originally, see in this connexion *Manji* v. *Gulam Mohammad* (3) and *Kunj Lal* v. *Ramji Lal* (4). Counsel for the appellant contends that there can be no question of laches in a case like this and that, even assuming that the platform was built 2½ years ago, an injunction for demolition of the platform must be allowed. For this proposition he relies on *Manji* v. *Gulam Mohammad* (3) and *Rustom Khan* v. *Rahman* (5). *Manji* v. *Gulam Mohammad* (3) is not a case of injunction but a case of joint possession. I am unable to see that the ordinary principle that laches disentitles a person to the discretionary relief of an injunction should not apply in this case. I, therefore, consider that the plaintiff's suit qua the platform must be dismissed.

As regards the staircase there is no question of laches as the plaintiff took action immediately and the defendants had full warning of the plaintiff's intentions. Counsel for the respondents, however, contends that if the plaintiff cannot have the platform demolished then as the staircase is built on the platform he cannot also ask for the demolition of the staircase. Each case of this nature must be judged on its own facts. I do not concede that it follows that because a person has built a platform some 2½ years before and thereby has to a certain extent secured exclusive use of the ground under the platform, he is entitled to raise a further structure on that platform which may still further deprive the plaintiff of the use of the joint property. A plaintiff, for instance, may in a particular case be perfectly willing to have joint user of a platform on a joint property but may not be willing that a defendant should have an exclusive user of a portion of the platform by erecting a staircase on it. It is clear that in the present case the defendants have not acquired an indefeasible title to the site of the platform. They have only got a right to maintain the platform on the joint site because of the laches of the plaintiff in not having it removed immediately. The site in question seems to be a portion of a road which was left for common use of the owners of certain shops and houses round about the road. At the same time counsel for the appellant has not been able to show me that the staircase in any way further restricts his user for this road. A space of 23½ feet is still left even after counting the whole of the land under the platform, and the staircase is only built on a portion of the platform. In the circumstances I do not consider that there is any need to order demolition of the staircase, and, as the plaintiff has not asked for compensation, or for joint possession of the platform I do not consider it necessary to go into the matter further.

I, therefore, dismiss the appeal of the plaintiff. Having regard, however, to the fact qua the staircase, which appears to be the real bone of contention, I have only refused the plaintiff's prayer for an injunction in the exercise of my discretion on the point. I think the defendants should only have the costs of this appeal.

N.D. *Appeal dismissed.*

(3) A.I.R. 1921 Lah. 157=2 Lah. 73.
(4) A.I.R. 1927 Lah. 416.
(5) A.I.R. 1923 Lah. 289.

A. I. R. 1927 Lahore 719

ZAFAR ALI, J.

Parem Chand— Judgment-debtor — Appellant.

v.

Budha—Decree-holder—Respondent.

Misc. S. A. No. 1980 of 1926, Decided on 22nd December 1926, from the order of the Addl. Judge, Gujranwala, D/- 5th May 1926.

Limitation Act, Art. 182—*Modified decree.*

Application for execution filed within three years of a modified decree is in time. [P 720,C 1]

Jagan Nath Malhotra—for Appellant.

Badar-ud-Din Qureshi—for Respondent.

Judgment.—In this case the only question for determination is whether the decree-holder-respondent's application dated the 23rd October 1925, for execution of the decree passed in his favour for possession of his half-share in a house by partition was barred by limitation or not. It appears that a preliminary decree for partition was passed on the 7th July 1921, and a commission was subsequently issued for dividing the property between the parties. They are joint owners of the

house, and are brothers. In the course of the proceedings for partition the Court ordered on the 8th January 1923, that the plaintiff should pay Rs. 100 to his brother as a condition precedent to his taking possession of his share of the house. It was further ordered that the plaintiff should deliver to defendant certain portions of the superstructure of the house. On the 23rd October 1925, the plaintiff made a fresh application for execution and the trial Court held that it was barred by time. On appeal the learned District Judge came to the conclusion that the time began to run from the 8th January 1923, or from the 26th November 1922, on which date the plaintiff had made an application during the execution proceedings. I am of opinion that the view taken by the lower appellate Court is correct. The decree having been modified by order dated the 8th January 1923, the application made for execution thereof on the 23rd October 1925, was within time. Further, the parties being brothers and in joint possession of the house neither can be precluded by lapse of time from taking possession of his share thereof.

I, therefore, dismiss the appeal with costs.

D.D. *Appeal dismissed.*

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* A. I. R. 1927 Lahore 720

HARRISON, J.

Akhtar Mohammad — Accused—Petitioner.

v.

Emperor—Opposite Party.

Crl. Rev. Petn. No. 1252 of 1927, Decided on 27th September 1927, from the order of the Sub-Judge, Lahore, D/- 13th June 1927.

* *Criminal P. C., S. 342 — De novo trial — Examination of accused by predecessor in office of the deciding Magistrate is not enough.*

Where the magistrate trying the case was transferred and his his successor began the trial de novo but did not again examine the accused under S. 342.

Held : it is not only a rule but principle that a Magistrate, who tries a case in the sense of "decides," must give the accused an opportunity of explaining any points which may have been made against him and must hear what he has to say, and it is not sufficient for his predecessor-in-office to have done so. Where such a procedure is not followed, the whole proceedings are vitiated. [P 720, C 2]

Barkat Ali—for Petitioner.

Judgment.—Akhtar Mohammad had been convicted of being in illegal possession of charas and sentenced to two years rigorous imprisonment and a fine of Rs. 200. On appeal the sentence of imprisonment was reduced to one year.

The facts as found are that this man had been selling 6 haras to the labourers on Ganda Singh Wala Canal. An application for revision has been admitted, and the first point urged by Mr. Barkat Ali is that there is an incurable irregularity in the proceedings in that after all the evidence had been recorded and the charge framed, the accused having previously been examined, the Magistrate was transferred and his successor took over the case. The accused applied for a *de novo* trial and after the witnesses had all been summoned he changed his mind to this extent that he asked to have certain witnesses only examined, and this was done. The second Magistrate relied partly on the evidence recorded by himself and partly on that recorded by his predecessor.

In my opinion there has been no irregularity on this point but my view is of no consequence for there is a much more serious defect, which, I think, vitiates the whole proceedings. In spite of the fact that the accused asked for *de novo* proceedings and did actually recall the more important witnesses, the second Magistrate never examined him under S. 342. It does appear to me to be not only a rule but a principle that the Magistrate who tries a case in the sense of "decides" it, must give the accused an opportunity of explaining any points which may have been made against him and must hear what he has to say, and it is not sufficient for the predecessor-in office to have done so.

The application for revision is accepted and as the accused has undergone more than four months' imprisonment, I do not think it necessary to order a retrial.

N.D. *Appeal allowed.*

A. I. R. 1927 Lahore 721 (1)

FFORDE AND CAMPBELL, JJ.

S. V. Vipper and *Co.*—Plaintiffs—Appellants.

v.

Sewat Ram-Ram Parshad Mills and *Co.*—Defendants—Respondents.

Second Appeal No. 125 of 1925, Decided on 2nd February 1927, from decree of the Dist. Judge, Delhi, D/- 27th November 1924.

Contract Act, S. 74—Earnest money—Party withdrawing before time for completion is not entitled to receive back.

Where a party has withdrawn from a contract before the time for completion has arrived causing thereby a breach he is not entitled to a return of earnest money paid by him to the other party : *A. I. R.* 1922 *Cal.* 104, *Foll.*

[P.721, C. 2]

Sardha Ram—for Appellants.

Gobind Ram Khanna—for Respondents.

Fforde, J.—This second appeal arises out of a suit by the buyers for damages for an alleged failure on the part of sellers to perform their part of the contract and for recovery of the sum of money which had been deposited with the sellers in accordance with an express term of the contract between the parties. The appellants contend that the contract was broken by the respondents inasmuch as they did not deliver the goods contracted for in appropriate instalments in accordance with the terms of the agreement. They alleged that the failure to deliver the first instalment entitled them to repudiate the entire contract and treat it as rescinded. On this point the lower appellate Court has found that the appellants were not entitled to repudiate the contract on the failure of the respondents to supply the first instalment of the goods. This question is to be determined mainly upon the correspondence between the parties. The time for and mode of delivery as provided by the original contract between the parties was varied from time to time. The exact extent of the variation is hard to determine, because the parties chose to carry on their correspondence in a language with which neither was familiar. The result has been a good deal of ambiguity and confusion in the letters from which conclusions of fact have to be drawn. I see no reason to differ from the lower appellate Judge in his finding that the appellants were not entitled to repudiate the contract upon the failure of the respondents to supply half the goods contracted for in the month of December. In my opinion the learned Judge of the appellate Court had material before him upon which he could fairly come to the conclusion that the appellants broke their contract in refusing to accept the remainder of the goods. That being so it is obvious that the appellants are not entitled to damages for breach of contract inasmuch as they had themselves withdrawn from it before the time for completion had arrived.

The question remains whether the appellants are entitled to the return of the deposit. In my judgment the lower appellate Court was right in holding that the deposit of earnest money being a term of the contract, the appellants, upon the particular facts of this case, were not entitled to have this money returned, and for that proposition the case cited by the learned Judge of the Court below is a clear authority. I refer to *Mangobinda Dutta* v. *Baisogomaff* (1). Agreeing with the decision of the lower appellate Court, in my judgment there is no alternative but to dismiss this appeal with costs.

Campbell, J.—I concur.

R.D. *Appeal dismissed.*

(1) A. I. R. 1922 Cal. 104.

A. I. R. 1927 Lahore 721 (2)

BHIDE, J.

Ghulam Muhammad—Defendant—Appellant.

v.

Rura and *others*—Plaintiffs—Respondents.

Second Appeal No. 614 of 1927, Decided on 22nd June 1927, from order of Dist. Judge, Jullunder, D/- 26th Nov. 1926.

Civil P. C., O. 41, R. 1—Memo. of appeal not accompanied by copies of judgments of lower Courts—Such copies being on record of another appeal by opposite party, is no good reason for dispensing with such copies.

An appeal is not properly instituted which is not accompanied by copies of the judgments of the lower Courts, as required by O. 41, R. 1, and the High Court rules. The mere fact that such copies are already on the record of some other appeal filed by the opposite party in the same

Court is not a good reason for dispensing with such copies : *A. I. R.* 1927 *Lah.* 423, *Foll.* [P 722 C 1]

Jalal Uddin—for Appellant.

Mohsin Shah—for Respondents.

Judgment.—A preliminary objection was raised in this appeal that the appeal was not properly instituted inasmuch as no copies of the judgments of the Court of first instance and the lower appellate Court were filed along with the memorandum of appeal. Counsel for the appellant admits that the copies were not filed with the appeal but states that he did not do so because the copies were already on the file of another appeal instituted by the respondents. According to O. 41, R. 1, and also the rules of this Court copies of the judgments of the lower Courts ought to have been filed along with the memorandum of appeal unless these were dispensed with specifically. Counsel for the appellants did not ask in the memorandum of appeal for the copies to be dispensed with, nor has any good reason been shown before me why the copies should have been dispensed with. The mere fact that the copies were already on the record of some other appeal filed by the respondents does not seem to be any good reason why the appellant should not have complied with the provisions of O. 41, R. 1, and the rules of this Court. A similar view has been taken by a Single Bench in *Niadar* v. *Bhartu* (1). Accordingly, I hold that the appeal has not been properly instituted and dismiss it with costs.

J.V. *Appeal dismissed.*

(1) A. I. R. 1927 Lah. 423.

A. I. R. 1927 Lahore 722

DALIP SINGH, J.

Khiaru—Plaintiff—Appellant.

v.

Dheru and *others*—Defendants—Respondents.

Second Appeal No. 869 of 1926, Decided on 22nd October 1926, from order of Dist. Judge, Jullundur, D/- 26th January 1926.

Minor—Alienation by self-constituted guardian—Minor must restore benefit when avoiding alienation.

Although a minor can avoid an alienation of his property effected by a self-constituted guardian, he is bound to restore any benefit that he might have derived from such alienation : *A. I. R.* 1926 *Lah.* 170, *Foll.* [P 723 C 1]

S. C. Chatterji—for Appellant.

Balwant Rai—for Respondents.

Judgment.—On the 18th December 1908, one Bhagwana mortgaged certain land, belonging to one Dheru minor, on behalf of Dheru to Dewan Singh. On the 16th January 1919, Dewan Singh sold his mortgagee rights to the plaintiff. The plaintiff sued for possession of the property on the basis of a mortgage-debt amounting to Rs. 613-14-0. In the mortgage-deed it was stated that Rs. 70 had been paid previously to discharge the decretal debt due from the father of the minor Dheru, Rs. 10 were for registration expenses and Rs. 220 for repurchase of a house belonging to the father of the minor which had been sold in execution of a decree. Basheshar Das, witness for the plaintiff, stated in Court that he had a decree for over Rs. 200 and less than Rs. 400 and that the house had been auctioned in execution of this decree and had been repurchased by Bhagwana. There was a second auction with reference to the same decree and Bhagwana then purchased the house in auction sale. Kanshi Ram, witness, deposes that he got a decree against the minor and the minor parted with this house finally to him for Rs. 350.

The defendant raised the various pleas as to the competency of Bhagwana to alienate the property and also that the alienation was not for his i.e., defendant's benefit.

The trial Court dismissed his suit holding that though Bhagwana was competent to alienate the property on behalf of the minor yet there was no necessity shown for the alienation and gave the plaintiff a decree for Rs. 613-14-0 against Bhagwana alone. The learned District Judge gave no clear finding as to the competency of Bhagwana, did not dispose of so far as can be seen in the judgment any of the grounds of appeal and held that the lower Court was right in holding that the alienation was invalid. I have heard the counsel for the appellant who urges that grounds Nos. 1 and 4 in particular should have been disposed of.

It seems to me after hearing the counsel on both sides that the finding of

fact, if any, by the District Judge is vitiated by the absence of any decision on the grounds 1 and 4 of the appeal before him. I, therefore, hold that I can go into the facts in this case.

Now it is clear enough that the minor did derive benefit from the purchase of the house and that the alienation was effected for his benefit. The question, however, remains as to whether Bhagwana, whose relationship with the minor was not clear on the record, was anything other than a self-constituted guardian on his behalf. Counsel for the appellant has not been able to point out to me any reason why Bhagwana was entitled to alienate the property of the minor even though it might have been for his benefit. This being so the plaintiff is not entitled to a decree against the property mortgaged, but in equity it seems to me that the defendant is bound to restore the benefit which he has derived from the alienation as was held in *Rang Ilahi* v. *Mahbub Ilahi* (1). Counsel for the respondents contends that this ruling is opposed to the Privy Council ruling in *Imambandi* v. *Mutsaddi* (2) and *Mohori Bibee* v. *Dharmodas Ghose* (3). Both these rulings were considered in *Rang Ilahi* v. *Mahbub Ilahi* (1) and I am bound by *Rang Ilahi* v. *Mahbub Ilahi* (1) which is a Division Bench ruling.

G.B. *Appeal allowed.*

(1) A. I. R. 1926 Lah. 170=7 Lah. 35.
(2) [1918] 45 Cal. 878=47 I. C. 513=45 I. A. 73 (P. C.).
(3) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P. C.).

A. I. R. 1927 Lahore 723

JAI LAL, J.

Rati Ram and *others*—Plaintiffs—Appellants.

v.

Tirkha and *others*—Defendants—Respondents.

S. A. No. 610 of 1927, Decided on 16th June 1927, from decree of Sr. Sub-J., Rohtak, D/- 20th November 1926.

(a) *Civil P. C., O. 6, R. 17—Plaint as framed praying for joint possession of disputed area—Plaintiff's case presented before lower Courts as one for exclusive possession—Relief prayed can be granted.*

Where a plaint as a whole was wide enough to enable the Court to grant joint possession of the area in dispute, but the plaintiffs' case as presented by counsel in the Court below was for separate possession of specific plots of which they alleged to be dispossessed.

Held: that the relief for joint possession can be granted on the plaint as framed. Even if the suit was for possession of specific plots of land, there was nothing to debar the Court from allowing an amendment of the plaint so as to convert the suit into one for joint possession. [P 724 C 1]

(b) *Civil P. C., S. 35—Costs.*

Where the plaintiffs did not properly represent their case before the Courts below, but were successful in appeal.

Held: that they would not get any costs of the litigation. [P 724 C 2]

Shamair Chand—for Appellants.

Nawal Kishore—for Respondents.

Judgment.—On the 21st May 1913, the appellants obtained a declaratory decree establishing their title to the land in suit. The decree was based on a compromise, the defendants having stated that they admitted the plaintiffs' title to the property and that they had relinquished possession thereof. The present suit was then instituted by the same plaintiffs against the same defendants or their legal representatives, for possession of the same land which is described as 1 bigha 8 biswas 13 biswansis out of 4 bighas 6 biswas, being field 967, on the allegation that they are owners of the land and that a decree in respect thereof was passed in their favour in 1913, and that the defendants dispossessed them about six months before the suit.

The trial Court dismissed the suit holding that the defendants did not dispossess the plaintiffs six months before the suit as alleged by them and that the plaintiffs did not obtain actual possession of the land when the decree in 1913 was passed in their favour.

The Senior Subordinate Judge has dismissed the appeal, holding that the suit relates to specific plots of the land and that the plaintiffs have not established that they were ever in possession of any particular plot out of field 967, of which they could be dispossessed six months before the suit.

It appears that in the trial Court a prayer was made on behalf of the plaintiffs that the suit be regarded as one for joint possession of the area mentioned in the plaint and decree given accordingly, but this was not granted by the trial Judge. This prayer does not seem to have been repeated before the Senior

Subordinate Judge, but it is contended by the counsel before me that the plaint is wide enough to cover the relief of joint possession, if it be found that the plaintiffs are entitled to joint possession of the land. Reading the plaint as a whole I consider that it is wide enough to enable the Court to grant joint possession of the area in dispute. It is at the same time true that in the trial Court and before the Senior Subordinate Judge also the case for the plaintiffs, as presented by counsel, was that they had been dispossessed of specific plots and the suit was for possession thereof. Even if the suit was for possession of specific plots of land there was nothing to debar the Court from allowing an amendment of the plaint so as to convert the suit into one for joint possession, but in this case, as I have stated it is not necessary to amend the plaint and a relief for joint possession can be granted on the plaint as framed.

Having regard to all the circumstances of this case and the previous history of the land in dispute I consider that it is a fit case in which the question of the plaintiff's right to obtain joint possession should be adjudicated upon. I, therefore, set aside the decree of the Senior Subordinate Judge and remand the case to him to decide whether the plaintiffs are entitled to a decree for joint possession. In order to enable the learned Judge to grant a decree for joint possession two matters will have to be determined by him.

(i) Whether, when the decree in 1913 was granted to the plaintiffs, joint possession of the land in suit was actually given to them by the defendants as stated by them in Court before the decree ; or,

whether the plaintiffs have been in joint possession of the land at any time within twelve years of the institution of the present suit ; or,

(ii) whether the fact that the previous decree was passed on an admission made by the defendants of the plaintiff's title to the property, the adverse possession, if any, of the defendants was put an end to and, therefore, defendants' adverse possession commenced from the date of the decree of 1913.

The last contention was raised before me by counsel for the appellants. I do not, of course, express any opinion as to whether it is sound or not. In view of the fact that the plaintiffs did not properly represent their case before the Courts below I direct that they will not get any costs of this litigation incurred heretofore.

The remand will be under O. 41, R. 23.

J.V. *Case remanded.*

A. I. R. 1927 Lahore 724

ZAFAR ALI, J.

Jagan Nath—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 984 of 1926, Decided on 23rd December 1926, from order of Dist. Magistrate, Ambala, D/- 14th July 1926.

Penal Code, S. 468—Letter written by accused knowing that it will be used for defrauding some person—Conviction under S. 468 is right.

Where the accused wrote the letter knowing that it will be used to defraud a certain person:

Held: that the letter was a forgery and a conviction under S. 468 was right. [P 726 C 1]

Nand Lal—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—The document in question in this case is a letter purporting to have been written by Sir Malcolm Hailey, Governor of the Punjab. The case for the prosecution is that this letter is a forgery and that it was forged by Sham Singh at the instance of Jagan Nath. They both have been tried together and convicted by the learned District Magistrate of Ambala, the former of forgery under S. 468, I. P. C., and the latter of abetting that offence as well as of using that letter as genuine, and of making an attempt to cheat by means of it (Ss. 468-109, 471, 417-511, I. P. C.). Sham Singh has been sentenced to rigorous imprisonment for three years and Jagan Nath to rigorous imprisonment for five years. They have appealed separately, each through counsel.

The facts that are incontrovertible may be summarized thus: Jagan Nath belongs to Jhelum District, but there is documentary as well as oral evidence to show that he paid visits to Ambala and was on friendly terms with Sham Singh who was employed as a clerk in the Ambala cantonment. On 1st September 1925, at Slogar, Jagan Nath called on Colonel

Watson, Divisional Superintendent, N. W. Ry. and asked him for a vendor's contract at Ambala and Saharanpur railway stations, and in the course of the interview that he had with him, he, in support of his request, handed to him a closed envelope in which Colonel Watson found the letter in question. The letter as well as the envelope is stamped with the words "Governor's Camp, Punjab." The letter is marked as Ex. P A and the envelope as Ex. P A 1. The letter runs as follows:

Dear Major Watson:

The bearer Jagan Nath is coming to see you about securing vendor's contract at Ambala and Saharanpur railway stations. He comes of a family which distinguished itself for its loyalty to the British Government in old days. His grandfather Gulab Rai was an old friend of mine who undoubtedly rendered great service to the Government, both in 1848 and 1857. He had been blind for many years before his death and therefore was not able to press his claim as he otherwise would have. I promised Gulab Rai that I would see that after his death his services would not be forgotten.

Besides this Jagan Nath himself supplied 417 recruits in the Great War, worked for more than two years in the Troop Comforts Fund without remuneration and rendered signal services during the marshal law days. He was also a great help in the railway strike of 1920 and again recently in 1925. He has thus richly deserved of Government. I would deem it a personal favour if you could see your way to let him have the contract for the two stations as it would be some recompense for his meritorious services.

Yours sincerely,
Sd. W. Malcolm Hailey.

The letter did not strike Colonel Watson favourably. He was, in the first place, surprised to receive a letter from the Governor and secondly the letter afforded intrinsic evidence of not being genuine, as the Colonel observed that the word "martial" that occurred in the letter was spelled as "marshal." He put off Jagan Nath without a final refusal and sent the letter to the agent, N. W. Ry , at Lahore. The Agent informed him that the letter was a forgery. The matter was then placed in the hands of the C. I. D. and Jagan Nath was arrested on 14th February 1926. He had at that time in his possession in a locked trunk, a typed copy of the remarks recorded by Mr. Silcock, Deputy Commissioner of Jhelum, on 8th January, about his grandfather Gulab Rai. This was a very important discovery to connect Jagan Nath with the forgery as several sentences which occur in this document were found embodied in the letter in question. These sentences are :

Gulab Rai had undoubtedly rendered great services to Government both in 1848 and 1857. He had been blind for many years before his death, "therefore was not able to press his claims as he otherwise would have. I several times promised Gulab Rai that I would see that after his death his services would not be forgotten." (See the letter P A above).

Further it was Jagan Nath who mentioned the name of Sham Singh to the police and the latter was accordingly got hold of, and on 13th February Mr. Nand Lal Manchanda, Magistrate, 1st Class, Lahore, required him to write at dictation, and dictated to him the letter P A in question. What Sham Singh thus wrote is marked as Ex. P J.

Now the questions for determination are: (1) Is the letter P A a forgery? (2) If it is, is it in the handwriting of Sham Singh? (3) Did Sham Singh write it at the instance of, or in conspiracy with Jagan Nath? or, in other words, was Jagan Nath aware that the letter was a forgery? and did he use it with that knowledge? Jagan Nath admitted that he did make over to Colonel Watson a closed envelope containing a letter, but his defence was that he had received the envelope from Shugan Chand (P. W. 19) and did not know what was in it. Shugan Chand contradicted him.

It is not denied that Colonel Watson's evidence established that the letter which the envelope contained was the letter Ex. P A, and it is nobody's case that the letter is a genuine document. Jagan Nath's learned counsel Dr. Nand Lal, however, contended that it had not been established by direct evidence that the letter was not in the handwriting of Sir Malcolm Hailey. The only evidence on this point is that of Khan Sahib Ikram-ul-Haq, Deputy Superintendent of Police, who deposed that he knew His Excellency the Governor's handwriting, and that the letter Ex. P A was not in his handwriting, nor bore his signature. Such evidence may ordinarily be deemed inconclusive, but in the present case there is the further evidence that the letter is in the handwriting of Sham Singh and the case for the prosecution rests on that. (His Lordship then examined the evidence and continued.) The finding of the Court below, therefore, that the letter P A is in the handwriting of Sham Singh is correct.

Now it is clear that the letter was written for the benefit of Jagan Nath, and the circumstance that certain sentences in the document Ex. P B that was in the possession of Jagan Nath were found embodied in the letter Ex. P A shows that it was Jagan Nath who got that letter written by Sham Singh. Thus there can be no matter of doubt that the letter was a forgery and that Jagan Nath used it knowing it to be such.

Dr. Nand Lal contended that, even if the letter was written by Sham Singh it was not "a false document" within the purview of S. 464, I. P. C., but there is no force in that contention. A person is said to make a false document

who fraudulently makes a document with the intention of causing it to be believed that such document was made by a person by whom he knows that it was not made

and, according to S. 25, I. P. C.,

a person is said to do a thing fraudulently if he does that thing with intent to defraud.

Now in the present case the presumption is that Sham Singh wrote the letter knowing that it will be used to defraud Colonel Watson. The letter was, therefore, a forgery and Sham Singh has been rightly convicted under S. 468, I. P. C. As regards Jagan Nath he was guilty of all the offences of which he has been convicted because he used that document in order to cheat Colonel Watson.

As regards sentences: Dr. Nand Lal argues that Jagan Nath could not have been awarded a punishment severer than that inflicted on the principal offender Sham Singh. But it is obvious that Sham Singh was a tool in the hands of Jagan Nath and that he forged the document for the benefit of Jagan Nath. I, therefore, maintain the convictions and the sentences and dismiss the appeal.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 726

HARRISON, J.

Manigir—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1677 of 1926, Decided on 28th January 1927, reported by Sess. Judge, Karnal, on 4-11-1926.

Arms Act, S. 19 (f)—Cartridges found during an investigation in a theft case in house of accused—Accused not knowing who kept them—Offence under S. 19 (f) is not made out.

During the investigation of a certain theft case the house of the accused was searched by the police and two cartridges of a rifle were discovered from an earthen pitcher placed in his house. The accused admitted the recovery of the cartridges but stated that it was not within his knowledge, and that his brother, who was an ex-military employee may have placed them in the house which was jointly occupied by the accused and his brother,

Held: that the accused was not guilty under S. 19 (f). [P 726 C 2]

Ram Lal Anand—for Petitioner.

Facts.—During the investigation of a certain theft case the house of the accused was searched by the police and as a result of this investigation two cartridges of a rifle were discovered from an earthen pitcher placed in his house. The accused was challaned under S. 19 (f), Act 9 of 1878, and was sentenced to a fine of Rs. 20 or to suffer one month's simple imprisonment by Pandit Man Mohan Nath, Magistrate, First Class, Karnal, on 13th August 1926. The accused filed an application for revision of the above order.

Grounds.—The accused admitted the recovery of the cartridges but stated that it was not within his knowledge, and that his brother, who was an ex-military employee may have placed them in the house which was jointly occupied by the accused and his brother. The Magistrate believed this story of the accused to be true. Moreover, the Magistrate in his judgment says that the shape of the cartridges was such that a simple villager as the accused appears to be cannot really know that they were cartridges.

Considering the Magistrate's own finding in the case the accused should not have been convicted and if the Magistrate considered that there was a technical offence a very nominal sentence would have been enough. Under the circumstances the record of the case is submitted to the High Court under S. 438, Criminal P. C., with a recommendation that the sentence passed on the accused may be quashed or in case it is considered that any offence has been committed the fine be reduced to one rupee.

Order.—For the reasons given by the learned Sessions Judge, I set aside the conviction. The fine will be refunded.

R.D. *Conviction set aside.*

A. I. R. 1927 Lahore 727

ADDISON, J.

Rati Ram and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No 66 of 1927, Decided on 7th March 1927, from order of First Cl. Mag., Rohtak, D/- 23-12-1926.

Penal Code, S. 366A—Knowledge.

Where the accused is not shown to have knowledge or intention that the girl might be or was likely to be forced to illicit intercourse, the offence under S. 366A is not committed.

[P 727 C 2]

Shamair Chand—for Appellants.

M. Sleem and *R. C. Soni* — for the Crown.

Judgment.—The three appellants Rati Ram, Ram Gopal and Dhounkal, have been convicted under S. 366-A, I. P. C., of the abduction of Mt. Sarati aged 13 or 14 years and each sentenced to five years' rigorous imprisonment.

The girl was married to a Jat boy named Bholar of Jaitpur and was living in the house of her husband. In March 1926 Dhandu, her cousin, who was living with her parents, came and said that she was required at home. He departed with the girl and took her to various places. He has not been tried as he is absconding.

The case against Rati Ram, appellant, is that the girl has stated that she was taken by Dhandu, already referred to and one Teja to Rati Ram's house where she stayed for one day and two nights. During that time Rati Ram had sexual intercourse with her though he is a married man. Rati Ram then took her to the house of Dhounkal and left her there. As regards Rati Ram there is no other evidence except that of the girl and there is no proof that he knew her to be married.

The case against Dhounkal, appellant, simply is that he sheltered the girl for 25 days. The only person who states this is the girl herself. There is also no evidence that he knew that she was a married girl.

From Dhounkal's house she was taken away by Chhajju. He is also said to be an absconder. Chhajju ultimately took her, according to the girl's statement, to Ram Gopal's house where she stayed for two days or so. She alleges that he raped her then. Thereafter according to the girl, Chhajju and Ram Gopal, appellant, took her to one Jag Lal to whom she was sold in order that Jag Lal might marry her. After she had been with Jag Lal for a day she told him that she was already married and proceedings started in this case. There is no evidence that Ram Gopal appellant knew that she was a married girl and except the statement of the girl that he raped her there is no evidence that he knew it to be likely that she would be forced or seduced to illicit intercourse with another person.

Jag Lal, however, to whom the girl was sold, has definitely stated that this Ram Gopal was not the person who was with Chhajju when the girl was sold to him. The person who accompanied Chhajju did give his name as Ram Gopal of Chhara but he must have given a wrong name as he was not the appellant. The other person present on this occasion, namely Lal Chand, P. W. 17, has said the same. One witness, P. W. 21, did state that he saw the girl in Ram Gopal's house but another person, P. W. 20, has said that the person who was in Ram Gopal's house at that time was not this girl but a grown up woman. The girl's statement is therefore contradicted as regards the allegation that Ram Gopal was one of the persons who sold her to Jag Lal and in these circumstances he is entitled to the benefit of the doubt.

I have already shown that as regards Dhounkal nothing is alleged against him except that he gave shelter to this girl for some 25 days and there is no evidence that he knew anything about her or did anything as regards her of a criminal nature. He also must be acquitted.

As regards Rati Ram, there is no evidence that he knew that this girl was married or that he induced her to go from any place or to do any act with intent that she might be, or knowing that it was likely that she might be forced or seduced to illicit intercourse with another person. It is true that the girl has said that he raped her but this cannot be accepted. In fact the case against the appellant for rape was withdrawn by the Crown. It is clear, therefore, that he also has not been proved to be guilty of any offence.

The appeal is accepted, all three appellants are acquitted, and are ordered to be set at liberty forthwith.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 728

TEK CHAND, J.

Harphul and *another*—Petitioners.

v.

The Crown—Opposite Party.

Criminal Case No. 144 of 1927, Decided on 12th March 1927, against order of Sess. Judge, Karnal, D/- 24th December 1926.

Criminal Trial—Sessions Court is not justified in evolving a new case.

A Sessions Judge is not justified in evolving a new theory as to the offence different from the case put forward either by the prosecution or by the defence. [P 728 C 2]

Shamair Chand—for Petitioner.

Des Raj Sawhney—for the Crown.

Judgment.—The petitioners, Harphul and Sabha Chand, sons of Bhajan, a Jat of mauza Subana in the Rohtak District, along with two others, Sultan and Kheman, were challaned under S. 325, I. P. C., for having caused grievous hurt to Hazari (P. W. 8), who is a brother of Harphul and Sabha Chand, petitioners. Hazari alleged that he was sleeping at his gatwar on the night between the 9th and 10th August 1926, when at midnight the four accused came there armed with lathis and beat him, causing eight injuries one of which was grievous, namely, the fracture of the tibia bone of the left leg.

The motive for the offence, as alleged by Hazari, was that his brothers Harphul and Sabha Chand bore a grudge against him because their father Bhajan had given a portion of the ancestral land to Hukmi and Hazari, two of his sons, to the exclusion of Harphul and Sabha Chand. The Magistrate found the case against all the four accused proved and sentenced them to one year's rigorous imprisonment each. On appeal the learned Sessions Judge held that there was not sufficient evidence against Sultan and Kheman and acquitted them, but upheld the conviction and sentence passed against Harphul and Sabha Chand who have preferred a petition for revision to this Court.

The learned Sessions Judge found himself unable to accept the evidence of P. W. 3 Duli Chand, who had appeared before the police several days after the occurrence, or that of P. Ws. 4 and 5 Surja and Ramji Lal, who were mere wajtakkar witnesses. He remarked that the case for the prosecution practically turned upon the evidence of Hazari alone. He was further of opinion that the assault was committed by Hazari and Harphul along with a brother of theirs, Sri Chand (D. W. 5), with whose wife Hazari had been carrying on a liaison for five or six years. It will be noticed that Hazari, when examined, denied that he had any intrigue with Sri Chand's wife and it is also noteworthy that Hazari, both in the first information report as well as in his evidence in Court, never mentioned that Sri Chand was one of his assailants. Indeed it was the case for the defence that the beating had been administered to Hazari by Sri Chand alone because of the resentment caused by this intrigue. Under the circumstances it seems to me that the learned Sessions Judge was not justified in evolving a new theory as to the beating different from the case put forward either by the prosecution or by the defence.

The assault in question took place on the night between the 9th and 10th and Hazari has stated in Court that soon after the occurrence half the village arrived on the scene and he mentioned the incident to those present, but that he did not name any of the accused petitioners as being among his assailants. If he actually saw the petitioners, who are his brothers, at the time of the assault, there seems to be no reason why he should not have made mention of this fact to the villagers who came to the scene soon after. This omission is very significant and throws a lot of doubt on Hazari's veracity.

It is further important to note that no report was made at the thana at a distance of five *kos* only until 13th August 1926. No satisfactory explanation for this delay has been furnished by Hazari. Sri Chand, the other brother, has appeared as a defence witness and he stated on oath that it was he and not the petitioners who beat Hazari. The evidence as to the motive alleged by the prosecution, namely, that Bhajan, the father, had favoured Hazari at the expense of Harphul and Sabha Chand, by giving the former land to the exclusion of the latter, is very vague and indefinite. Bhajan, who would be the best witness in support of the alleged gift, has not been produced. On the whole I find that the evidence of Hazari, on which alone the learned Ses-

sions Judge has placed reliance, is extremely unsatisfactory and I am not convinced that the petitioners were among the assailants who caused grievous hurt to Hazari.

I, therefore, accept this revision, set aside the conviction of the petitioners and direct that they be set at liberty forthwith.

R.D. *Conviction set aside.*

A. I. R. 1927 Lahore 729

AGHA HAIDAR AND HARRISON, JJ.

Shera—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1193 of 1926, Decided on 14th January 1927, from order of Sess. Judge, Rawalpindi, D/- 19th October 1926.

(a) *Penal Code, S.* 300—*Person annoyed by his wife over domestic matter causing her death —Offence is murder.*

Where the accused caused death of his wife, being annoyed with her because she opposed him in some domestic matter and there was no grove and sudden provocation.

Held : that the offence committed was murder. [P 729 C 2]

(b) *Penal Code, S.* 300—*Motive is irrelevant in murder.*

Adequacy or inadequacy of motive is irrelevant when the offence alleged is murder. [P 729 C 2]

Amar Nath Chona—for Appellant.

Corden Noad—for the Crown.

Judgment.—Shera, sweeper has been found guilty of having murdered his wife Mt. Barkate by stabbing her with a knife on the night of the 2nd July 1926.

The facts are that several temporary houses had sprung up near a kiln at Rawalpindi, in which the brickmakers, who are sweepers, lived as did also two Munshis Rajwali and Babu Des Raj. On the night of 2nd July cries were heard from the part of the quarters occupied by this man Shera and his wife. Various persons, Shadi, the brother of the woman, Mt. Kamon, her mother, Mt. Rakhi, her sister, Nathu and Abdullah and Jiwan and Sohna all ran up. They found the woman lying on her charpoy with her intestines protruding and grievously wounded in the stomach. Her husband Shera was standing by with a knife in his hand and admitted having stabbed his wife. The woman lived long enough to go to the hospital and there to make a dying declaration, in which she stated that her husband had stabbed her and that the cause of the quarrel was a dispute regarding the return of her step-daughter to her husband. The facts are are not seriously questioned and all that counsel has urged before us is that the story told by the accused must be true, namely, that he woke up to find a man, whom he recognized as Khushia, near his wife's bed and this so enraged him that when Khushia ran away he killed his wife. This story which was told in the committing Magistrate's Court is supported by the evidence of one witness, a relation, named, Abdullah, P. W. 7. None of the other witnesses of whom most are relations, support it. It is also urged that the motive was inadequate. It appears to us that it is wholly immaterial whether the motive was or was not adequate, for there is no shadow of doubt that this man Shera murdered his wife by stabbing her three times, and we see no reason to doubt the truth of the woman's own statement made on her deathbed that the cause of the quarrel was the return of her step-daughter. Counsel has also urged that there must have been grave and sudden provocation because an ordinary household knife was used and not some more deadly implement. This does not impress us at all. Finally it is urged that there is a difference in the version given of the exact date, on which the step-daughter had returned to her husband. We find it proved beyond all shadow of doubt that this man Shera murdered his wife by stabbing her in the abdomen and that he has wholly failed to prove that there was any provocation of any sort. We find that though he was doubtless annoyed with his wife because she opposed him in the matter of the sending of the daughter to her husband, there was no shadow of jusdification for his conduct.

We dismiss the appeal and confirm the sentence of death.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 730

BROADWAY AND AGHA HAIDAR, JJ.

Natha Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party

Criminal Appeal No. 1329 of 1926, Decided on 16th March 1927, from order of Addl. Sess. Judge, Jullundur, D/- 7th December 1926.

Penal Code, S. 304—Accused flinging a heavy balla towards deceased while the latter was removing wrongfully the rafters of accused's roof—Death caused by fracture of skull—Offence under S. 304 (2) is committed.

The deceased went up the roof of the accused's house and began to remove the rafters which he had no right to do. The accused flung a heavy balla at the deceased which fractured the deceased's skull and caused his death.

Held : that although the accused had a right to defend his property, he exceeded that right and was guilty under S. 304 (2). [P 731 C 2]

Bevan Petman—for Appellants.

Des Raj Sawhney—for the Crown.

Broadway, J.—Natha Singh, son of Bhagat Singh, and Labh Singh, son of Ram Singh, Jats, mauza Rurka Kalan, have been convicted of having attacked and killed one Natha Singh, son of Rur Singh, of the same village. Natha Singh has been sentenced to death, his offence having been held to fall under S. 302, I. P. C, and Labh Singh has been sentenced to four months' rigorous imprisonment under S. 323, I. P. C. They have appealed and the case is also before the Court under S. 374, Criminal P. C.

The facts are briefly these : Natha Singh and Labh Singh were building a Kotha which adjoined that of one Sheru, a cousin of Natha Singh deceased. The walls had been erected and the roof was being put on the 4th September 1926, in the early morning, when the deceased suddenly appeared on the roof of Sheru's house and proceeded to remove certain rafters or ballas which were being used for the roofing of their house by the appellants. Thereupon Natha Singh is said to have struck the deceased a blow with one of the ballas, a formidable weapon weighing about $4\frac{1}{2}$ seers. The blow apparently struck the deceased on the point of the left shoulder and the left side of his head. As he fell Labh Singh is said to have struck him a blow with a similar balla which took effect on his buttocks. People arrived and the deceased was taken to the hospital where he reached at about 9-30 a.m. in an unconscious state. No report was made to the police of this occurrence by anyone till the morning of the 5th September 1926, when the Sub-Assistant Surgeon in charge of the Rurka Kalan hospital sent a rukka to the police station stating that Natha Singh, son of Rur Singh, had been brought to the hospital the previous morning in an unconscious state and his condition was critical. Acting on this rukka the police went to the hospital and commenced investigation. Natha Singh succumbed to his injuries in the afternoon of the 5th September 1926 at 4-30 p.m. The post mortem examination was held on the following day when the only injuries discoverable on the body of the deceased consisted of a contused wound on the left side of the head, $2\frac{3}{4}$" long, $\frac{1}{8}$" wide, and scalp deep, "S" shaped, $3\frac{1}{2}$" above the root of the external ear, and a scratch mark, $\frac{1}{2}$" × $\frac{1}{8}$", on the tip or point of the left shoulder. No mark of any injury was visible, apparently, on the buttocks. In due course the police sent up the two appellants charged under S. 304, but they were committed to the Court of Sessions under S. 302, I. P. C.

Oh behalf of the appellants it has been urged by Mr. Petman that Labh Singh had committed no offence and that Natha Singh's offence, if any, came within the ambit of S. 323, or, at the utmost S. 325, I. P. C. He bases his contention on the fact that the deceased had no shadow of right to interfere in any shape or form with the rafters which the appellants were placing on their roof. Now the adjoining house belongs solely to Sheru. No doubt the decea-ed was Sheru's cousin and, as Sheru is childless, his reversioner, but that fact could not give the deceased any right whatever to interfere with the building or the house by Natha Singh and Labh Singh. Sheru himself has gone into the witness box as a defence witness and has stated as follows :

Before building the kotha the accused had asked my permission. I told the accused not to place rafters on my wall, but to place a beam alongside my wall and then put rafters thereon. I have no objection to the kotha as it now stands. I still live in my kotha. The accused have not put any rafters on my wall.

From this statement it is perfectly clear that the appellants were doing what they had every right to do. The owner of the adjoining house has clearly stated

that the permission given by him had not and has not been exceeded. He has also stated that deceased had no share in his house of any kind and had never used the house, nor tied his buffalo there. P. W. 5 Natha Singh, son of Dasondha Singh, has to some extent supported Sheru, for he says:

The accused had placad rafters on a beam which rested on this accused's walls but the rafters were protruding on to the deceased's walls above the beam, which was placed alongside that wall.

From this it is obvious that the deceased's action in interfering with what the appellants were doing was wholly unwarranted.

The evidence of the alleged eyewitnesses is to the effect that the deceased had actually tore up one of the rafters and thrown it down and was in the act of removing a second when he was struck. It has been urged that in striking the deceased the appellants were acting within their right of defence of property. In my judgment there can be no doubt that the deceased was either causing mischief or committing criminal trespass on the property of the appellants and in these circumstances the appellants were justified in repelling the act of the deceased and under the law would have been entitled to use violence to the extent, if necessary, of causing grievous hurt. The violence used by Labh Singh, assuming that he struck the blow on the buttocks was, therefore, not in excess of what he was entitled to use, and in these circumstances he committed no offence. I would, therefore, accept his appeal and acquit him.

In the case of Natha Singh, appellant, the position is a little different. It has been urged by Mr. Petman that he ought not to be held to have aimed the blow at the deceased's head but that having the balla in his hand he merely swung it at the deceased's body without realizing whether it would hit, or knowing it to be likely to hit, him on any particular part of the body. Further, it was suggested that the rafter struck the deceased on the shoulder and glanced off on to his head. In these circumstances it was contended that the appellant Natha Singh could not be pinned with the knowledge referred to in S. 299, I. P. C. On the other hand, the learned Public Prosecutor has urged that the offence committed by Natha Singh was one of deliberate murder. He has contended that the provocation given by the deceased was of a very ordinary kind and that Natha Singh had no right of defence whatever. In my judgment the offence committed by Natha Singh falls somewhere between the two extremes stated by the learned counsel. I consider that the appellant had the right to defend his property in the circumstances existing in this case and, had the injury caused to the deceased amounted only to grievous hurt, I would have been prepared to acquit him. But to aim a blow with so formidable a weapon as the balla in Court with such violence as to fracture a skull, as the deceased's skull was fractured, seems to me be sufficient to pin the appellant with the knowledge referred to in S. 299, I. P. C. To strike anybody a blow in the head with any kind of a heavy stick or weapon is always a very dangerous act, and it is well known by Jats that such blows result in fracturing the skull followed by the death of the victim. The balla used in this case, although unwieldy, is a very formidable weapon indeed, and in these circumstances I consider that Nath Singh has exceeded his right of defence, and I would, therefore, set aside the conviction and sentence under S. 302, I. P. C., and convict him under S. 304-II, I. P. C., and sentence him to five years' rigorous imprisonment.

Agha Haidar, J.—I agree.

G.B. *Conviction altered.*

A. I. R. 1927 Lahore 731

TEK CHAND, J.

Tarak Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 572 of 1927, Decided on 24th June 1927, from order of 1st Class Magistrate, Ludhiana.

Criminal P. C., S. 439—High Court will not interfere with an interlocutory order framing a charge, but it has power to examine proceedings when charge is framed and if necessary set it aside.

An order framing a charge is interlocutory and it is not usual for the High Court to interfere with such orders. But the power of the High Court to examine proceedings of the lower Court at the stage when charge is framed and, if necessary, to set aside the charge and quash the proceedings is undoubted: 33 *P. R. Cr.* 1910; 39 *Mad.* 561 and *A. I. R.* 1925 *All.* 311. *Foll.* [P 732 C 2]

Nand Lal—for Petitioner.

Judgment—This is an application under S. 439, Criminal P. C., praying that the charge framed against the petitioner Tarak Singh by a Magistrate, First Class, Ludhiana, under S. 304-A, I. P. C., be set aside and the entire proceedings in the criminal case pending against him be quashed. The facts, as disclosed by the prosecution evidence, are as follows :

On 22nd January 1927, the deceased Harnam Singh, along with the petitioner Tarak Singh and P. W. 4, Kartar Singh went out for shooting partridges. They went to a place, ¾ of a mile distant from mauza Jodhan where the deceased lived. The party saw a partridge appearing. Upon this the petitioner loaded his gun and began to follow the bird. The deceased was to his left. While pursuing the bird, the petitioner had the barrel of the gun turned downwards. He accidentally slipped and fell down, with the result that the gun went off and hit Harnam Singh below the right knee and he fell down. The petitioner and P. W. No. 4, Kartar Singh, held Harnam Singh deceased by the arm and made him walk a few paces. He, however, began to bleed profusely and sat down. The petitioner bandaged his knee with his own dopatta and sent Kartar Singh to the village to bring a charpoy. Kartar Singh returned with a charpoy, accompanied by P. W. No. 5, Mit Singh. They removed the injured person to the dispensary at Gujarwal where, in addition to the doctor in charge, Harnam Singh was attended to by two other medical men, Dr. Basant Singh and Dr. Bir Singh, whom the petitioner specially sent for for the purpose. As, however, the injury caused to Harnam Singh was serious he died the next morning. Before his death the petitioner appeared before the Sub-Inspector, P. W. No. 2, Mahomed Yusuf, and made the first information report giving the above particulars. Before the Sub-Inspector could reach the dispensary the injured person had died.

The petitioner was sent up for trial under S. 304-A, for having caused the death of Harnam Singh deceased by a rash and negligent act. In support of the chalan seven witnesses were produced. Of these P. W. No. 4, Kartar Singh, is the only eyewitness. He gives the facts as have been set out by me in the earlier part of this judgment, and states that the injury was caused to the deceased as the accused accidentally slipped and fell down. where his gun went off. Of the remaining witnesses P. W. No. 1, Premo, is the sister of the deceased. She states that as soon as the deceased was brought back to the village after the accident, he stated that he had been hit as a result of a gun accidentally going off. P. W. No. 5, Mit Singh, took a charpoy to the scene of the occurrence, and he states that when he reached there he was told by the deceased that

there was no fault on the part of the accused. He fell down accidentally and the gun went off.

P. W. No. 7, Dr. Balwant Singh, in charge of the dispensary at Gujarwal states that the deceased on his arrival told him that he had been injured as a result of an accident and that the petitioner was in no way to blame. Other witnesses gave merely formal evidence. The Court summoned Dr. Basant Singh and Dr. Bir Singh who, as already pointed out, were summoned by the deceased to help Dr. Balwant Singh in attending to the deceased. Both these gentlemen state that the deceased specifically told them that he had been injured merely by accident and that no blame attached to the petitioner.

It will thus be seen that the entire evidence for the prosecution indicates that the deceased received injuries merely by accident. In these circumstances I fail to see how the Magistrate came to frame a charge against the petitioner. On the prosecution evidence itself there was no case which the petitioner had to meet. The statements of Kartar Singh and the other persons, to whom the deceased had given the details of the occurrence, clearly indicate that the gun went off purely accidentally. No act of negligence or rashness is imputed to the petitioner. On this evidence the Magistrate was in error in not discharging the petitioner and in framing a charge against him.

No doubt the order passed by the lower Court is interlocutory and it is not usual for this Court to interfere with such orders. But the power of this Court to examine proceedings of the lower Court at the stage when charge is framed and, if necessary, to set aside the charge and quash the proceedings, is undoubted. Reference may in this connexion be made to the leading authority of this Court reported in *Emperor* v *Bishen Das* (1) and

(1) [1910] 33 P.R.Cr. 1910=8 I.C. 1161=57 P.L.R. 1911.

to the leading Madras case on the subject *In re Kuppusami Aiyar* (2). The same view has been taken by the Allahabad High Court in *Gokul Prasad* v. *Debi Prasad* (3) where, under somewhat similar circumstances, Mr. Justice Mukerji set aside the charge and quashed the proceedings.

For the foregoing reasons I am of opinion that this petition must succeed. I accordingly set aside the charge, quash the proceedings pending against the petitioner in the Court of the Magistrate, First Class, Ludhiana, and order that the petitioner be discharged.

R.D. *Petition accepted.*

(2) [1915] 39 Mad. 561=28 M.L.J. 505=(1915) M.W.N. 365=29 I.C. 109=2 L.W. 463.
(3) A. I. R. 1925 All. 311.

A. I. R. 1927 Lahore 733 (1)

JAI LAL, J.

Fajjoo and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 808 of 1926, Decided on 1st November 1926, from order of 1st Cl. Magistrate, Pind Dadan Khan, D/- 28th June 1926.

Penal Code, S. 304—*Sentence.*

Where the deceased was the aggressor and had gone to the land of the accused to molest him,

Held : that a sentence of five years' rigorous imprisonment would be sufficient. [P 733 C 2]

Ram Lal—for Appellants.

Din Dyal for *Govt. Advocate* — for the Crown.

Judgment. — The Magistrate has found, and this finding is not attacked on appeal before me, that the appellants and the deceased had a dispute about the ownership of some land. The accused, however, were in possession thereof and had erected some sort of building on it. On the morning of 30th May 1926, the deceased Raham Ali and his brother Hasham Ali went to this land

either to molest the accused when they were levelling the ground or to remove the building that had been constructed by them,

and a fight ensued between the parties with the result that the appellants Fajjoo and Jawan caused a large number of injuries on the person of the deceased which resulted in his death soon after Hasham Ali escaped without receiving any injury.

Both parties produced evidence which supported the main story of the prosecution with the only variation that, according to the defence evidence, the deceased received his injuries, not at the hands of the accused but owing to the building having fallen on him when he was demolishing it. This story has been rightly rejected by the Magistrate as untrue.

The weight of the evidence is in support of the conclusions of the Magistrate and as the learned counsel for the appellants has not seriously attempted to attack the finding of the Magistrate I do not think it necessary to discuss the evidence in detail.

The only point on which the counsel addressed me was the question of sentence. After hearing the counsel for the Crown I have come to the conclusion that the sentence in this case is severe in view of the fact that the deceased and his brother Hasham Ali were the aggressors from the commencement. They had no business to go to the disputed land which was admittedly in possession of the accused either to molest them or to remove the buildings. Under all the circumstances I consider that a sentence of five years' rigorous imprisonment will be adequate, and accepting this appeal I reduce it accordingly.

G.B. *Appeal partly accepted.*

A. I. R. 1927 Lahore 733 (2)

SHADI LAL, C. J.

Bir Singh and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1799 of 1926, Decided on 18th February 1927, from order of Dist Magistrate, Hissar, D/- 17th November 1926.

Criminal P. C., S. 423 (1) (*b*)—*Scope.*

It is doubtful whether an appellate Court can, under S. 423 (1) (b), pass an order which would make the position of the appellants worse. [P 734 C 1]

Devi Dayal and *Bryne*—for Petitioners.

Zafar Ullah Khan—for the Crown.

Judgment. — The trial Magistrate convicted the petitioners under S. 323, I. P. C., but the District Magistrate has, on an application for revision presented to him by the complainant, directed their retrial for an offence described in S. 330, I. P. C. Now, it is ad-

mitted by the learned counsel for the complainant that the District Magistrate had no jurisdiction to revise the order of the trial Magistrate and to direct a re-trial. It is, however contended that, as the accused themselves had preferred an appeal to the District Magistrate, the latter could under S. 423, sub-S. (1), Cl. (b), Criminal P. C., direct a re-trial of the accused. It is, however, doubtful whether an appellate Court can, under the aforesaid section, pass an order which would make the position of the appellants worse. But it is unnecessary to pronounce a final opinion on the question because, as pointed out by the predecessor of the District Magistrate, in his order, dated 17th June 1926, the story of the complainant appears to be an exaggerated one, and the evidence produced by him cannot justify a conviction under S. 330, I. P. C.

Accordingly, I accept the application for revision and set aside the order directing re-trial of the accused.

R.D. *Application accepted.*

A. I. R. 1927 Lahore 734

ZAFAR ALI, J.

Pir Bakhsh—Plaintiff—Appellant.

v.

Chanan Din—Defendant—Respondent.

Second Appeal No. 1717 of 1926, Decided on 14th December 1926, from decree of Addl. Dist. Judge, Lahore, D/- 8th March 1926.

Limitation Act, S. 14—*Scope.*

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted, where the decree in appeal is one of dismissal: *A. I. R.* 1921 *Bom.* 184 and *A. I. R.* 1918 *P. C.* 151, *Foll.* [P 735 C 1]

Muhammad Amin—for Appellant.

Guranditta Mal—for Respondent.

Judgment.—There is a preliminary objection to this second appeal, namely, that it is barred by time inasmuch as copy of the judgment of the lower appellate Court was not filed within the prescribed period. The appellant's explanation, supported by his affidavit and by copy of an entry in the register of application for copies, is that he had obtained a copy of the judgment, but found on the day on which he presented his memorandum of appeal that it was lost. This explanation appears to be true and there can be no doubt that the loss of the copy was accidental. This was sufficient cause for not filing copy of the judgment within the prescribed period, and I, therefore, extend the time under S 5, Lim. Act.

On the merits also the question is whether the plaintiff-appellant's suit was within time. The lower appellate Court has held that it was not. The facts are briefly as below:

The plaintiff purchased a piece of land on 18th January 1917, and went into possession. A nephew of the vendor brought a suit for a declaration that the sale would be inoperative as against his reversionary rights after the death of the vendor. This suit was dismissed by the trial Court, whose order was upheld by the District Judge, but on second appeal it was decreed by Mr. Justice Abdul Raoof on 17th June 1919. The vendee lodged a Letters Patent Appeal from that decree, but it was dismissed.

The present suit to recover the purchase-money, etc., from the vendor was instituted on 7th August 1925, i. e., more than six years after the date of the decree passed by Mr. Justice Abdul Raoof. The lower appellate Court has held that the suit was governed by Art. 116, Indian Lim. Act, according to which the period of limitation was six years, and that it was barred by time, because the limitation ran from the date of the decree of Mr. Justice Abdul Raoof and not from the date on which the Letters Patent Appeal was dismissed. This view appears to be correct. As pointed out in *Martand Mahadev* v. *Dhondo Moreshwar* (1).

Under Indian Law an original decree is not suspended by presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal.

A similar question arose before their Lordships of the Judicial Committee in *Juscurn Boid* v. *Prithichand Lal Chaudhary* (2) and the following may he cited from p. 678 of the judgment of their Lordships:

The only question is whether time began to run from the 3rd August 1906, the date of the appellate decree, or from the 24th August 1905 the date of the original decree. Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that, as between these

(1) A. I. R. 1921 Bom. 184=45 Bom. 582.
(2) A. I. R. 1918 P. C. 151=46 Cal. 670=46 I. A. 52 (P. C.).

two decrees, this is the correct view, for, whatever may be the theory under other systems of law, under the Indian Law and procedure an original decree is not supended by presentation of an appeal, nor is its operation interrupted where the decree in appeal is one of dismissal.

I, therefore, dismiss this appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 735 (1)

SHADI LAL, C. J.

Emperor—Petitioner.

v.

Rahmat Khan—Accused—Respondent.

Criminal Revn. No. 1680 of 1926, Decided on 21st January 1927, reported by Dist. Magistrate, Gujrat, on 8th November 1926.

Penal Code, S. 409, and Criminal P. C., S. 562—Offence under S. 409, Penal Code, does not come within the purview of S. 562, Criminal P. C.

The offence under S. 409, Penal Code, is beyond the scope of S. 562, Criminal P. C., and so a Magistrate acts without jurisdiction if he releases under S. 562, Criminal P. C., an accused convicted under S. 409, I. P. C. [P 735 C 1]

S. R. Laul—for Respondent.

Order.—The convict, who was a Branch Sub-Postmaster, has been found guilty of having committed criminal breach of trust in respect of two sums of money: Rs. 50 in January 1926, and Rs. 12-2-0 in March 1926; but has been released on probation of good conduct under S. 562, Criminal P. C. Now, S. 409, I. P. C, punishes an offence of a criminal breach of trust by a public servant with transportation for life or imprisonment, etc.; and there can be no doubt that this offence does not come within the purview of S. 562, Criminal P. C. It is provided by that section that, when any person under 21 years of age or any woman is convicted of an offence not punishable with death or transportation for life, the offender may be released on executing a security bond. Now, the offender in the present case is certainly under 21 years of age, but the offence committed by him is punishable with transportation for life. The trial Magistrate had, therefore, no jurisdiction to pass an order under S. 562, Criminal P C. I must, therefore, set aside the order of the Magistrate releasing the convict under S. 562, Criminal P. C.

As regards punishment, I have taken into consideration the youth of the offender, but I cannot overlook the fact that he has been guilty of a serious offence in respect of property which was entrusted to him in the capacity of a public servant. Having regard to all the circumstances I sentence the convict to suffer rigorous imprisonment for one year.

J.V. *Accused convicted.*

A. I. R. 1927 Lahore 735 (2)

JAI LAL, J.

Abdul Majid—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1170 of 1926, Decided on 11th January 1927, from order of 1st. Cl. Magistrate, Ambala D/- 11th October 1926.

Penal Code, S. 376—Partial penetration is sufficient constitutes offence of rape.

Partial penetration, though not sufficient to cause any rupture or injury to the hymen, is sufficient penetration within the meaning of S. 376 and the offence is not attempt to commit rape but of rape. [P 736 C 1]

Abdul Aziz—for Appellant.

Ram Lal—for the Crown.

Judgment.—Abdul Majid, appellant, aged 30 years, a vegetable seller of Ambala cantonment, has been convicted of the offence of an attempt to commit rape on Mt. Saraswati, aged 10 or 11 years, daughter of Teja Ram of Ambala.

It appears that on 20th August 1926, in the evening, Mt. Saraswati went to buy vegetables in the bazar when Abdul Majid called her saying that he would give her something, took her in a room behind his shop, shut one plank of the door, and throwing the girl on the ground sat on her and committed rape on her. The girl raised an outcry which attracted the attention of Gurdial who called Hem Raj. Ram Parshad, a Head constable, also arrived at the scene and all three went to the door of Abdul Majid's room and asked him what the matter was. Mt. Saraswati came out of the room crying and told them what had happened. The matter was reported at the thana and the girl was examined by a lady doctor Miss Jacob the same evening, who found injuries on the private parts of the girl, but there was no

rupture of the hymen. In her opinion there had been a partial penetration but not sufficient to cause any injury to the hymen.

The case for the prosecution is proved by the statement of Mt. Saraswati and is supported by the testimony of Gurdial, Hem Raj and Ram Prasad. The statement of the lady doctor Miss Jacob strongly corroborates the story told by the girl. The accused was examined by a doctor, but no injury was found on his person. This under the circumstances does not militate against the truth of the prosecution story.

In a statement before the Magistrate the accused denied the offence, and when asked to explain why a false case had been made out against him he stated that he would file a written statement. In his written statement he says that Mt. Saraswati came to his shop to buy vegetables on the evening in question, but he did not molest her at all. He alleged that a false case had been made out by Ram Prasad and Gurdial owing to communal bias. It is impossible to believe this defence. There is no explanation of the injuries on the private parts of the girl and it is inconceivable that she would be a party to the concoction of a false case of this nature. I have no hesitation in agreeing with the conclusion of the learned Magistrate that the case of the prosecution is perfectly true.

The Magistrate, however, has convicted the accused under Ss. 376 / 511, I. P. C. In this he appears to have ignored the definition of rape which provides that penetration is quite sufficient to constitute an offence of rape. It is not, therefore, the case of an attempt to commit rape but one of rape. I alter the conviction to one under S. 376, I.P.C.

The sentence is appropriate and I dismiss the appeal.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 736

BROADWAY AND BHIDE, JJ.

Shankar Lal Kundan Lal — Defendants—Appellants.

v.

Firm Nanhe Mal Kallan Mal—Plaintiffs—Respondents.

First Appeal No. 2044 of 1924, Decided on 17th June 1927, from decree of Sr. Sub-Judge, Gurgaon, D/- 20th June 1921.

Civil P. C., O. 26, R. 11—Decree based on incomplete report of the commissioner should be set aside.

Where the commissioner appointed to take accounts in a suit for dissolution of partnership stated that with reference to the "bahi khata it cannot be positively said what transactions were made for the partnership business" and where it was found that he himself never examined the account books at all, but the examination that took place was made by his munim :

Held : that the decree passed in pursuance of the report of the commissioner should be set aside. [P 737 C 2]

Nanwan Mal and *Shamair Chand*—for Appellants.

Kishan Dayal and *Bishan Narain*—for Respondents.

Broadway, J. — A firm known as Nanhe Mal Kallan Mal instituted a suit against Shankar Lal, Kundan Lal and Gopi Mal, three brothers and Jallu Mal and Kishan Lal two other persons, the sons of Jai Ram. The plaintiff sought to recover the sum of Rs. 7,881, as principal and interest due by Shankar Lal, Kundan Lal and Gopi Mal on a book account as a result of an alleged dissolution of partnership. No relief was prayed against Jallu Mal and Kishan Lal. It was averred that the plaintiffs and defendants had formed a partnership for the carrying on of a certain business, that this partnership had been dissolved and accounts settled, that Shankar Lal Kundan Lal and Gopi Mal had been found liable to pay to the plaintiffs the sum claimed and that the amount that Lallu Mal and Kishan Lal owed had also been settled and a bond executed by them in respect thereof. In para. 12 of the plaint while asking for a specific decree against the first three defendants for the amount claimed, it was also asked that it should be declared that the partnership had been dissolved. The first three defendants filed one written statement and the other two defendants filed another. Gopi Mal, of the first three, alleged that he had nothing whatever to do with the partnership. The other two defendants definitely pleaded that no dissolution had been effected and that the partnership was still in force. They also pleaded that far from there having been a loss in the partnership there had been considerable profit which was payable to them by the plaintiff. The defendants Lallu Mal and Kishan Lal also alleged that the partnership was still in exis-

tence, that no settlement had been arrived at and that they were not liable under any bond.

On these pleadings the cases proceeded and ultimately resulted in a preliminary decree which was passed on the 16th December 1920. It was held that the partnership had not been dissolved as alleged by the plaintiff. Dissolution was ordered and shares of the parties were fixed, Gopi Mal being absolved from liability, and an account was ordered to be taken. No appeal was filed by either of the parties against this preliminary decree.

Subsequent to this, one Rai Sahib Lala Paras Das was appointed to examine the accounts as commissioner and to ascertain the state of affairs. He furnished a report on the 12th May 1923. He put in a final report together with the statements of certain persons who had been examined by him. Objections were filed by both sides against this report and evidence was led in support of the various objections.

On the 17th June 1924 the Senior Sub-Judge passed a final decree purporting to be based on the commissioner's report. According to this decree, a sum of Rs. 21,000 odd was found to be the amount of loss incurred in the partnership. Gopi Mal has been found to have no concern in the matter whatever and Shankar Lal and Kundan Lal were ordered to pay a sum of Rs. 5,531-15-6, while Lallu Mal and Kishan Lal were ordered to pay to the plaintiff a sum of Rs. 6,065-4-9.

Against this appeal Shankar Lal and Kundan Lal preferred one appeal and Lallu Mal and Kishan Lal a second appeal, the former through Mr. Shamair Chand and the latter through Mr. Manohar Lal, whose case has been argued before us by Mr. Moti Sagar.

Taking up the first appeal, namely, that by Shankar Lal and Kundan Lal, it has been argued that the trial Court erred in acting on the very incomplete report of the commissioner. We have been taken through the evidence on the record as well as through this report. It is evident that the commissioner found it exceedingly difficult to differentiate in the accounts between the private transactions and those relating to the partnership account. At the same time he came to the conclusion that the total loss amounted to Rs. 21,210-14-3. He was examined as a witness and there definitely stated that with reference to the present bahi khata it cannot be positively said what transactions were made for the partnership business.

This being the case it is a little difficult to understand how he arrived at the sum of Rs. 21,210-14-3, as being the loss incurred in the partnership. It appears to me that the learned Senior Sub-Judge erred in accepting this report as being sufficient for disposal of the controversy before him. In my judgment, when the commissioner definitely stated that he found it impossible to understand the accounts correctly the learned Senior Sub-Judge should have called upon the parties to produce evidence to explain them before himself. Another objection which to my mind has force is that the commissioner has admitted that he himself never examined the account books at all. The examination that took place was made by his munim. The report therefore should have been signed by his munim and not by himself.

In these circumstances I would accept this appeal, and, setting aside the final decree, return the case to the Court below with the direction that the accounts should be properly gone through and a correct decree be passed in accordance with law.

Costs in this Court will follow the event.

Bhide, J.—I concur.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 737

FFORDE AND ADDISON, JJ.

Emperor—Appellant.

v.

Fasih-ud-Din and *others*—Accused—Respondents.

Criminal Appeal No. 724 of 1926, Decided on 7th February 1927, from order of 1st Cl. Mag, Delhi, D/- 16th April 1926..

Criminal P. C., Ss. 239 and 234—Four persons convicted in a joint trial—One under S. 381, I. P. C.—Second under S. 379, I. P. C. —Third under 411, I. P. C.—Fourth under S. 414, I. P. C.—Trial was held illegal.

Four persons were convicted in a joint trial. Accused 1 of three offences of theft under S. 381 in respect of property alleged to have been stolen on three different dates ; Accused 2 of

three offences of theft under S. 379 in respect of property alleged to have been stolen on three different dates; Accused 3 under S. 411 of dishonestly receiving or retaining stolen property; Accused 4 under S. 414 of assisting in disposal of stolen property. [P 738 C 1]

Held: that there had been both a misjoinder of charges and of persons and the trial was illegal.

Carden Noad—for the Crown.

Nand Lal and *Nanwan Mal*—for Respondents.

Fforde, J.—This is an appeal by the Crown under the provisions of S. 417, Criminal P. C., against the acquittal of Fasih-ud-din, Raja Ram, Mai Ditta and Shib Charan, who have been tried upon charges framed under Ss. 381, 379, 411 and 414, I. P. C.

The learned Government Advocate contends that the acquittal was wrongly had, being against overwhelming evidence of guilt. The first point, which we are faced with, is that the four persons, who have been acquitted, have been tried in a manner not authorized by law, inasmuch as there has been both a misjoinder of charges and of persons.

That there has been a misjoinder of persons there can be no doubt whatsoever. Fasih-ud-din was tried under S. 381, that is, of theft by a clerk or servant in possession of property of his master, in respect of the property alleged to have been stolen on 21st September 1924, and upon a second charge of property alleged to have been stolen on 28th September 1924, and upon a third charge of having stolen property on 16th October 1924.

Raja Ram has been tried under the provisions of S. 379 of having stolen property on 21st September 1924, on 28th September and again on 16th October 1924.

Mai Ditta has been tried under the provisions of S. 411 I. P. C., for having dishonestly received or retained property alleged to have been stolen on 17th November 1924, and Shib Charan has been tried under the provisions S. 414, I. P. C., for having voluntarily assisted in disposing of the property which is alleged to have been stolen on 21st September 1924. It is not necessary to discuss the various sections of the Criminal Procedure Code which prohibit the joinder of persons who have been charged with offences of these several kinds.

The trial is clearly an illegal one and accordingly the whole proceedings in my judgment must be set aside. The appeal against the acquittal obviously cannot be entertained and must be dismissed. It is open to the Crown to take such further steps to bring the parties to trial as they may be advised.

Dr. Nand Lal has urged that in view of the long time taken in prosecuting this illegal trial it would be a great hardship to his client to be put through a fresh ordeal. That, however, is not a matter upon which we can make any suggestion to the Crown. It is for the learned Government Advocate to give such advice in the circumstances as he may deem fit.

Addison, J.—I concur.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 738

BROADWAY AND BHIDE, JJ.

Lallu Mal and *another*—Defendants—Appellants.

v.

Firm Nanhe Mal-Kallan Mal—Plaintiffs—Respondents.

First Appeal No. 2074 of 1924, Decided on 17th June 1927, from decree of Sr. Sub-Judge, Gurgaon, D/- 17th June 1924.

Civil P. C., O. 41, R. 20—Interested parties not joined in appeal originally—Appellate Court can allow them to be joined later on.

Where persons who were interested in the suit were not joined originally as parties to appeal therefrom, the appellate Court can have them so joined under O. 41, R. 20. [P 739 C 1]

Moti Sagar, Nawal Kishore and *Hem Raj*—for Appellants.

Kishan Dayal, Bishan Narain and *Shamair Chand*—for Respondents.

Broadway, J.—A preliminary objection has been taken in this appeal by Mr. Kishan Diyal to the effect that it is incompetent for the reason that the other partners interested in the suit, namely, Shankar Lal and Kundan Lal, had not been made parties. He founded his objection on certain principles enunciated in *Raj Chunder Sen* v. *Ganga Das Seal* (1) by their Lordships of the Judicial Committee. In my judgment the objection is well founded and I consider that Shankar Lal and Kundan Lal were necessary parties to the appeal, inasmuch

(1) [1904] 31 Cal 487=31 I. A. 71=8 C. W. N. 442=8 Sar. 623 (P. C.).

as they were clearly necessary parties in the suit. I think, however, that the provisions of O. 41, R. 20, Civil P. C., enable us to cure this defect, and I therefore make Shankar Lal and Kundan Lal parties to this appeal. Mr. Shamair Chand has accepted notice on their behalf. Inasmuch as we have accepted the connected appeal arising out of the same proceedings in *Shankar Lal Kundan Lal* v. *Nanhe Mal Kallan Mal* (2), it follows that this appeal must also be accepted and the case remanded for disposal in accordance with the order passed in the other appeal. It is specially noted that no decision on the merits of this case has been given by us. Costs will follow the event.

Bhide, J.—I concur.

D.D. *Case remanded.*

(2) A. I. R. 1927 Lah. 736.

A. I. R. 1927 Lahore 739

SHADI LAL, C. J., AND JAI LAL, J.

Adam Khan—Appellant.

v.

The Crown—Opposite Party.

Criminal Appeal No. 1306 of 1926, Decided on 4th March 1927, from order of Sess. Judge, Jhelum, dated 2nd October 1926.

Evidence Act, S. 27—Fact discovered from information of several accused—Fact will be deemed to have been discovered from information of the first.

Where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information the fact should not be treated as discovered from the information of them all, but from the information of the first: 24 *W. R.* 36, *Cr.* and 7 *P. R.* 1916, *Foll.*

[P 740 C 1]

Nanwan Mal—for Appellant.

Sundar Das—for the Crown.

Jai Lal, J—On the night between 7th and 8th December 1925, a gang of Pathans forcibly entered the house of Devi Ditta. an Arora of mauza Sahna in the district of Jhelum and committed dacoity there, and some of them in so committing the dacoity killed Bhagat Ram, son of Devi Ditta, on the spot, and caused serious injuries to Devi Ditta who succumbed to them on 20th December. Injuries also caused to Mt. Viran Devi, wife of Devi Ditta, Mt. Maya Devi, his daughter, and other residents of the village who, on hearing the outcries of the inmates of the house, came to their assistance.

With regard to the factum of dacoity there can be no manner of doubt. It has been proved by the testimony of the approver Mian Gul, Mt. Viran Devi, Mt. Maya Devi, Raghbir Singh, servant of Devi Ditta, Guran Ditta and several other residents of the village who as has already been stated, received injuries in the course of the dacoity. It has also been established by the statement made by Devi Ditta before a Magistrate immediately before his death and by the evidence of Mt. Viran Devi and Mt. Maya Devi that considerable property including ornaments and cash was taken away by the dacoits. The real question that we have to determine is whether the participation of the appellants in the dacoity has been established.

The approver Mian Gul, has, in his evidence at the trial, given a description of the manner in which this crime was planned and committed. His statement has been quoted in extenso in the judgment of the learned Sessions Judge and we no doubt consider it necessary to repeat it here. It is sufficient to say that he has mentioned the five appellants as having taken part in the dacoity. What remains to be seen is whether his testimony has been corroborated in material particulars so far as each appeal is concerned.

With regard to Saidul Umar it has been established that after his arrest he took the Sub-Inspector of Police to a khad near the village Nun in the Rawalpindi District and pointed out a place which was dug up and stolen property was recovered therefrom. Similarly Sarbuland pointed out another place in the same khad from which stolen property was recovered. Awal Khan also is proved to have given information to the police as a result of which stolen property was found buried in the khad. In addition to this several witnesses have identified these convicts as being present at the dacoity.

The learned Sessions Judge has not relied upon this evidence of identification. We overselves have not been able to discover any good reason why it should be discarded. (His Lordship then discussed this evidence and proceeded.) We are therefore, of opinion that the identification of the appellants by the witness is genuine and is good evidence in support of the testimony of the approver.

The learned Sessions Judge has relied upon the alleged discovery of stolen property made in pursuance of the information supplied by Shabru and Niazak as evidence corroborative of the testimony of the approver as against these appellants. It appears that this property was buried in the khad in a place which was first pointed out by Saidul Umar in the absence of Shabru and Niazak and that these two prisoners were then brought up separately and pointed out the same place which was dug out and the property recovered. We are unable to agree with the learned Judge in the view that the evidence as to information given by these convicts is admissible against them. S. 27, Evidence Act, under which this evidence has been admitted, reads as follows:

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

The question is whether the fact of the stolen property having been buried in the place from where it was recovered was discovered in consequence of information received from Shabru and Niazak. It will be observed that only so much of the information given by the appellants can be proved as relates distinctly to the fact thereby discovered. The fact that the property was buried in a particular place was already known to the police as a result of information given by Sad-ul-Umar. It cannot, therefore, be held to have been discovered as a result of the information given by the two prisoners concerned. Where a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all, but from the information of the first: vide *The Queen* v. *Ram Churn* (1). The same view has been taken in several cases in this Court. Reference may, for instance, be made to *Chhuttan* v. *Hazari Lal* (2) and *Budha* v. *Crown* (3). We are of opinion that the evidence relating to the alleged recovery of stolen property as a result of information given by Shabru and Niazak was not admissible against them.

We have, therefore, to examine the evidence of the witnesses who profess to have identified these appellants at the time of dacoity. (His Lordship then examined the evidence and concluded). The result is that all the appellants are proved to have taken part in the dacoity in question and they have been rightly convicted under S. 396, I. P. C. In view of the daring and brutal nature of the crime the penalty of death is the only appropriate sentence to be inflicted upon them.

We dismiss the appeals and confirm the sentence of death passed on each convict.

G.B. *Appeal dismissed.*

(1) [1875] 24 W. R. Cr. 36.
(2) [1915] 7 P. R. 1916=46 P. L. R. 1916=30 I. C. 22=129 P. W. R. 1915.
(3) A. I. R. 1922 Lah. 315.

A. I. R. 1927 Lahore 740

AGHA HAIDAR, J.

Ujagar Singh and *others*—Convicts-Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 40 of 1927, Decided on 4th May 1927, from order of 1st Class Magistrate, Lyallpur, D/- 23rd December 1926.

(a) *Penal Code, S. 97—Matter not urgent and sufficient time available to have recourse to authorities—No right of private defence of property arises.*

There can be no right of private defence of property when the matter was not urgent and no serious loss of the property was threatened and there was ample time to have recourse to the authorities: *A. I. R.* 1926 *Lah.* 516, *Foll.* [P 743 C 1]

(b) *Penal Code, S. 97—Owners while carrying away their tree, attacked by a party armed with dangs—Former have a right of private defence*

The Jats were the owners of a tree and, while in lawful possession of it, were carrying it away. While doing so, they were resisted by a body of men who were armed with dangs. Fight ensued and both parties were severely injured and one of the Jats died.

Held: that the Jats were justified in protecting themselves from enemy's onslaught and in the fight which ensued they were merely protecting their person and property: *A. I. R.* 1923 *All.* 194, *Foll.* [P 743 C 1]

Bevan Petman and *Ram Chand Manchanda*—for Appellants.

Mulk Raj for *Govt. Advocate*—for the Crown.

Judgment.—Under a sale-deed dated the 19th February 1926, one Sunder Singh, a Jat, transferred half a square of land to Chattar Singh, and Ujagar Singh,

the sons of Kesar Singh, Kambohs by caste. In this sale-deed it is provided:

Now the land mentioned above . . . . together with all kinds of existing trees excepting two kikar trees, one beri tree and one shisham tree which the executant-vendor shall cut within three months; otherwise they would be considered the property of the purchaser. . . . .

The property which formed the subject-matter of the sale-deed was at the date of the sale in the possession of a prior usufructuary mortgagee. The story for the prosecution is that on the 18th August 1926, at about 10 p. m. the Kambohs (accused in trial No. 84/2 of 1926) and the Jats (accused in trial No. 87/2 of 1926) had been engaged in a serious fight with the result that five persons on the side of the Kambohs and the same number on the side of Jats received injuries and one man, Hira Singh, on the side of the Jats received serious injuries to which he succumbed soon after. The police sent up (1) Ujagar Singh and (2) Chattar Singh, sons of Kesar Singh, (3) Kharak Singh and (4) Lachman Singh, sons of Bua Ditta, (5) Kesar Singh (6) Bahadur Singh, (7) Hira Singh, (8) Shamir Singh, (9) Wir Singh and (10) Wasawa Singh charging them under S. 304/149 I. P. C. This was trial No. 84/2. In trial No. 87/2 eight persons, namely, (1) Mangal Singh, (2) Ishwar Singh, (3) Lal Singh, (4) Sohan Singh, (5) Jagat Singh, son of Mangal Singh, (6) Diwan Singh, (7) Jota Singh and (8) Bahadur Singh were challaned to take their trial under S. 325/149, I. P. C. Evidence was recorded separately in the two cases; but the learned Magistrate disposed of the two cases by one judgment.

The case for the prosecution before the trial Court was that the whole dispute centred round a shisham tree to which both parties laid claim. Each party claimed for himself the right of private defence of property. The learned Magistrate, who tried the case, relying upon certain authorities, has come to the conclusion that, having regard to tha circumstances of the case, the fight was a premeditated one on both sides and that no question of self defence arose in the case. He accordingly convicted all the accused in both the cases. The accused in trial No. 84/2, i. e., the party of the Kambohs were convicted under S. 304-II read with S. 149, I. P. C. and have been sentenced to six years' rigorous imprisonment each and a fine of Rs. 100 or in default to further rigorous imprisonment for six months. The party of the Jats has been convicted under S. 325/149, I. P. C., and sentenced to three years' rigorous imprisonment and a fine of Rs. 100 each or in default to further rigorous imprisonment for six months.

Both parties appealed to this Court, and the case of the Kambohs was argued principally by Mr. Petman followed by Mr. Ram Chand Manchanda, while the appeals by the Jats were argued by Sir Mohammad Shafi. The case was argued fully on the 8th, 22nd, 29th and 30th April 1927, and counsel took me carefully through the whole evidence on the record. The evidence on the record is very voluminous, and I do not propose to discuss it at any considerable length. There is one piece of evidence, however, which requires a somewhat detailed consideration. This is the receipt dated the 13th February 1926, which purports to have been executed by Sunder Singh in favour of Mangal Singh and Jagat Singh. It acknowledges receipt of Rs. 40 being the price of two kikar and one shisham trees which Sunder Singh purported to have sold to Mangal Singh and Jagat Singh. This receipt was put forward by the Jat party two days after the occurrence, and it may be mentioned here that in the first information report which Mangal Singh gave at the police station at about 3 o'clock on the day of occurrence no mention was made of this receipt. On behalf of the Kambohs it was pleaded in the Court below, and the argument was repeated before me in appeal, that this receipt was a forged document which had been prepared for the purpose of establishing their defence by the Jats. On the other hand the Jats cited evidence to show that the receipt represented a genuine transaction. In the view that he took the learned Magistrate did not enter into the question of the genuineness or otherwise of the receipt. In appeal Mr. Bevan Petman realized the importance of the receipt and devoted a portion of his argument to it in order to show that the receipt was spurious and forged document. On the other hand Sir Mohammad Shafi strenuously argued that the receipt represented a genuine transaction and, that according to it, Sunder Singh had sold the trees mentioned in the sale-deed to his clients Jagat Singh and Mangal Singh on the 13th February 1926. He read

before me the evidence of the scribe Thakar Das and of a marginal witness Ram Ditta and also referred to other evidence. He also referred to the evidence of Sunder Singh who deposed to the genuineness of the transaction as evidenced by this receipt. To the argument put forward by Mr. Bevan Petman that the receipt contained alterations and was recorded in an irregular book of account, Sir Mohammad Shafi replied that the receipt was written in an ordinary village zemindar's memorandum book. I myself examined the book in which the receipt is written. Having regard to the informal nature of the book and the evidence on the record, I am of opinion that the receipt represents a genuine transaction and that Sunder Singh had, as a matter of fact, prior to the sale-deed which was executed on the 19th February 1926, in favour of Chattar Singh and Ujagar Singh, the sons of Kesar Singh, sold the trees to Mangal Singh and his son Jagat Singh. The dispute, as already stated, refers to the shisham tree, only, and we are not concerned with the other trees.

The evidence on the record shows that the shisham tree had, as a matter of fact, been felled down sometime before the occurrence, although some of its longer roots might have been embedded in the soil on the date of the occurrence. Further, it appears that the tree had been cut down within three months of the sale-deed executed by Sunder Singh in favour of Chattar Singh and Ujagar Singh, the sons of Kesar Singh, and, therefore, according to the terms of the sale-deed, the property in the shisham tree did not pass to the vendees. On this point the evidence of Sunder Singh (P. W. No. 10 in trial No. 87/2) and Phangan (D. W. No. 3 in trial No. 87/2) is important. According to the evidence of Sardar Dayal Singh, Sub-Inspector, the trunk of the shisham tree was a fairly big one and in his opinion it required nine or ten people to remove it. The party of the Jats on the morning of the occurrence took a gadda or a big cart to the place where the shisham tree was lying and after loading it proceeded to their houses. They had lathis and axes with them. These axes might have been originally intended to lop off such branches as may have been left on the trunk and interfered with its portability. There is evidence to show that Kesar Singh had sent one Sawan Singh to Mangal Singh with the object of forbidding Mangal Singh and his son Jagat Singh from removing the tree, four or five days before the occurrence. It is also said that a day before the occurrence, Sawan Singh was again sent on a similar errand by Kesar Singh to Mangal Singh. There is ample evidence on the record that on hearing the news that the Jats were removing the shisham tree, a party of the Kambohs proceeded to the place where the tree had been lying in order to stop the cart from taking it away. Another party of the Kambohs soon joined, and there is evidence to show that they followed the cart to a distance of one square and attempted to stop it. There is some difference of opinion about the weapons which the Kambohs, were carrying. According to some witnesses for the prosecution two men, at any rate, in the party of the Kambohs, carried tokwas or hatchets while the rest were carrying dangs. According to other witnesses the Kambohs party was armed with dangs only. As has been mentioned above, the kambohs party consisted of ten persons while the Jats were only eight in number. There was a fight and both parties received injuries, and as already stated, one Hira Singh, on the side of the Jats lost his life. Into the details of the injuries received by the members of the two parties it is not necessary to go.

The main difficulty in this case arises from the fact that the accused in one case are the witnesses in the other and vice versa and the Public Prosecutor, who gave considerable assistance to the Court frankly admitted before me at the time of the argument that there was no independent evidence for the prosecution in either case. After giving the matter my most anxious consideration. I have come to the conclusion that Mangal Singh and Jagat Singh had purchased the shisham tree from Sunder Singh before he had executed the sale-deed in favour of Kesar Singh's sons. They were, therefore, the owners of the shisham tree and, in the exercise of their right as such owners, they were lawfully engaged in removing the trunk of the shisham tree on the morning of 18th August 1926. The Kamboh party had an inkling of their intention a few days previously and, according to evidence, they sent Sawan Singh

to Mangal Singh and Jagat Singh to act as an intermediary. They had ample opportunity during the three or four days to take legal steps, or at any rate to seek the assistance of the proper authorities. They could have informed the police and sought its protection in the usual way. They did nothing of the kind and ultimately decided to take the law into their own hands. They went to the spot on hearing the news that the Jats were carting away the shisham tree. They attempted to stop the Jats as they were carting away the shisham tree. They pursued them up to a distance of one square and ultimately stopped the cart as it was on its way to the houses of the Jats. A number of cases were cited before me which I need not discuss in detail. I may refer only to *Datta Ram* v. *Emperor* (1). This case lays down that there can be no right of private defence of property when the matter was not urgent and no serious loss of the property was threatened and there was ample time to have recourse to the authorities. In the present case even if the Kambohs considered that they had some right or supposed right in the shisham tree, they had ample time to have recourse to the authorities, and it cannot be said that they had the right of private defence of property under the circumstances. After all the trunk of the shisham tree was not such a valuable or rare thing for the loss of which a money compensation would not afford adequate relief. As I have already stated the Jats were the owners of the tree and while in lawful possession of it, were carrying it away. When resisted by a body of men, like the Kambohs who were armed with at least dangs were justified in protecting themselves from the enemy's onslaught. In this connexion I may refer to the principle of the case *Hira* v. *Emperor* (2) I, therefore, allow the appeals of the Jats, holding that they were within their right in resisting the party of the Kambohs when it sought to stop them from removing the shisham tree and that in the fight which ensued they were merely protecting their person and property.

The result is that I accept the appeals of the Jats namely, Jagat Singh. Mangal Singh, Diwan Singh, Lal Singh and Ishwar Singh (Criminal Appeal 191 of 1927) and Jota Singh, Bahadur Singh and Sohan Singh, (Criminal Appeal 192 of 1927), set aside their convictions and sentences and direct that they be released forthwith.

As to the party of the Kambohs, I am fully aware of the tendency in these riot cases for the rival parties to implicate as many members as possible belonging to the party of their adversaries and one cannot be too careful, when dealing with such cases. The actual fight was a fierce and short one and one can easily imagine that the actual combatants would receive more or less severe injuries and carry the marks of the same on their persons. At the same time it does not stand to reason that after going through a pitched battle like the one of the present case, a combatant belonging to one side or the other would escape unscathed without injury however slight on his person. Hence as to the participation of persons who bore marks of injuries on their persons there cannot be any doubt. I, therefore, give the benefit of the doubt to those among the Kambohs who did not receive any injuries. I find that only five persons namely Kesar Singh, Ujagar Singh, Bahadur Singh, Shamir Singh, and Kharak Singh received injuries. As to the rest of the accused in trial No. 84/2 there is no evidence that they received any injuries whatsoever. I, therefore, give them the benefit of the doubt and hold that it is not satisfactorily proved that they actually took part in the fighting. Accordingly I acquit Chhattar Singh, Lachman Singh, Wasawa Singh, Hira Singh and Wir Singh as the case against them, in my opinion, is at best a doubtful one. As regards the persons of the party of the Kambohs who received injuries and as to whose participation in the riot there cannot be any doubt, I hold them guilty of an offence under S. 304-II/149, I. P. C., but I do not think that the sentence of six years' rigorous imprisonment and a fine of Rs. 100 passed upon each of them is called for. I would, therefore, reduce the sentence from six years' rigorous imprisonment to three years' rigorous imprisonment in the case of each of them, I set aside the order as to fine. The fine, if paid will be refunded. With this modification I dismiss the appeals of the Kambohs.

G.B. *Sentences reduced.*

(1) A. I, R. 1926 Lah. 516.
(2) A. I. R. 1923 All. 194=45 All. 250.

A. I. R. 1927 Lahore 744

SHADI LAL, C. J.

P. F. Linton—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 1681 of 1926, Decided on 28th January 1927, made by Dist. Magistrate, Gujrat, on 8th November 1926.

Criminal Trial—Pending civil suit by complainant against accused likely to throw light on criminal case—Criminal proceedings were stayed.

Where the decision of the civil suit, which was instituted by the complainant himself against the accused about three months before he brought the criminal case, was likely to throw considerable light upon the dispute in the criminal case, the proceedings of the criminal Court were stayed.

Mukand Lal Puri—for Petitioner.

Abdul Qadir—for the Crown.

The facts of the case are as follows: On the 29th June 1926 Muhammad Ali, the complainant in the present 420, I. P. C. case, filed a civil suit in the Court of the Junior Sub-Judge, Gujrat, against Mr. P. F. Linton, a resident of Calcutta, to recover a sum of Rs. 3,000 (principal Rs. 2,064-4-0, interest Rs. 935-12-0) on the ground that in the year 1922 defendant had showed himself to be the Managing Director of the Firm of Linton Brothers, Calcutta, and in this capacity had agreed to supply 2,000 tons of coal to plaintiff at the rate of Rs. 6 per ton. That Rs. 2,400 had been paid by plaintiff in advance to Mr. Linton for which plaintiff had obtained a receipt dated 23rd October 1922. That only 18 tons of coal valued at Rs. 108 had been supplied by defendant. Subsequently Linton Brothers had transferred the working of the Company as well as its accounts to another Company N. M. Alexandar and Co. to whom plaintiff had applied for the fulfilment of the contract. Messrs. Alexander and Co. had replied that there was no account of Sheikh Muhammad Ali plaintiff in the books of the Company. Plaintiff had thereupon asked Mr. Linton defendant to recoup the balance with interest but had received no reply from him hence the suit for recovery of Rs. 3,000 was preferred. Defendant Mr. Linton represented by Mr. Der Raj, Advocate, admitted the receipt of Rs. 2,400 and the agreement to supply the coal but stated that he was not personally responsible for any money, but the firm which had been dissolved was responsible. The following issues were framed.

1. Whether Mr. P. F. Linton is personally liable.

On plaintiff.

2. Whether Kendnadih Coal Company and P. Dutt and Company were necessary parties.

On defendant.

3. Whether plaintiff's suit is within time.
4. Whether this Court has juisdiction.
5. Whether plaintiff is entitled to interest by way of damages and at what rate.

The proceedings are forwarded for revision on the following grounds :

Now I find from the perusal of the files that these issues were framed on 6th October 1926 and the present complaint under S. 420, I. P. C., was lodged by Sheikh Muhammad Ali the plaintiff in the civil suit, against Mr. Linton, defendant, in the civil suit on 28th October 1926 on the grounds that accused had received the money fraudulently and did not incorporate the receipt of Rs. 2,400 in the accounts of the firm. The Magistrate issued the warrant against the accused after examining the complainant only and without seeing the file of the civil case. Now I consider that the Magistrate has abused his discretion in issuing a warrant to compel the attendance in Gujrat of a person resident in Calcutta to answer a charge which is in issue and sub-judice in civil proceedings in Gujrat which were instituted by the complainant himself four months previously to the criminal complaint and upon the same facts. Further I consider that the Magistrate has acted unjudicially in refusing the application of accused's counsel to stay the proceedings till the decision of the civil suit which the Magistrate was empowered to do under S. 344, Criminal P. C. Further the Magistrate seems to have wrongly interpreted the discretion allowed him under S. 75 (2), Criminal P. C., which contains no provisions that its operations are restricted to benefit pardahnashin ladies. I consider that the Magistrate should not have refused to examine the civil file or to hear the arguments of defence counsel for the stay of proceedings which were based on the facts of the civil file. I do not consider that an order by me transferring the case to another Court under S. 528, Criminal P. C., would materially benefit the accused as apparently under S. 75 (2), Criminal P. C., a warrant

can only be cancelled by the Court issuing it, I consider that the facts on which the criminal prosecution is based are completely in issues (1) and (2) framed by the civil Court previous to the institution of the prosecution. With regard to the Magistrate's refusal to consider the objection of the accused's counsel it seems that the Magistrate does either not understand the scope of his powers under S. 202, Criminal P. C., or else is biassed against the accused.

For these reasons I consider that the proceedings of the criminal Court should be stayed until the decision of the civil suit. However, since I do not find that I have the power as a District Magistrate to do this, I forward the file of the criminal case together with the file of the civil suit to the High Court at Lahore for favour of orders On receipt of orders I propose, unless directed to the contrary, to transfer the file to another Court on account of the suspicion of bias noticed above.

Sir Shadi Lal, C. J. — On the facts, which are correctly stated by the learned District Magistrate, I am not prepared to accede to the contention urged by Mr Mukund Lal Puri for the accused that the proceedings in the criminal case should be quashed. It is true that the trial Magistrate made several orders which were wholly unjustified, and that he fully deserves the strictures passed upon him by the District Magistrate But I do not think that on the record, incomplete as it is, I should exercise my extraordinary jurisdiction as a Court of revision and quash the proceedings.

I am, however, of opinion that the decision of the civil suit, which was instituted by the complainant himself about three months before he brought the criminal case, is likely to throw considerable light upon the dispute in the criminal case; and that the proceedings of the criminal Court should be stayed pending the decision of the civil suit.

I accept the recommendation made by the District Magistrate and order accordingly.

G.B. *Order accordingly.*

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A. I. R. 1927 Lahore 745

CAMPBELL, J.

Nur Ali Shah—Petitioner.

v.

Natha —Respondent.

Criminal Revn. No. 1485 of 1926, Decided on 7th January 1927, reported by Addl. Sess. Judge, Lahore, on 11th August 1926.

Criminal P. C., S. 139 A (.)—Public right of way claimed over a field—Owner denying it—Revenue records making no mention of such right—Case falls under S. 139-A.

Where a right of way over an uncultivated field was in dispute between villagers and the owner, and the owner closed that way on bringing the field under cultivation, relying on the revenue records which made no mention of any public path :

Held : in proceedings against the owner under S. 133, Criminal P. C., that this case was exactly one which S. 139-A, Criminal P. C., was designed to meet. [P 746 C 1]

Rights of way are obviously matters to be decided by the civil Courts and not by the criminal Courts. It is in the interest of public policy that criminal Courts should not deal with matters which it is compulsory to leave to civil Courts. [P 746 C 1]

Abdul Aziz—for Petitioner.

Report.—A quarrel has arisen in village Kot Murad Khan over a right of way to a well near the village The most convenient way lies over fields belonging to Nur Ali Shah and others. For some years these fields were uncultivated, and no dispute over their use as a means of access to the well arose. They have since come under cultivation, and Nur Ali Shah has closed the passage across them by means of a thorn fence.

The result of this action was that the public was forced to go round to the well by a longer way which passes over fields belonging to one Natha and others. On this Natha lodged an application for the passing of an order under S. 133, Criminal P. C., to Nur Ali Shah and his companions to remove the thorn fence on the ground that it was an unlawful obstruction to a public way. The application has been very carefully considered on the spot by the two Magistrates who have dealt with it in succession. The Magistrate passing the final order has come to the conclusion, which there is no reason to question, that the closed path is the nearest way from the village to the well that the well to which a small

mosque is attached, was in common use by the public up to the date of the obstruction, and that it was not only used by men, but also for carts, and that the obstruction has been a nuisance to the public. The party of Nur Ali Shah rely chiefly on the revenue records, which show that the fields belong to them, and make no mention of any public path, but the learned Magistrate points out that so long as the fields were uncultivated, no objection could be raised to public access and that this does not, therefore, disprove the allegation that the way was a public one. For these reasons he has ordered the removal of the obstruction and the opening of the way to 2½ paces within 14 days from 13th July, on which the order was passed.

Grounds.—The order of the Magistrate does not appear to be sustainable. The Magistrate has only found that the way was in fact being used by the public up to the date of the obstruction, but has not found that they had any right to do so, except by the tacit consent of the owners. Even if it is considered that this constitutes lawful use by the public within the meaning of S. 133, it has still to be found that the obstruction was unlawful ; and it appears to me that if the owner of an uncultivated field wishes to bring it under cultivation, he has every right to close it to public access unless a right of way has been clearly established. In this case there has been no finding as to the time during which the way has been used by the public, and in the absence of any evidence on this point the revenue records raise a clear presumption that no such right of way existed.

The case seems to be exactly of the class which S. 139-A, Criminal P. C., was designed to meet. The party causing the obstruction has produced reliable evidence in support of their denial of the existence of any public right in respect of the way. In these circumstances the Magistrate was bound to stay the proceedings until the matter of the existence of such a right had been decided by a competent civil Court, and he had no jurisdiction to proceed with the enquiry or pass any final order. Rights of ways are obviously matters to be decided by the civil Courts and not by the criminal Courts. It is in the interest of public policy that criminal Courts should not deal with matters which it is compulsory to leave to civil Courts. No powers of appeal are given in respect of orders under S. 133, Criminal P. C.

Order.—It seems to me clear that the Magistrate has overlooked S. 139-A, Criminal P. C. As recommended by the learned Sessions Judge I set aside the Magistrate's order and in lieu thereof order under S. 139-A (2) that proceedings be stayed until matter of the existence of the alleged right of way has been decided by a competent civil Court.

J.V. *Order set aside.*

A. I. R. 1927 Lahore 746

JAI LAL, J.

Muhammad Jan—Accused—Appellant

v.

Emperor—Opposite Party.

Criminal Appeal No. 1148 of 1926, Decided on 31st January 1927, from order of Sess. Judge, Karnal, D/- 18th October 1926.

Penal Code, S. 420—Middleman introducing cheat to complainant for purchases of ornaments — His dishonestly and fraudulently acting in the transaction must be established.

In order to sustain a conviction of a middleman who introduced a cheat to the complainant, under S. 420, it is necessary for the prosecution to establish that he acted dishonestly and fraudulently in the transaction. [P 747 C 1]

Shamair Chand—for Appellant

Malik Muhammad Hussain—for Respondent.

Judgment.—Jan Muhammad alias Mohammad Jan, appellant in Appeal No. 1148, and Abdur Rahman, appellant in Appeal No. 1266 of 1926 have been convicted under S. 420, I. P. C., and have been sentenced to six months' and two years' rigorous imprisonment respectively. They have both appealed to this Court and I have heard Mr. Shamair Chand on behalf of Jan Mohammad.

The case for the prosecution is that on the 25th December 1925 Jan Mohammad went to P. W. 1 Munir Khan, and told him that two ornaments of gold were for sale, which he could secure for him cheap and on the latter agreeing introduced Abdul Rahman who sold a necklace and a chain to Munir Khan for Rs. 240. An assurance was given by Abdul Rahman, and it is alleged by Jan Mohammad that the ornaments were of pure gold. As a fact they were not of gold. This last

fact has been established by the evidence of Anokhi Lal and Nur Mohammad. When Munir Khan went home he discovered that he had been duped and asked Jan Mohammad to call Abdur Rahman and to have the amount paid by him restored on return of the ornaments. Next morning both Jan Mohammad and Abdul Rahman came to Munir Khan's shop and there Abdur Rahman stated that he had not got the money and would execute a promissory note in favour of Munir Khan, but the latter did not agree to this. A head constable on receiving the information of the incident had the matter reported at the thana with the result that both the appellants were sent up for trial and convicted.

So far as Jan Mohammad is concerned, in my opinion, the case against him is very doubtful. Munir Khan distinctly states that he paid the money to Abdur Rahman. In the conversation the next morning it was Abdul Rahman who stated that he would execute the promissory note in his favour. Jan Mohamnad on no occasion accepted personal liability, and it has not been established that he made any money out of the transaction. He is a young man of 22 years of age, and it is quite possible that he was duped by Abdur Rahman, who appears to be a clever man, in the same manner in which Munir Khan was duped. In order to sustain his conviction it was necessary for the prosecution to establish that Jan Mohammad acted dishonestly and fraudulently in the transaction. This, in my opinion, has not been established. It is not shown that Mohammad Jan knew or had reason to believe that the ornaments were not of gold, nor has it been shown that any portion of Rs. 240 went to him. I accept his appeal and acquit him.

With regard to Abdur Rahman there is considerable evidence against him. Muhammad Yaqub and Shafaat Ahmad were present, when the ornaments were sold by him and Rs. 240 paid to him. They also proved that the next morning Abdur Rahman expressed his inability to produce the amount received by him the previous day, and offered to execute a promissory note in favour of Munir Khan. There can, therefore, be no doubt as to his guilt. I dismiss his appeal.

R.D. *Order accordingly.*

A. I. R. 1927 Lahore 747

TEK CHAND AND AGHA HAIDAR, JJ.

Mathra and *others*—Defendants—Appellants.

v.

Ram Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1729 of 1923, Decided on 14th June 1927, from decree of Dist. Judge, Karnal, D - 14th April 1923.

Civil P. C., O. 42, R. 2—Copy of judgment of the first Court should accompany a memorandum of second appeal.

A memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation in the absence of any sufficient cause to explain the delay: *A. I. R. 1921 Lah. 73, Foll.*

[P 748 C 1]

Iftikhar Ali—for the Appellants.

Shamair Chand—for Respondents.

Agha Haidar, J.—This appeal was admitted as long ago as 15th June 1923 The learned Judges, who admitted it under O. 41, R. 11, Civil P. C., made the following note:

Subject to all just exceptions on the question of limitation the appeal is admitted.

The case came up to-day for hearing. On behalf of the respondent Mr. Shamair Chand raised the objection that the appeal, when it was filed, was barred by limitation. He says that the appeal was filed without a copy of the judgment of the first Court as required by R. 2, O. 42, which was incorporated in that order as long ago as 1919. The newly added rule runs as follows:

(2) In addition to the copies specified in O. 41, R. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance.

The last date of limitation was 20th July 1923. The appeal was filed on 18th July, but as already stated without a copy of the judgment of the first Court. The appellants applied for a copy of the judgment of the first Court on 19th July 1923, and the copy was ready on 20th July 1923, and was delivered to the appellants on the same day. This copy was filed ultimately in this Court on 23rd July 1923.

No explanation is forthcoming of the delay in applying for the copy nor has any affidavit been filed on behalf of the appellants explaining the delay so as to bring the case within the provisions of S. 5,

Indian Lim. Act. The law on the point is laid down very clearly in a judgment reported as *Mol Malu* v. *Sri Ram* (1), where it was held that:

"memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of the first instance, and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation.

This being so, and in the absence of any sufficient cause to explain the delay, there is no other alternative for this Court except to dismiss the appeal as being barred by limitation.

The appeal is accordingly dismissed with costs.

Tek Chand, J.—I agree.

Appeal dismissed.

N K.

(1) A. I. R. 1921 Lah. 73=2 Lah. 227.

A. I. R. 1927 Lahore 748

BROADWAY AND AGHA HAIDAR, JJ.

Risal Singh and *another*—Plaintiffs—Appellants.

v.

Manohar Lal and *others*—Defendants—Respondents.

First Appeal No. 1512 of 1922, Decided on 1st March 1927, from decree of Dist. Judge, Hissar, D/- 27th March 1922.

(a) *Registration Act, S. 60 Document registered — Presumption as to execution and receipt of consideration arises.*

It cannot be said that a document is without consideration simply because there was no cash payment at the time of the execution of the deed. Where a document is registered it is to be assumed that the document was explained by the Sub-Registrar to the executants who admitted its execution and the receipt of consideration and that the whole proceedings in connexion with registration and endorsement etc., were regular and in order: 33 *Cal.* 537 (*P. C.*) and *A. I. R.* 1924 *P. C.* 78, *Rel. on.* [P 750 C 2]

(b) *Contract Act, S. 16 — Terms apparently harsh—Debtor must bring his case within S. 16 to get relief.*

Unless the mortgagor can clearly bring his case within the four corners of S. 16, the parties must be held to be bound by the terms of their contract as embodied in the mortgage, however harsh such terms might appear to be: *A. I. R.* 1918 *P. C.* 48 and *A. I. R.* 1918 *P. C.* 249, *Foll.* [P 751 C 1]

A Court should look at the transaction at its inception and see if at that time it was so hard and unconscionable that a Court of justice would not enforce it. The mere fact that interest has accumulated as a result of the efflux of time coupled with default of payment of interest on the part of the mortgagor cannot be a defence which the mortgagor can validly raise in order to ask the Court to reduce the amount claimed by the mortgagee: *A. I. R.* 1918 *P. C.* 249 and *A. I. R.* 1924 *Lah.* 21, *Foll.* [P 751 C 2]

(c) *Transfer of Property Act, S. 58 (c)—Condition that if mortgage money is not paid in two years mortgagee would take property absolutely is not illegal.*

The condition in a mortgage-deed that if the entire amount of the mortgage money with interest was not paid within two years, the mortgagees would become absolute owners of the property, is not by any means illegal. It is merely a mortgage by conditional sale. [P 751 C 2]

(d) *Evidence Act, S. 18—Admission by pleader in lower Court cannot be set aside by engaging another pleader in appeal.*

Where in the lower Court the pleader for a party admitted the correctness of the accounts filed by the opposite party

Held: It is not open to a party in appeal to try to go behind an admission made by his pleader, who represented him in the trial Court, by engaging a fresh counsel in the appellate Court: 9 *W. R.* 485; 2 *M. I. A.* 253; 6 *C. W. N.* 82; 21 *Mad.* 274 and 22 *Mad.* 538, *Foll.* [P 752 C 1, 2]

Nanak Chand and *Anant Ram Khosla*—for Appellants.

Kishan Dayal and *Hargopal*—for Respondents.

Agha Haidar, J.—The appeal arises out of a suit for possession, by redemption of certain mortgaged land detailed in the plaint, on payment of Rs. 1,635-5-4 or any other amount which the Court may deem proper with reference to the circumstances of the case. The Court below decreed the plaintiffs' claim for possession of the land on condition that the plaintiffs should pay to the defendants a sum of Rs. 30,000 within six months from the date of the pronouncement of the judgment. The usual preliminary decree was ordered to be drawn up under O. 34, R. 7, Civil P. C. The plaintiffs have come up in appeal to this Court.

The facts are briefly these: On 29th June 1893, Dewat Ram mortgaged 101 bighas kham of land to one Daya Ram for a sum of Rs. 200. The mortgage was usufructuary, and the rate of interest was Rs. 1-9-0 per cent per mensem compound interest with yearly rests. On 15th November 1893, Dewat Ram and his brother Sis Ram mortgaged with possession 352 bighas kham of land together with a house to Dharu Mal and Daya Ram for Rs. 690. The consideration was made up in this way.

Due under the first mortgage...Rs. 213.
Advanced in cash.....Rs. 477.

Total Rs 690.

The term of the mortgage was three years, and the rate of interest was also

the same. On 22nd December 1894, Dewat Ram and Sis Ram mortgaged the same property for Rs. 450. Rs 131 being interest due under the last mentioned bond, and Rs. 319/- cash advance The mortgage was with possession and the rate of interest was the same. The bond in suit is dated 28th June 1899. The parties to this document are the same as those of the prior bond of 15th November 1893, and 22nd December 1894, and the terms are practically the same except that instead of Re. 1-9 0 per cent per mensem compound interest with pearly rests, this bond provides six-monthly rests. The house was also taken out of the security, which under this bond, remained 352 bighas kham of land only. It may also be noted that the bond of 1899 contains a specification of the respective interests of the mortgagees in that the share of Daya Ram is given as one-third and that of Dharu Mal as two-thirds. The mortgagees did not take possession under this unufructuary mortgage of 1899, but contented themselves by taking a kabuliyat from the mortgagors, who remained in physical possession of the property on payment of a yearly rent of Rs. 100. On 24th December 1903, the mortgagors redeemed one-third of the land on payment of Rs. 816-10-8 to Daya Ram, one of the mortgagees, being one-third share of the total mortgage money. The plaintiffs-appellants are the heirs and representatives of Sis Ram and Dewat Ram while the defendants-respondents are the sons of Dharu Mal, Daya Ram having dropped out as the result of the redemption of his one-third share in the mortgage.

The present suit is for redemption of the remaining two-thirds of the mortgaged property on payment of a sum of Rs. 1,633-5-4, representing two-thirds of the original mortgage-money. The main allegations of the plaintiffs are that the mortgage in suit was obtained by the exercise of fraud and undue influence upon the original mortgagors, that in fact no consideration passed under the mortgage and that the rate of interest was penal and had been fraudulently entered in the document, since the mortgagors were given to understand that it was only 1 per cent per mensem. It is also alleged that at the time when Daya Ram released one-third share of the mortgaged land on receipt of Rs. 816-10-8 Dharu Mal mortgagee had also agreed to release his two-thirds-share of the mortgaged property on payment of a proportionate share of the mortgage money but that, as the mortgagors were poor people, they could not raise the requisite sum. It is further alleged that at the time of the execution of the document in suit, there was a great famine in the district of Hissar and the mortgagors were in extremely straitened circumstances and were in fact starving and so easily fell into the clutches of the defendants, money-lenders. It may be observed here that there is no prayer in the plaint asking for the cancellation of the mortgage bond of 1899 on the ground of fraud, undue influence etc.

The written statement controverts the main allegations of the plaint, and it is pleaded therein that the mortgage bond of 1899 was a document to which no exception could be taken as the rate of interest and the other terms were not unusual. It is further pleaded that the plaintiffs were ready and willing a short time ago to pay Rs. 15,000 for the redemption of mortgage, and that having regard to the accounts filed by the defendants and the conditions set forth in the mortgage-deed, the plaintiffs could not redeem the land unless they paid Rs 30,000. It is also urged that the plaintiffs' objections in respect of consideration, fraud and undue influence are barred by limitation and that the mortgage-deed having been acted upon by the plaintiffs themselves, it was not open to them to raise any objections now. The learned District Judge framed a number of issues but has disposed of the case by recording findings on issues 1, 2, 3, and 6 only. These issues are as follows :

(1) Was the mortgage executed under undue influence and fraud.

(2) Are the mortgagors entitled to redeem on payment of Rs. 1,633-5-4 ?

(3) Are the mortgagees entitled to realise thirty thousand rupees ?

(6) Are plaintiffs' pleas about want of consideration and necessity and fraud and undue influence barred by limitation.

On issue 1. the learned District Judge has held that no case of fraud has been made out by the plaintiffs, but he has found that the mortgage bond in suit was obtained by the exercise of undue influence.

On issue 6, which deals with the question of limitation he has held that the plaintiffs' plea of undue influence is barred by limitation, having regard to the provisions of Art. 91, Lim. Act. In other

words he has held that, although the document may have been obtained by the exercise of undue influence, nevertheless the document was enforceable at law as the suit had been brought long after the expiry of the prescribed period of three years' limitation, so that the plaintiffs are debarred from questioning the validity of the mortgage-deed.

Issues 2 and 3 have been decided together and, as the plaintiffs' pleader did not dispute the correctness of the account filed by the defendants by which they arrived at the figure of Rs. 30,000, the learned District Judge passed a decree for redemption conditional on payment of that sum.

The case was argued at considerable length by the learned counsel for the plaintiffs-appellants. His main contention was that the plea of undue influence having been found in favour of the plaintiffs the learned District Judge ought to have decreed the claim on payment of the amount admitted by them and that his finding on the question of limitation was erroneous. He also urged that the issue as regards fraud should have been decided by the Court below in the plaintiffs' favour.

After a perusal of the judgment and hearing some of the arguments at the Bar, we did not feel satisfied as to the correctness of the learned District Judge's finding on the plea of undue influence. The learned counsel was called upon to support the findings of the learned District Judge on this issue. In his argument on this part of the case he raised four points, the contention being that the plaintiffs must be taken to have been under the undue influence of the mortgagees, seeing that they agreed to terms which are on the face of them hard and unconscionable. The points are as follows:

(1) that the document was without any consideration;

(2) That Re. 1-9-0 per cent per mensem, compound interest with six-monthly rests, was penal and exorbitant;

(3) that Cl. 5 of the mortgage-deed as regards the conditional sale, was harsh and unconscionable; and

(4) that the plaintiffs were to pay interest as well as the land revenue.

As regards the first point it is true that at the time of the execution of the bond in suit no consideration was paid in cash, but the consideration consisted of the principal and interest due under the two previous bonds. The defendants have submitted their accounts and their correctness was not challenged by the plaintiffs' pleader in the trial Court.

We may take it, therefore, that the amount of consideration mentioned in the bond is correct. As to why the predecessors of the appellants agreed to execute the document of 1899, when they were not pressed with any necessity for borrowing a fresh sum of money is difficult to say. They may have had reasons of their own, and it is possible that the mortgagees might have been thinking of taking foreclosure proceedings which the mortgagors were anxious to avert. Anyhow it cannot be said that the document was without consideration simply because there was no cash payment at the time of the execution of the deed. The document was registered and, having regard to the observations of their Lordships of the Privy Council in *Gangamoyi Debi* v. *Troiluchhya Nath* (1) and *Baijnath Singh* v. *Jamal Bros. & Co. Ltd* (2), we may take it that the document was explained by the Sub-Registrar to the executants who admitted its execution and the receipt of consideration and that the whole proceedings in connexion with registration and endorsement, etc., were regular and in order. In any event the burden of proof was upon the plaintiffs to show that the document was without consideration. So far from discharging this burden the plaintiffs in the present suit are seeking to redeem the mortgage on payment of the mortgage-money mentioned in the bond itself.

As regards the second point: a good deal of argument was addressed to us based on the ground that the rate of interest was extortionate and should be relieved against. We have been referred to a number of cases, and particularly to *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3) and *Maneshar Bakhsh Singh* v. *Shadi Lal* (4). It is true that there are certain observations in these two cases which lend some support to the conten-

(1) [1905] 33 Cal. 537=33 I. A. 60=10 C. W. N. 522=3 C. L. J. 349 (P. C.).
(2) A. I. R. 1924 P. C. 48=51 Cal. 354=2 Rang. 99=51 I. A. 18 (P. C.).
(3) [1906] 28 All. 570=33 I. A. 118=3 A. L. J. 495 (P. C.).
(4) [1909] 31 All. 386=3 I. C. 385=36 I. A. 96 (P. C.).

tion raised by the learned counsel for the appellants, but those observations must be read along with the particular facts of those cases and cannot be regarded as of universal application. In fact in *Sundar Koer* v. *Rai Sham Krishen* (5), the last two precedents were distinguished by their Lordships of the Privy Council on the ground that in those cases the borrower was a "disqualified proprietor" under the Oudh Land Revenue Act 1876, and his estate was under the management of the Court of Wards and that this circumstance created a peculiar disability in him so that, having regard to these circumstances, the lender was in a position to dominate his will. Thus these two cases do not help the appellants. The appellants are Jats, and it is unlikely that they would be so pliable as to easily come under the influence of the defendants who are Mahajans. Time was when Courts of justice, in their solicitude to protect the mortgagors from the cupidity of grasping money-lenders, were disposed to reduce the rate of interest if it appeared to be exorbitant, but the tendency of the latest pronouncement of their Lordships of the Privy Council seems to be that, unless the mortgagor can clearly bring his case within the four corners of S. 16, Contract Act, the parties must be held to be bound by the terms of their contract as embodied in the mortgage, however harsh such terms might appear to be: vide *Aziz Khan* v. *Duni Chand* (6) and *Balla Mal* v. *Ahad Shah* (7).

In these cases the rate of interest was respectively 25 per cent and 30 per cent compoundable yearly, and was held to be enforceable. Their Lordships have very clearly laid down that a transaction though improvident, and even harsh, should be enforced unless it is established that the money-lender, by taking unfair advantage of his position, had secured an unconscionable bargain for himself from the borrower by dominating his will. Cases might arise when originally a small sum was advanced, but by accumulation of interest it has swelled up to a very large sum; but, as pointed out by their Lordships of the Privy Council in *Balla Mal* v. *Ahad Shah* (7) we should look at the transaction at its inception and see if at that time it was so hard and unconscionable that a Court of Justice would not enforce it. The mere fact that interest has accumulated as a result of the efflux of time coupled with default of payment of interest on the part of the mortgagor cannot be a defence which the mortgagor can validly raise in order to ask the Court to reduce the amount claimed by the mortgagee. To the same effect is the case reported in *Khote Ram* v. *Nawaz* (8) where *Aziz Khan* v. *Duni Chand* (6) and *Ball Mal* v. *Ahad Shah* (7) are referred to and applied. The result is that merely because the sum originally advanced by the mortgagees has swelled up to a very high figure does not constitute a valid ground which would justify a Court of Justice in cutting down the rate of interest. We may also point out that the stipulated rate of interest is by no means unusual. In fact it works out to be lower than Rs. 24 per cent per annum compound interest with yearly rests.

As regards the third point, the condition that if the entire amount of the mortgage money with interest was not paid within two years, the mortgagees would become absolute owners of the property is not by any means illegal. It is merely a mortgage by conditional sale. In the Provinces where the Transfer of Property Act (4 of 1882) is in force, a mortgage by conditional sale is distinctly recognised by the legislature. At the time when the document in suit was executed there was nothing illegal or improper in introducing this term into a mortgage bond.

As regards the fourth point, Cl. 4 of the bond provides that the whole of profits from the mortgaged land which may accrue after payment of revenue and the village cesses shall be credited towards interest. Along with the mortgage bond in suit the mortgagors had executed a kabuliat under which they were let into possession as lessees and after paying the Government revenue they were to pay a sum of Rs. 300 and afterwards Rs. 200 a year as rent to the mortgagees. There is nothing hard or unconscionable in this arrangement. On the other hand, it is a very common method employed by mortgagees in order to ensure the regular

(5) [1907] 34 Cal. 150=34 I. A. 9=5 C. L. J. 106 (P. C.),
(6) A. I. R. 1918 P. C. 48.
(7) A. I. R. 1918 P. C. 249.
(8) A. I. R. 1924 Lah. 21=4 Lah. 76.

payment of interest. The document had been in for about 21 years, and soon after its execution the parties appeared before the revenue authorities in order to get mutation effected in favour of the mortgagees. Several kabuliats were executed by the mortgagors in favour of the mortgagees from time to time and had been more or less acted upon. We have also the fact that the plaintiffs had been repeatedly sued by the mortgagees for arrears of kabuliat money and decrees were passed against them, sometimes ex parte and at other times on contest and throughout these proceedings and transactions the plaintiffs or their predecessors never raised any protest that the document in suit had been obtained by fraud or undue influence and was without consideration. Some oral evidence has been produced on behalf of the plaintiffs to show that at the time of the execution of the mortgage bond in suit there was a famine and that the mortgagors were in a state of want; but this evidence is not convincing and we are not satisfied that the parties were not dealing with each other at arm's length at the time when the document in suit was executed. Having regard to all the circumstances of the case we are satisfied that the document is valid and enforceable at law. In fact the plaintiffs themselves have in the present suit sought to enforce it, although they took care to plead that only some of its terms were harsh and unconscionable and should be relieved against.

The learned counsel for the defendants-respondents has also tried to support the decree of the Court below by arguing that the finding of the trial Court on the issue of undue influence was erroneous and should have been given in his favour. This course was open to him, and we are satisfied that he has succeeded in establishing that the document was not obtained by undue influence.

A feeble attempt was made by the learned counsel for the appellants to challenge the correctness of the accounts filed by the defendants in the Court below, but, as already observed, the pleader, who represented the plaintiffs in the Court below, did not dispute those accounts and admitted their correctness. It is not open to a party in appeal to try to go behind such an admission made by his pleader who represented him in the trial Court by engaging a fresh counsel in the appellate Court, vide *Kower Narain Roy* v. *Sreenath Mitter* (9), *Rajunder Naraen* v. *Bijai Govind Singh* (10), *Bhut Nath Sircar* v. *Ram Lall Sercar* (11), *Jagapati Mudiliar* v. *Ekambara Mudaliar* (12) and *Venkata Narasimha Naidu* v. *Bhashyakarlu Nidu* (13).

This being our view, the question of limitation does not arise, and we need not express any opinion on it; though if it were necessary for us to decide the plea of limitation we should have considerable difficulty in upholding the finding of the learned District Judge on issue 6, having regard to the decision of their Lordships of the Privy Council in *Jafri Begum* v. *Ali Raza* (14).

The result is that I affirm the decree of the Court below and dismiss the appeal with costs.

Broadway, J.—I agree that no undue influence has been proved and dismiss the appeal with costs.

D D. *Appeal dismissed.*

(9) 9 W. R. 435.
(10) [1837-11] 2 M. I. A. 253=1 Sar 253 (P.C.).
(11) [1902] 6 C. W. N. 82.
(12) [1894] 21 Mad. 274=3 M. L. J. 40.
(13) [1899] 22 Mad. 538.
(14) [1901] 23 All. 38=28 I. A. 111=8 Sar. 27 (P. C.).

A. I. R. 1927 Lahore 752

DALIP SINGH, J.

Kanshi Ram and *others*—Defendants—Appellants.

v.

Ralla Ram and *others* — Plaintiffs—Respondents.

Second Appeal No. 618 of 1927, Decided on 20th June 1927, from decree of Addl. Dist. Judge, Lyallpur, D/- 24th November 1926.

Civil P. C., O. 2, R. 2—The rule does not bar a suit on different cause of action.

When a suit for possession *qua* certain land has failed and a fresh suit for redemption is brought, the suit is not barred, the cause of action not being the same. [P 753 C 1,2]

Dev Raj Sawhney for Appellants.

Tirath Ram—for Respondents.

Judgment.—The facts of this case are given correctly in the judgment of the trial Court as conceded by the counsel on both sides *qua* the point as to whether this suit is barred by O. 2, R. 2, Civil P. C. They are as follows:

Four persons were equally related to each other:

Hari Ram	Ghausi	Har Dhian	Gur Dhian
Successor-in-interest Jawahir, died childless.		Successors-in-interest are the plaintiffs in the suit.	Successors-in-interest were Mewa, and Sewa who died childless.

Successor-in-interest, Bura Mal

'Successors-in-interest are the present defendants.

The land of Mewa and Sewa was mortgaged by Mewa to Bura Mal on 1st August 1879. Mewa and Sewa died. The land remained with Bura Mal. One-third share of Mewa and Sewa devolved on Jawahir. Jawahir alienated certain property (the mortgaged land of Mewa and Sewa being specifically excluded) by sale to the plaintiff's predecessors-in-interest on 5th April 1888. A suit was brought by Bura against the vendee and his tenant for possession on the ground of ownership and as mortgagee. It was held that Jawahir had abandoned his interest in the land before the sale and, therefore, the vendee had got no title to possession and the suit was decreed. Jawahir died and the plaintiffs' predeces ors-in interest, sued for possession of certain property which formed a portion of the property about which the previous suit had been brought by Bura Mal. The suit came to the Chief Court and was dismissed on the ground that the previous suit was a bar to this suit.

Now the plaintiffs have brought a suit for redemption of their share of the land which was mortgaged by Mewa and Sewa to Bura Mal. In their plaint they specified the shares in the khata numbers which they alleged had been mortgaged and the amount payable for redemption.

The trial Court decreed the suit.

The appellate Court dismissed the appeal and stated expressly that the only point argued before it was that the suit was barred by O 2, R. 2. It held that it was not so barred.

In second appeal it is again urged that the suit is barred by O. 2, R. 2. I am unable to see how this can possibly be so. The plaintiffs could not sue for possession purely on the ground of being heirs of Jawahir *qua* this property. They have now not brought a suit for possession, but a suit for redemption and, therefore, the cause of action is not the same Counsel has cited *Darlari Lal* v. *Golind Saran* (1), *Muhammad Hafz* v. *Muhammad Zakariya* (2), and *Mu ti* v. *Bhola Ram* (3). None of these cases seems to me to have any bearing on the question now in issue. I, therefore, repel this contention (The judgment then discussed other matters not necessary for this report and dismissed the appeal.)

N.K *Appeal dismissed.*

(1) A. I. R 1924 All. 902=46 All. 822.
(2) A. I R. 1922 P. C. 23=44 All. 121=49 I. A. 9 (P. C.).
(3) [1894] 16 All. 165=(1894) A. W. N. 65 (F. B.).

A. I. R. 1927 Lahore 753

DALIP SINGH, J.

Nizam Din and *others*—Defendants—Appellants.

v.

Ali Mohammad and *others*—Plaintiffs—Respondents.

Second Appeal No. 2144 of 1925, Decided on 1st November 1926, from decree of Addl. Dist. Judge, Lahore, D/- 9th October 1925.

Adverse possession—Constructive possession—Trespasser in possession of a larger plot comprising plot in dispute—Assertion of title over the whole plot—Adverse possession over the smaller plot in question can be claimed

Though ordinarily speaking the doctrine of constructive possession cannot be used in favour of a trespasser, nevertheless, in a case where the plot in dispute forms part of a larger plot with defined boundaries over which larger plot there have been physical acts of ownership in portions and where there has been an assertion of title over the whole plot throughout, such circumstances are relevant evidence as to the possession of the waste land : 15 *Mad.* 101 (*P. C.*) and 16 *I. C.* 39, *Foll.*

[P 754 C 2]

Niaz Mohammad and *Syed Mohsin Shah*—for Appellants.

Zafrulla Khan—for Respondents.

Judgment.—These four connected appeals can be disposed of in one judgment. The short point for decision in the case is whether adverse possession can be established over a piece of waste land when such waste land forms part of a plot of land with defined boundaries over other portions of which acts of ownership have undoubtedly taken place and where there has been an assertion of right qua the whole land.

The plots in dispute form part of an area known as Takya Patrangan. The plan shows that the whole of this plot is bounded on the west by the wall of the cemetry, on the east by the Grant Trunk Road, on the south by a shara-i-am and the property of one Maula Bux and on the north by the cemetery referred to above. It seems to me clearly enough to be a plot with defined boundaries. It is not necessary that a defined boundary must be a hedge. It is sufficient if the boundary is such as is plainly visible or perceivable by an ordinary person. The plot in question satisfies this condition. The whole plot was entered in the revenue papers as shamilat deh, but in the possessory column the names of four persons, Mauj Din, Ghamman, Wali and Jhandu were shown in possession in equal shares as ghair dakhilkar. Portions of this plot have been from time to time alienated by these persons or their representatives.

In 1914 the shamilat was partitioned and the present plots in dispute fell to various persons now defendants. In 1885 Mauj Din had mortgaged a small plot to Bishan Singh. Allah Bux, zaildar and Muhammad Bux, lambardar, members of the proprietary body, sued Bishan Singh and obtained a decree under S. 9, Specific Relief Act. The predecessors of the plaintiffs then sued Allah Bux and Muhammad Bux and claimed that they had rights of ownership over the whole plot known as Takya Patrangan. This suit was decreed on 11th May 1887. The present defendants were certainly not parties, but it is clear enough that to the knowledge of the proprietary body the plaintiffs in the present cases were asserting ownership over the whole plot. In second appeal before me it has been urged that the learned District Judge, who gave no finding as to the proprietary title in the whole of the takya, was in error in holding that adverse possession over the plots now in dispute had been acquired by the present plaintiffs. The argument is that the plots now in dispute formed a piece of waste land and that constructive possession can only apply to the case of a person with title and cannot apply to a case where the person has no title, but claims solely on the strength of adverse possession. Now, in *Sivasubramanya* v. *Secretary of State* (1) and in appeal from that case to the Privy Council reported as *Secretary of State* v. *N. S. Subramania Tevar* (2) and *Shiddheswari Dasya* v. *Shashi Bhushan* (3), a Division Bench ruling of the Calcutta High Court. it was pointed out that though ordinarily speaking, no doubt, the doctrine of constructive possession cannot be used in favour of a trespasser, yet nevertheless in a case where the plot in dispute forms part of a larger plot with defined boundaries over which larger plot there have been physical acts of ownership in portions and where there has been an assertion of title over the whole plot throughout such circumstances are relevant evidence as to the possession of the waste land : In *Sivasubramanya* v. *Secretary of State* (1) it was pointed out that the persons then claiming possession had throughout asserted their ownership and had exercised such acts of dominion over the property as the property was capable of bearing. Similarly, here the present plots may have lain waste, but the predecessors of the present plaintiffs purported to mortgage the whole of the plots and purported to sell portions of the whole plot and, therefore, it can fairly be held that they had an animus possidendi even over the plots now in dispute and I, therefore, hold that the learned District Judge was right in holding that the plaintiffs had acquired title by adverse possession over the plots now in dispute. This is sufficient to dispose of all the appeals, but it should also be pointed out that in the appeal of Muhammad Shafi against Ghulam Mohammad and another the learned District Judge held that the appeal had abated, and as this was a suit for redemption, and Ghulam Mohammad had obtained a decree for redemption of the whole, it follows that the appeal had abated in toto. The learned District Judge refused to set aside the abatement and the point has not even been urged in the grounds of appeal before me, that the learned District Judge was wrong in his decision. It follows, therefore, that in that appeal, which is by Muhammad Shafi, the appeal to this Court must, in any event, fail.

The result is that the appeals fail and I dismiss them with costs.

G.B! *Appeal dismissed.*

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(1) [1886] 9 Mad. 285.

(2) [1892] 15 Mad. 101=18 I. A. 149=6 Sar. 74 (P. C.).

(3) [1912] 16 I. C. 39.

A. I. R. 1927 Lahore 755

TEK CHAND AND AGHA HAIDAR, JJ.

Ram Singh—Plaintiff—Appellant.

v.

Ganga Ram and *others*—Defendants—Respondents.

First Appeal No. 252 of 1923, Decided on 9th May 1927, from preliminary decree of Sr Sub-Judge, Amritsar, D/- 26th October 1922.

(a) *Contract Act, S. 74—Compound interest.*

The mere fact that compound interest is provided for in the document sued upon is no ground for cutting it down to simple interest : *A. I. R.* 1918 *P. C.* 48 ; *A. I. R* 1918 *P. C.* 249 and *A. I. R.* 1927 *Lah.* 445, *Foll.*

[P 755 C 2]

(b) *Hindu Law—Debts—Antecedent debt.*

The family property is liable when the father has contracted the debt for the satisfaction of an antecedent debt ; 46 *All.* 95 (*P. C.*), *Foll.*

[P 756 C 1]

Kishan Dial and *Bishan Narain*—for Appellant.

Agha Haidar, J.—This appeal arises out of a suit brought on foot of a mortgage dated 14th August 1911. The suit was brought within 12 years.

The learned Judge of the trial Court substantially decreed the claim but he did not allow compound interest either at the rate of 13 annas per cent. per mensem or at the slightly enhanced rate of Re. 1 per cent per mensem. He has allowed interest only at the Court rate of 6 per cent per annum from the date of the expiry of the period of grace, instead of the contractual rate. He has further declined to give a personal decree against defendants 4 and 5 on the ground that they were minors at the date of the mortgage in suit. Furthermore he did not give a personal decree against Manak Chand, defendant 5, because in the opinion of the learned Judge he did not "acknowledge" the debt within six years after the mortgage. The plaintiff being dissatisfied with this decree has come up to this Court in appeal.

The learned Judge of the Court below was not justified in cutting down the condition as to compound interest with six-monthly rests. The law on the subject has now been put beyond all possibility of doubt and we have got recent authorities of this Court where compound interest has been allowed at higher rates than those claimed by the plaintiff in the present case. The attention of the Court is invited to *Aziz Khan* v. *Duni Chand and others* (1), and *Balla Mal* v. *Ahad Shah* (2). In three recent cases of this Court civil appeals Nos. 2294 of 1925, *Mangat Rai* v. *Babu Singh* (3) and *Risal Singh* v. *Manohar Lal* (4), the point is fully discussed and it is laid down that the mere fact that compound interest is provided for in the document sued upon is no ground for cutting it down to simple interest.

This being so the judgment of the learned Judge is erroneous in so far as it has refused the plaintiff compound interest at the rates stipulated in the mortgage-deed in suit. The interest would accordingly be calculated at the rate of 13 annas per cent per mensem compoundable six-monthly for the first two years and at the rate of Re. 1 per cent per mensem compoundable six-monthly for the period after the expiry of the first two years. This latter rate of interest would be calculated not only up to the date of the institution of the suit but also up to the date of the decree and further on up to the date on which the period of six months' grace would expire. After the expiry of the period of grace and up to the date of actual realization, the rate of interest will be calculated at the Court rate of 6 per cent per annum.

As to the question of exempting the minors from personal liability, it is frankly admitted by the learned advocate for the plaintiff that his client never intended that the decree should be executed against the person of any one of these minors. All that was intended was that the whole family property including the interest of the minors, should be liable for the satisfaction of the decree which might be obtained by the plaintiff in the present suit. It may be noted that the mortgage was executed in this case in order to pay an antecedent debt in the shape of a prior mortgage in favour of one Phalla Mall and the whole of the mortgage money which was borrowed, i. e. Rs. 6,300, was to be paid in satisfaction of that antecedent debt. Now, the law on this point has been definitely settled by their Lordships of the Privy Council in the leading case of

(1) A. I. R 1918 P. C. 48.
(2) A. I. R. 1918 P. C. 249.
(3) A. I. R. 1927 Lah. 445.
(4) A. I. R. 1927 Lah. 748.

Brij Narain v. *Mangal Prasad* (5). After this pronouncement which lays down the law once and for all for the guidance of the Courts in India, it is settled beyond all doubt that the family property is liable when the father has contracted the debt for the satisfaction of an antecedent debt. This being so the whole of the family property would be liable for the satisfaction of the decree obtained by the plaintiff on the foot of the mortgage in suit.

The question of "acknowledgment" which had been raised in the Court below and was argued before us in appeal also loses its importance so far as the minors are concerned for the whole family property is liable But it still retains its importance *qua* the actual executants of the mortgage bond who were majors at the time. There can be no doubt that p. 4 and p. 6 contain clear and definite acknowledgments of the debt and the liability flowing from it. It is signed by Ganga Ram and Ghoni Lal both and Ghoni Lal is personally liable for the debt.

Under these circumstances the plaintiff would be entitled to proceed against the persons of one of the actual executants of the mortgage bonds in suit namely, Ghoni Lal. It may be noted here that Ganga Ram, the father of the family, has died during the pendency of the appeal. As his legal representatives were already on the record it was not necessary for the appellant to take any formal proceedings as regards his representation.

The result is that I would allow the appeal, modify the decree of the Court below and in lieu thereof substitute a decree in the light of the observations made in this judgment. As the appeal has substantially succeeded the appellant would be entitled to the costs of this appeal. Let a decree be prepared in terms of O 34, R. 4 Civil P. C.

Tekchand, J.—I agree.

D.D. *Appeal allowed.*

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(5) A. I. R. 1924 P. C. 50= 46 All. 95=51 I. A. 129 (P. C.).

* A. I. R. 1927 Lahore 756

JAI LAL, J.

Mihyan Mal and *another*—Defendants—Appellants.

v.

Piran Ditta and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 25 of 1927, Decided on 21st April 1927, from decree of Dist. Judge, Gujranwala, D/- 1st October 1926.

* *Pre-emption—Vendee, a cosharer by virtue of a prior sale, not pre-empted till the date of second sale—Although first sale, is pre-empted at the time for pre-empting second sale, vendee can successfully resist the suit.*

Where the defendant-vendee was a proprietor in the village on the date of the sale in suit by virtue of the previous sale which had been successfully pre-empted on the date of the second suit but was so pre-empted after the second sale, the defendant-vendee has equal rights of pre-emption with the plaintiff and the latter's suit must therefore fail : *A. I. R.* 1923 *Lah.* 520 and *A. I. R.* 1925 *Lah.* 202, *Foll* ; 25 *P. R.* 1903, *not Foll.* [P 757 C 1]

G. C. Narang—for Appellants.

M. L. Puri—for Respondents.

Judgment.—This judgment will dispose of Civil Appeals Nos. 25 and 26 of 1927, the same point being involved in both. On 12th June 1924, Mihyan Singh and Arjan Singh purchased 2 kanals of land from one Karam Singh and a mutation was sanctioned in their favour on 23rd March 1925. Then, on 23rd June 1924, the same vendee purchased another area of 87 kanals 4 marlas by means of a registered sale-deed from the same vendor. Piranditta, respondent, thereupon instituted a suit for the pre-emption of the sale of 23rd June 1924 on the ground that he was a cosharer in Khewat No. 91, 83 kanals 4 marlas of land then sold being comprised in that khewat. One of the pleas of the defendant-vendee was that Piranditta's right to pre-empt was not superior to his as, by virtue of the purchase of the 2 kanals of land on the 12th June 1924, he (the vendee) had also become a cosharer in Khewat No 91, the 2 kanals of land then sold also being comprised in that khewat number. The plaintiff thereupon instituted a suit for pre-emption of the sale of 12th June 1924 also. Both these suits have been decreed by the Courts below. The vendee is the appellant before me.

The only question involved in these second appeals is whether under the circumstances the defendant-vendee can suc-

cessfully contest the right of the plaintiff to pre-empt the sale of 23rd June 1924, by virtue of his being a cosharer in Khewat No. 91 under the sale of the 12th June 1924, which has been successfully pre-empted by Piranditta. The learned District Judge has followed *Kalu* v. *Bhupa* (1), *Zahar Khan* v. *Mustjab Khan* (2), *Kehr Singh* v. *Mahman Singh* (3), in support of his view In the last of these cases which was decided by a single Judge of the Chief Court of the Punjab it was held that a vendee who, by reason of a prior purchase, had become a land-holder in the village and as such was competent to resist the claim of a pre-emptor with respect to a subsequent purchase, cannot, if in a pre-emption suit he loses the first bargain, retain the subject-matter of the second bargain. But in at least two later judgments cited by the counsel for the appellant a contrary view has been taken. Reference may be made to *Hadayat Ullah* v. *Ghulam Muhammad* (4), where Campbell, J., held that a successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale, but from the date of which he enforces his rights, that is, from the date on which he satisfies the condition of the decree and brings it into operation, and consequently that the word "owner" has not been qualified by the Punjab Pre-emption Act so as to mean a person who is not in danger of losing his ownership right at the suit of a pre-emptor. *Kehr Singh* v. *Mahman Singh* (3) was considered by the learned Judge and not approved, and a pre-emption suit brought almost under circumstances similar to those in the present case was dismissed. In *Nadir Ali Shah* v. *Wali* (5), a Division Bench of this Court held that, where the defendant vendee was a proprietor in the village on the date of the sale in suit by virtue of the previous sale which had been successfully pre-empted on the date of the second suit but was so pre-empted after the second sale, the defendant-vendee had equal rights of pre emption with the plaintiff and that the latter's suit must, therefore, fail. The facts in that case were also similar to the present one and the law laid down there fully governs the present case.

I am aware of the dictum that it is open to a vendee to defeat the claim of pre-emption by any legitimate device as it has often been remarked, that pre-emption is an unreasonable clog on the right of freedom of contract. Still, if the view that has been taken in the cases which I have followed is correct, the right of pre-emption is bound to become practically a dead letter and title, which is liable to be displaced, has been placed on the same footing as indefeasible title. Personally I feel some hesitation in endorsing the view taken in these two cases, but am bound to follow the judgment of the Division Bench in *Nadir Ali Shah* v. *Wali* (5), and the opinion of Campbell, J., is entitled to great weight. I must, therefore, accept this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

G.B. *Appeal accepted.*

(1) [1893] 30 P. R 1893.
(2) [1899] 55 P. R. 1899.
(3) [1908] 25 P. R. 1908=51 P. W. R. 1908=128 P. L. R. 1908.
(4) A. I. R. 1923 Lah. 529.
(5) A. I. R. 1925 Lah. 204=5 Lah. 486.

A. I. R. 1927 Lahore 757

BROADWAY AND SKEMP, JJ.

Ghansham Das—Plaintiff—Appellant.

v.

Anant Singh and *others*—Defendants—Respondents.

First Appeal No. 2140 of 1922, Decided on 2nd May 1927, from decree of Senior Sub-Judge, Mianwali, D/- 31st May 1922.

Religious Endowment—Property acquired by sadhu passing to chela—It is religious property in chela's hands.

If a sadhu acquires property and does not devote it to religious purposes, he remains absolute arbiter of the disposal of the property, but if the property has once passed to a chela, in virtue of his being chela it is only reasonable to hold that the chela must treat the property as religious : 156 P. R. 1899 and 1 Lah. 545, *Foll.* [P 758 C 2]

Hargopal and *Jagan Nath Bhandari* for *Lala Badri Das*—for Appellant.

Jagan Nath Aggarwal and *Lal Chand*—for Respondents.

Skemp, J.—The suit out of which this appeal has arisen was lodged owing to proceedings under the Charitable and Religious Trusts Act (14 of 1920).

Two persons named Jit Singh and Das Ram made an application under S 4 of that Act setting forth that certain property belonged to a Dharamsala at

Bhakhar and praying that accounts should be taken. The Court directed that accounts should be taken and thereafter the present appellant Bhai Ghanshyam Das, lodged a suit for a declaration that the property in question, which was detailed in the plaint was his private property and that he was not liable to render accounts. The plaintiff who described himself as chela of Bhai Ram Chand, a fakir sewapenthi, relied upon a will executed by Ram Chand. The defendants admitted the detail of the property and the factum of the will, but pleaded that it merely made the plaintiff manager of the dharmsala and of its property. The Subordinate Judge framed a single issue, whether the plaintiff was the absolute owner of the property in dispute. He found that the property belonged to the dharmsala and dismissed the suit. The plaintiff has appealed and the question for determination in appeal is the same as in the lower Court.

The first Mahant of the dharmsala in question was Kishan Das. He was succeeded by Hardial Singh and Hardial by Ram Chand. In each case the succession was from Mahant to chela. A short time before his death Ram Chand executed a will naming Ghanshyam Das as his successor. The whole scheme of the will was to appoint Ghanshyam Das Mahant and as such manager of the property attached to the shrine. The will began by setting forth that Ram Chand was Mahant and that there was property attached to the dharmsala. Ram Chand had four chelas, of whom three were unsuitable for various reasons and Ram Chand appointed Ghanshyam Das to be Mahant and Gaddi Nashin. A passage relied upon by the appellant runs :

> After my death Ghanshyam Das shall be entitled to realize the income of my property and to spend it according to the prevailing practice;

but the very next sentence is that Ghanshyam Das shall not be entitled to incur excessive expenses detrimental to the dharmsala. Ghanshyam Das was directed to carry out all duties towards the dharmsala like previous Mahants and to do everything in accordance with past and present practice. He was vested with all the rights that the testator enjoyed and declared to be the owner of any other property which Ram Chand might acquire.

The property in suit falls mainly into two classes: (1) three wells with land attached and (2) house and shop property in Bhakkar. The first well was made about the year 1838 by the Sikh Kardar at his own expense for supply of water to travellers and ultimately gifted by senkalp to the first Mahant, Kishan Das. The second well was sunk about ten years later and given to Kishan Das by way of dharmarth. The third well is the earliest in point of time being sunk about 1818 by Kishan Das himself. It is called dharamsalawala. The house property was mostly acquired by the testator Ram Chand during his lifetime and most of it is in the immediate vicinity of the dharmsala which apparently Ram Chand wished to extend.

Now there is not the slightest doubt that the well made by or gifted to Kishan Das must be regarded as property belonging to the shrine. In *Ram Singh* v. *Nihal Singh* (1), Powell J. wrote :

> No one would have any doubt that if a sadhu acquires property, and does not devote it to religious purposes, he remains absolute arbiter of the disposal of the property, but if the property has once passed to a chela, in virtue of his being chela to the exclusion of natural heirs, it certainly would be only reasonable to hold that the chela must treat the property as religious.

This passage was quoted with approval in *Indar Singh* v. *Fateh Singh* (2).

Mr. Hargopal, who appeared for the appellant, urged that these cases were distinguishable because there were natural heirs. The Mahants of the dharamsala in question are sewapanthis, a celibate order (explanation in Volume 3 of Rose's Glossary of Punjab Tribes and Castes). The Mahants being celibates there could be no question of natural heirs and as already noted succession in each case has been to a chela.

As to the other property acquired by Ram Chand, it was alleged that none of the documents on the record make any reference to holding the property in trust for the dharamsala and that they may be read as if Ram Chand had bought in his own name. It is here that the construction of the will becomes so important; it is incapable of any construction except that Ram Chand was endeavouring to find the best possible Mahant among his chelas who would manage the dharmsala and its affairs.

(1) [1889] 136 P. R. 1889.
(2) A. I. R. 1921 Lah. 337=1 Lah. 540.

The appellent's counsel referred to *Jamiat* v *Raji* (3), *Gurdit Singh* v. *Sher Singh* (4), and *Ranchordas* v. *Parvati Bai* (5). The two last-mentioned rulings dealt with the creation of trusts for dharm or dharmarth by will, which were held to be invalid for vagueness and have no bearing on the present question. But in *Jamiat* v. *Raji* (3), the custodian of a shrine was held to be the private owner of property gifted to him as dharmarth. If this view be correct it may be distinguished on two grounds : (1) that the gift was made to the custodian himself and not to his predecessor, and (2) in that case the donee was held to be the custodian of a shrine and not one of the members of a religious fraternity while as already noted these Mahants were sewapanthis, of whom Mr. Ross said : "They are celibates and eat and share together." It would be difficult for a member of a sect of this kind who is supposed to have renounced the world to acquire property of his own distinct from the institution which he serves.

Another way of looking at the matter is that the plaintiff, on whom the onus lies bases his title on a will which begins by setting forth that the dharamsala owns property. The plaintiff has claimed the entire property attached to the dharmsala and has denied that the dharamsala has any property of its own. He has produced only one witness, Bogha Ram, who supports this contention. On the other hand his own witness Khan Chand states that the property attached to the dharamsala cannot be sold without necessity, and Lala Moti Ram, an Honorary Magistrate of Bhakkar who attested the will, gives a history of the shrine which shows that the earlier Mahants were religious men who abandoned their families and became sadhus. None of them he said, could sell the property attached to the dharamsala for his personal requirements. He said that the present dispute had arisen because Ghanshyam Das had taken to himself a goldsmith woman.

It hardly seems necessary to notice authorities that moneys saved from the income of the shrine should be spent on the shrine. In my opinion the plaintiff has failed to discharge the onus of proving that the property set forth in the plaint is private property, and I would dismiss the appeal with costs.

Brodway, J—I agree.

D.D. *Appeal dismissed.*

(3) [1919] 109 P. R. 1919=53 I. C. 577.
(4) [1912] 78 P. R. 1912=106 P. L. R. 1912=14 I. C. 247=63 P. W. R. 1912.
(5) [1899] 23 Bom. 725=26 I.A. 71=7 Sar. 543 (P. C.).

A. I. R. 1927 Lahore 759

ZAFAR ALI, J.

Lal Singh and *others*—Plaintiffs—Appellants.

v.

Wadhawa and *others*—Defendants—Respondents.

Second Appeal No. 792 of 1926, Decided on 22nd Dec. 1926, from decree of Dt. Judge, Gurdaspur, D/- 15th Dec. 1925.

Limitation Act, S. 28—Non-payment of rent—Landlord and tenant—Adverse possession.

If a tenant pays no rent, it does not follow therefrom that he is in adverse possession.

[P 759 C 2]

Fakir Chand—for Appellants.

Mahomed Azim Khan—for Respondents.

Judgment.—The land in dispute, only 11 marlas in area, is a portion of the shamilat of the village and bears 13 mango trees. The revenue record of 1910-11 shows that it was in the occupation of Kahna, sweeper, as a tenant, but he paid no rent. The defendants are sons of Kahna and they, like their late father, paid no rent. In answer to the suit brought by the proprietors of the village for possession of the plot these sons of Kahna pleaded that they had been in possession for 60 years as owners and not as tenants. The trial Court decreed the plaintiffs' suit, but on appeal the learned District Judge dismissed it, holding that defendants' possession had been adverse for upwards of the statutory period as they had paid no rent during the past 35 years.

Now it is clear that, if a tenant pays no rent, it does not follow therefrom that he is in adverse possession. Presumably, the proprietors in the present case allowed Kahna to enjoy possession of this small plot of land without paying any rent because he was a village menial and served them as such. There was nothing to indicate that Kahna's possession was adverse to the proprietors.

I, therefore, accept the appeal, set aside the order of the lower appellate Court

and restore that of the trial Court. The defendants will pay plaintiffs' costs throughout.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 760 (1)

JAI LAL, J.

Punjab Sind Bank Ltd., Gujranwala—Plaintiff—Appellant.

v.

Kanshi Ram and *another*—Defendants—Respondents.

Misc First Appeal No. 2899 of 1926, Decided on 20th March 1927, from order of Sr. Sub-Judge, Gujranwala, D/- 31st Augst 1926.

Civil P. C., O. 41, R. 5—Final mortgage-decree passed — Appeal from preliminary decree pending — Trial Court cannot suo motu stay execution.

After the final decree for sale is passed, the trial Court has no jurisdiction suo motu to stay the sale of the property which is directed to be sold by virtue of the final decree on the ground that an appeal is pending from the preliminary decree. [P 760 C 1, 2]

Man Singh and *Sunder Singh* - for Appellant.

Jagan Nath Aggarwal — for Respondents.

Judgment.—In a suit for sale of mortgaged property a preliminary decree was passed under O. 34, R. 4 and on failure of the judgment-debtor to comply with its terms a final decree has been passed. In the meantime the decree-holder-mortgagee has filed an appeal in this Court in so far as a certain relief claimed by him was not granted by the trial Court. It also appears that another mortgagee, who apparently has been held to be a puisne mortgagee as compared with the decree holder but who claims to be a prior mortgagee, has also appealed from the preliminary decree. No order staying further proceedings after the preliminary decree was obtained from this Court and consequently the trial Court rightly passed the final decree. But on 31st August 1926, the Senior Subordinate Judge passed a curious order, apparently suo motu that the decree-holder has admittedly preferred an appeal from the order in question. Hence he should still wait for decision of the appeal. The execution case be consigned to the record room at present.

After the final decree was passed the lower Court had no jurisdiction to stay the sale of the property which was directed to be sold by virtue of the final decree. The learned counsel for the respondents-judgment-debtors has frankly admitted before me that he cannot support the view of the learned Senior Subordinate Judge but it is alleged that it is the other mortgagee in whose interest the stay of the sale has been ordered but there is no appearance on his behalf before me. The order of the lower Court cannot be defended on any ground whatsoever and must, therefore, be set aside, but there is nothing on the record to show that any of the other parties concerned moved the Court to stay the sale, and I am, therefore, unable to grant any relief to the decree-holder by way of costs of these proceedings.

I accept the appeal, set aside the order of the trial Court and direct the Senior Subordinate Judge to proceed with the sale of the property in accordance with law.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 760 (2)

SHADI LAL, C. J. AND JAI LAL, J.

Hira Singh—Defendant—Appellant.

v.

Tara Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 849 of 1923, Decided on 22nd April 1927, from decree of Dist. Judge, Amritsar, D/- 19-3-1923.

Custom—Punjab — Sale of ancestral land—Valid necessity.

Where the sale consideration was the amount due on previous mortgages and two of the sons of the alienor had joined in the sale wherein previous mortgages were admitted and these mortgages had existed for more than 16 years and had not been challenged in the meantime,

Held: that the sale must be deemed to be for valid necessity. [P 761 C 1]

Shamair Chand—for Appellant.

Govind Ram Khanna — for Respondents.

Jai Lal, J.—This is an appeal against a declaratory decree passed by the District Judge of Amritsar to the effect that the sale of ancestral land made by Katha Singh and his two sons Ujagar Singh and Saudagar Singh for Rs. 1,000 on 21st May 1914, shall not affect the reversionary rights of the plaintiffs. The plaintiffs are the two remaining sons of Katha Singh and a son of Saudagar Singh

The consideration for the sale as recited in the deed was as follows :—

Rs. 297, on account of three mortgage-deeds, dated 18th, 19th and 21st of June 1904 respectively for Rs. 99 each executed by Katha Singh in favour of Hira Singh, the alienee.

Rs. 508 on account of interest on a book account due to the alienee.

Rs. 135 on account of interest due on a previous bond to the alienee.

Rs. 60 paid at the time of the registration of the sale-deed for household expenses.

The District Judge has held that the existence of the book account relating to the item of Rs. 508 and 135 has not been proved and that the necessity for Rs. 60 also has not been proved. These are findings of facts which cannot be attacked on second appeal.

With regard to the item of Rs. 297, however, the District Judge has held that this item did not constitute a valid necessity as no independent evidence was produced in the present suit to prove that the mortgages were originally created for a valid necessity. We, however, consider that having regard to the fact that two sons of Katha Singh joined him in executing the sale-deed in suit wherein the existence of the previous mortgages was admitted and that these mortgages have existed for more than 16 years and have not been challenged in the meantime, the item of Rs. 297 should have been allowed as a debt contracted for a valid necessity.

We accept this appeal and modify the decree of the District Judge to the extent that the lien of the defendant-vendee to the extent of Rs. 297 on the land sold is maintained. The appeal is dismissed in other respects. Parties shall bear their own costs throughout.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 761

ADDISON, J.

Ganga Ram and *another*—Plaintiffs—Appellants.

v.

Ram Sukh and *others*—Defendants—Respondents.

Second Appeal No. 2324 of 1926, Decided on 18th January 1927, from decree of Dist. Judge, Ferozepore, D/- 18th June 1926.

***Punjab Tenancy Act** (16 of 1887), S. 77 (3) (d) and S. 100—Suit to establish occupancy right is triable only by revenue Court—Civil Court wrongly exercising jurisdiction over it—High Court is competent to set-aside decree of civil Court or to order it to be registered in a revenue Court.*

A suit by a tenant to establish his claim to a right of occupancy falls within S. 77 (3), group (2) (d) and is exclusively triable by a revenue Court. [P 761 C 2]

Where, however, a Court of first instance or of appeal wrongly exercises its jnrisdiction in respect of such matter, the High Court is competent under S. 100 to quash the orders of such Court or to direct that any such decree be registered in a revenue Court. [P 761 C 2]

Fakir Chand—for Appellants.

D. C. Ralli for *Manohar Lal* and *Duni Chand*—for Respondents.

Judgment.—This was a suit for a declaration that the plaintiffs were occupancy tenants of 40 bighas, 2 biswas of land. The suit was dismissed with costs by the Subordinate Judge, Fourth Class, Fazilka. On appeal the learned District Judge held that the plaintiffs were occupancy tenants of 11 bighas 6 biswas and granted them a declaration to that effect. Against the decision of the District Judge both sides have appealed to this Court.

It was admitted by counsel on both sides that this was a suit by tenants to establish a claim to a right of occupancy, that it fell within S. 77 (3), Group 2 (d) Tenancy Act. It was cognizable by a revenue Court only. In these circumstances, I accept the appeals holding that the suit was cognizable by a revenue Court, and setting aside the appellate order of the District Judge under S. 100 Punjab Tenancy Act, I order that the decree of the Subordinate Judge, Fourth Class, be registered in the Court of the Assistant Collector, First Grade, Ferozepore District, as, in my opinion, there has been no prejudice caused by his trying the suit. I further direct that the memorandum of appeal presented to the District Judge shall be returned to the appellants there in order to be presented to the Collector of the Ferozepore District who should entertain and hear the appeal. There will be no order as to costs in this Court or in the Court of the District Judge.

J.V. *Order accordingly.*

A. I. R. 1927 Lahore 762

BROADWAY AND SKEMP, JJ.

Ram Das and *others*—Plaintiffs—Appellants.

v.

Hardyal and *others*—Defendants—Respondents.

First Appeal No. 1316 of 1922, Decided on 26th April 1927, from decree of Senior Sub-Judge, Hissar, D/- 25th April 1922.

Jurisdiction — Civil or revenue — Plaintiff claiming partition of shamilat land according to khewat—Defendant claiming it to be according to khudis—Civil Court has jurisdiction to try the suit.

Plaintiffs sought partition of a shamilat land before the revenue authorities claiming that the partition should be according to khewat. Eight of the cosharers contested the claim (the remainder admitting it), and urged that the partition should be according to khudis. The revenue officer, after an examination of the revenue records, gave effect to the contention of the contesting defendants and held that the partition should be according to khudis and referred the plaintiffs who disputed this to the civil Courts.

Held : that the civil Court had jurisdiction and the suit was within limitation : 112 *P. R.* 1919 and 98 *P. R.* 1919, *Foll.* [P 762 C 1, 2]

Nanak Chand and *Anant Ram Khosla*—for Appellants.

Nand Lal—for Respondents.

Broadway, J.—This appeal has arisen out of a suit brought by some of the proprietors of mauza Shaladheri in the district of Hissar. The facts briefly are these. Mauza Shaladheri is a becharagh village and is owned by the owners of patti Datta and patti Sishi Pana Bola. The entire land in mauza Shaladheri is shamilat. The plaintiffs sought partition of this shamilat land before the revenue authorities claiming that the partition should be according to khewat. Eight of the cosharers contested the claim, (the remainder admitting it), and urged that the partition should be according to khudis. The revenue officer, after an examination of the revenue records gave effect to the contention of the contesting defendants and held that the partition should be according to khudis and referred the plaintiffs who disputed this to the civil Courts.

At the trial of the case the contesting defendants fought the case on its merits and also pleaded that the civil Courts had no jurisdiction and that the suit was barred by limitation. The trial Court came to the conclusion that it had jurisdiction and that the suit was within limitation, but dismissed the plaintiffs' suit on the merits. Against this dismissal of their suit the plaintiffs have preferred this appeal and on their behalf Mr. Nanak Chand has been heard. So far as the questions of jurisdiction and limitation are concerned, I consider that the first, that of jurisdiction, is disposed of by the decision in *Chhajju* v. *Dallu* (1), while the latter to my mind is concluded by *Johana* v. *Wali* (2).

Turning to the merits: it has been contended by Mr. Nanak Chand that the Court below should have sent for the revenue records. At the same time he has strenuously protested against the use made by the trial Court of the partition proceedings which led to this suit. As a matter of fact, the plaintiffs themselves filed Ex. P. 1, part of the revenue record, which clearly shows that this shamilat land was held by the various cosharers according to khudi and not according to khewat, and further that, according to revenue records when partition was desired, it should take place according to khudis. This piece of evidence is supported by Ex. D. I, which shows that the revenue had been collected according to the khudi rule and the latest batch of 1921-22 (Ex. D. 6) is to the same effect. From these documents it is clear that ever since 1891, at any rate, the revenue has been collected according to khudis. Mr. Nanak Chand admits that any suit by him to have these entries in the revenue records altered would be barred by time, but has pleaded that although there is a presumption of correctness attaching to them, nevertheless the other records with the revenue authorities would afford a basis for rebutting the said presumption. It is also contended that the evidence produced by his clients supports their case. An examination of the evidence of the witnesses Ram Jas and Maya Ram does not appear to me to afford the plaintiffs any assistance. These two witnesses only depose to the manner in which the cosharers in this land arranged to put it to the best possible use, levying certain fees for grazing and for cutting wood. The third witness, Ali Muhammad, special kanungo, supports the revenue records and says that the revenue is paid according to kudhis which is in accordance with

(1) [1919] 112 P. R. 1919=53 I. C. 419.
(2) [1919] 98 P. R. 1919=53 I. C. 595.

certain statements made by the proprietors in 1909-10 at the time of the settlement. The onus of proving that the entry in question was wrong was clearly on the plaintiffs and this onus they have in my opinion failed to discharge.

I would, therefore, dismiss the appeal with costs.

Skemp, J.—I agree.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 763 (1)

ADDISON, J.

Fateh Muhammad—Applicant—Appellant.

v.

Maya Das and *others*—Creditors—Respondents.

Misc. First Appeal No. 1976 of 1925, Decided on 3rd January 1926, from an order of Dist. Judge, Jhang, at Sargodha, D/- 28th April 1925.

Provincial Insolvency Act (5 *of* 1920), *S.*27 (2) *—Court can enlarge time for application for discharge even after expiry of original time fixed.*

The fact that an application by an insolvent for extension of time within which to apply for his discharge, is made after expiry of the time fixed therefor, is not fatal to the application. *A. I. R.* 1925 *Lah* .416, *Foll.* [P 763 C 1]

Muhammad Din Jan—for Appellant.

Judgment.—Fateh Muhammad was adjudicated an insolvent on 1st March 1923, and at the same time was directed to apply for his discharge within two years. The case came on for hearing in the ordinary course on 28th April 1925, when Fateh Muhummad applied for an extension of the time within which he should apply for his discharge. The learned District Judge refused to extend the time on the ground that he could not do so as the prescribed period had expired by a few days. He, therefore, annulled his adjudication. Against this decision Fateh Muhammad has appealed.

The appeal must be accepted on the authority of *Lakhi* v. *Molar* (1) where it was held that it is not a fatal defect that the application for extension was made after expiry of the fixed date. It was further held there that S. 148, Civil P.C., established that principle and there was nothing repugnant to it in the provisions of the Insolvency Act, especially as provision for the extension of time was contemplated by S. 27 (2) of the Act. I accordingly accept the appeal ex parte and remand the case to the District Judge with a direction that he must apply his mind to the question as to whether an extension should be granted. The annulment of the adjudication is set aside. There will be no costs here as none of the creditors have appeared.

J.V. *Appeal accepted.*

(1) A. I. R. 1925 Lah. 416.

A. I. R. 1927 Lahore 763 (2)

DALIP SINGH, J.

Miss Lourie of Simla—Surety — Appellant.

v.

Stephanatos of Simla — Decree-holder —Respondent.

Misc. First Appeal No. 494 of 1927, Decided on 1st July 1927, from order of Sr. Sub-Judge, Simla, D/- 27th Oct. 1926

Registration Act, S. 17 — Security bond hypothecating immovable property upwards of Rs. 100 is compulsorily registrable.

A security bond, which was not merely a personal covenant to pay the decretal amount but which hypothecated immovable property of over Rs. 100 in value towards its payment, was executed to stay a sale in execution proceedings.

Held : that the bond was compulsorily registrable : 123 *P. R.* 1919 and 31 *Mad.* 330, *Foll.* [P 764 C 1]

Mohammad Amin Khan—for Appellant

B. Bevan Petman—for Respondent.

Judgment.—The facts of this appeal are as follows :

The decree-holder, Mr. Stephanatos, obtained a decree for Rs. 11,000 against one Mr. Lowrie in 1923. Mr. Lowrie appealed and that appeal was dismissed on 3rd February 1926. In the interval on 27th August 1923, the decree-holder took out execution and finally a notice was issued under O. 21, R. 66, Civil P. C., on 28th September 1923. An application was made for stay of sale on 9th November 1923, and the judgment-debtor was asked to give security. On 6th December 1923, a security bond was filed by Miss Lowrie, daughter of the judgment-debtor. The decree-holder raised various objections as to the possession of the property mentioned in the bond and as to the title to it. On 7th December 1923,

the Court referred the question to the Collector for report. In the meantime Mr. Lowrie died on 24th March 1924, and the execution application was dismissed in default on 20th June 1924. On 14th August 1926, the decree-holder applied for execution by attachment and sale of the security bond. The executing Court held that the bond contained a personal undertaking to pay the decretal amount and that the non-removal of the bond from the execution file showed that the surety was making a continuing offer to the decree-holder and that the decree-holder accepted the continuing offer by filing this application for attachment of property, etc., mentioned in the bond. It is difficult for me to understand how, when the appeal itself had been dismissed and when the execution application had been dismissed also, the surety could be still held to be making a continuing offer to the decree-holder.

Secondly, there is no personal undertaking to pay the decretal amount. There is a personal undertaking to pay the balance, if any, after the sale of the properties hypothecated by this bond. *Lahore Spinning and Weaving Mills Co. Ltd.* v. *Uttam Chand* (1) which follows *Nagaruru Sambayya* v. *Tangatur Subbayya* (2) is distinct authority for the proposition that such a bond must be registered.

For the above reasons I accept the appeal and set aside the order of the lower Court with costs.

J.V. *Appeal accepted.*

(1) [1919] 122 P. R. 1919=53 I. C. 463.
(2) [1908] 31 Mad. 330.

A. I. R. 1927 Lahore 764

BROADWAY AND ZAFAR ALI, JJ.

Mt. Lachmi—Defendant—Appellant.

v.

Firm Gopichand Arurchand — Plaintiffs—Respondents.

First Appeal No. 1780 of 1922, Decided on 10th November 1926, from decree of Sr. Sub-Judge, Lahore, D/- 6th May 1922.

Interest—Mother of original debtor sued —She denying claim and alleging want of notice to her—Decree for interest equal to original sum is not illegal or inequitable.

Where it was sought to recover the money from the mother of the orginal debtor and the mother clearly stated that she had no knowledge of the debt and that no demand had been made from her.

Held : **that the Court would not be acting either illegally or inequitably in giving the plaintiff a decree for interest equal to the amount of the original sum reducing the rate of interest.** [P 764 C 2 ; P 765 C 1]

Broadway, J.—This and the cross-appeal No. 2093 of 1922 arise out of a suit brought by the firm of Gopichand-Arurchand against Mt. Lachmi for a sum of Rs. 6,222. The debt has been incurred by the son of Mt. Lachmi, one Bahal Singh in 1915. Bahal Singh was murdered a year or so after that and the present suit was lodged within the period of the limitation but without any notice, in writing at any rate, being served on Mt. Lachmi. The claim was based on a bond for Rs. 1,500 bearing interest at the rate of 25 per cent. per annum with annual rests and a bahi account of Rs. 200. Mt. Lachmi denied all knowledge of the indebtedness of her son and pleaded definitely that she had not been notified of the claim. The trial Court granted the plaintiffs a decree for Rs. 1,700 as the principal and a further sum of Rs. 1700 as interest with costs in proportion. This result has dissatisfied both sides. Mt. Lachmi in her appeal claims that she ought not to be made to pay interest at all, whereas the firm of Gopichand-Arurchand claim that they should be allowed interest in full and ask for an increase of the decretal sum by Rs. 2,822.

It has been urged by Mr. Mehr Chand on the authority of a large number of rulings that the mere fact that there has been a delay in bringing a suit, or that the rate of interest appears to be large is not sufficient to warrant a Court to interfere in favour of the debtor on the question of interest unless undue influence has been established or the rate of interest could be held to be penal. With these decisions we have no quarrel. They are, however, all differentiated from the suit before us in that here it is sought to recover the money from the mother of the original debtor. The mother clearly stated that she had no knowledge of the debt and that no demand has been made from her. Arurchand is the plaintiff and had to admit that he had not given Mt. Lachmi any notice in writing, nor does he say that he made any oral demand. In these circumstances, in my judgment the Court below has not acted

either illegally or inequitably in giving the plaintiff a decree for interest equal to the amount of the original sum which I might mention is partly composed of interest as is evident from the accounts brought on the record. In my judgment the decision arrived at by the Court below is correct and I would, therefore, dismiss both appeals with costs.

Zafar Ali, J.—I agree.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 765

TEK CHAND AND COLDSTREAM, JJ.

Sher Muhammad and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 468 of 1927, Decided on 3rd August 1927, from order of Sess-Judge, Jhelum, D/- 20-4-1927.

(a) *Evidence Act, S. 30—Retracted confession—Co-accused cannot be and the maker should not be convicted.*

The rule is now firmly established that ordinarily, it is improper to use the retracted confession of an accused person against his co-accused, and that, generally speaking it is not safe to convict the maker of such a confession without corroboration in material particulars. [P 768 C 1]

(b) *Penal Code, Ss. 34 and 302—Each of the persons having common intention to rob, and if necessary to kill, is guilty of the offence committed.*

Four persons went to the house with the common intention to rob, and if necessary to kill, the inmates of the house or any other person who might raise an alarm or obstruct them in carrying out their design. In furtherance of this common intention two women were put to death.

Held : each of them was guilty of murder : *A. I. R.* 1925 *P. C.* 1, *Foll.* [P 768 C 2]

Abdul Kadir—for Appellants.

Abdul Rashid—for the Crown.

Tek Chand, J.—Four persons, Mehra and Nawab, sons of Fatta, and Sher Mohammad and Nawab, sons of Aulia, were tried by the Court of Sessions at Jhelum under Ss. 460 and 436, I. P. C., for having committed house-breaking by night, murdered two women, Mt. Sukhi and Ram Labhai, who were sleeping there, and then set fire to the house itself. Of these the learned Sessions Judge has acquitted two, viz., Nawab, son of Fatta, and Nawab, son of Aulia, and, agreeing with the unanimous opinion of the four assessors has convicted Mehra and Sher Mohammad under Ss. 302, 436 and 457, I. P. C. For the first of these offences, he has sentenced Mehra and Sher Mohammad to death and for the other two he has sentenced each of them to rigorous imprisonment for two years and three years respectively. The convicts have appealed and the record is also before us under S. 374, Criminal P. C., for confirmation of the sentence of death.

The house in question was situated in mauza Hasil and belonged to one Dial Singh, P. W. 7, who had been working as a ghee contractor in Peshawar for the last seven or eight years. He went to Peshawar a short time before the occurrence, leaving the house in charge of his widowed mother Mt. Sukhi, aged about 60 years. Mt. Sukhi being abone had asked Mt. Ram Labhai, a young unmarried girl 15 or 16 years of age, and the daughter of P. W. 4 Mt. Chanon, to sleep with her in the house. On the night between 8th and 9th December 1926, Mt. Sukhi and Mt. Ram Labhai slept in the room shown as kotha No. 1 on the plan P/P. Early next morning a little after sehri time P. W. No. 3 Budh Singh, who lived in one of the neighbouring kothas, saw thick smoke coming out of Dial Singh's house and called out to P. W. 4 Mt. Chanon that the house was on fire and that Mt. Sukhi and Mt. Ram Labhai were probably dead. Mt. Chanon went and fetched P. W. 2 Sundar Singh, a cousin of Dial Singh, who, on going to the house, found the door of the residential kotha open. The house was on fire and the smoke was so great and dense that nothing was visible. Sundar Singh, however, rushed into the kotha and noticed that the charpais where Mt. Sukhi and Mt. Ram Labhai slept were empty. He then went into the deorhi, the door of which was also open, but was unable to go further owing to the fierce fire. He, however, raised a hue-and-cry, which brought a number of persons to the spot. These persons tried to put down the fire, but the flames were too strong for them. All that they were able to do was to pull out seven or eight bags of corn that were lying in the kothri and to demolish the roof. Through the flare they noticed that a big hole had been made in one of the walls, that the whole house had been ransacked, that a number of trunks had been broken open and emptied and that the bodies of

Mt. Sukhi and Mt. Ram Labhai were burning. By sunrise they succeeded in putting out the fire, but did not think it advisible to take out the bodies and left them where they were. Sundar Singh arranged to send a wire to Dial Singh at Peshawar informing him of the catastrophe and proceeded to the police station at Niia, a distance of three miles, to make the first information report which was recorded at 11 a. m.

Sub-Inspector Mohammad Khan P. W. 26 reached the spot at about 2 p m. and after the usual formalities dispatched the dead bodies to Chakwal. Sub-Assistant Surgeon Kirpal Singh, P. W. 1, performed the post-mortem examination on 10th December, but, as the bodies were badly burnt, he could 'not ascertain the cause of death, nor was he in a position to say whether the bodies had been burnt before or after death. No marks of violence were visible nor could any wounds or bruises be recognized. In the meantime a knife, Ex. P.-6, had been taken out of the debris by Saidan, chaukidar and handed over to the Sub-Inspector on 9th December 1926. Dial Singh arrived at Hasil on 10th December 1926, and on the following day gave a list, Ex. P-F, of the stolen property, which is printed at p. 4 of the paper-book.

In the first information report Sundar Singh had suggested that Mul Singh, Feroz and Zaman were probably the culprits, as a dispute had lately arisen between Mul Singh and Dial Singh about the construction of a certain wall, in which Firoz and Zaman had sided with the former. The Sub-Inspector, on his arrival in the village on 9th December 1926, locked up the houses of these three persons, but, after enquiry, came to the conclusions that he was on the wrong track. His suspicions fell on Jiwan, chaukidar, P. W. 16, Mehra, appellant, and his brother Nawab, son of Fatta, and he arrested them. On 11th December 1926, he suspected that Sher Mohammad, appellant, had also participated in the crime and he arrested him also.

On 12th December 1926. Sher Mohammad, appellant, led the police to the bed of the Swan stream and pointed out a spot there which was dug up. From the earth was recovered a bundle containing clothes, 45 in number, which were identified by Dial Singh as belonging to him. Shortly after this recovery, at about 5 p. m. on the same after noon Mehra, appellant took the investigating party to a kotha in his house in which sheep and goats were kept and, after scratching the floor, brought out a small bundle containing a suthan (trousers)of Japan cloth in which was found wrapped up a loaded six-chambered revolver and a number of gold ornaments, a list of which will be found (Ex. P-J) printed at p. 7 of the paper-book. Most of these ornaments were found entered in the list P. F. which had been given by Dial Singh the day before, and all of these were identified on recovery by Dial Singh as belonging to him. Further investigation continued in the village and at mauza Dadhambar on 13th. The convicts were then taken to Chakwal. On the 14th and on 15th Mehra, appellant, made a confession Ex. P. W. No. 24/A, before Khan Faiz Mohammad Khan, Sub-Divisional Magistrate. The next day Sher Mohammad, appellant, was also produced before the same Magistrate and he also made a confession, Ex. P. W. No. 24/B. These confessions will be found printed at pp. 13—17 of the paper-book. Both these confessions were retracted before the committing Magistrate.

The only eyewitness to the crime produced at the trial was P. W. 3, Budh Singh, who stated that he was sleeping in the adjoining room, was roused soon after midnight by Mt. Sukhi shouting out that she heard a noise, and saw the appellants and their companions committing the crime. The learned Sessions Judge, however, did not believe the evidence of this witness, and, after going through the record and hearing the learned Government Advocate, I agree in holding that no reliance whatsoever can be placed on his testimony.

If Budh Singh's evidence is rejected, the case against the appellants rests mainly on their confessions and the recovery, at their instance, of the property belonging to Dial Singh. The appellant's learned counsel has argued : (a) that neither of the two confessions was made voluntarily, and having been retracted ought not to be used even against the person who made it ; (b) that the recovery of the articles at the instance of the appellants is evidence merely of housebreaking by night and not of murder ; and (c) that the prosecution having failed definitely to establish that the two

women were killed before being burnt, the appellants can be convicted, if at all, under S. 460 alone and not under S. 302, I. P. C.

After giving due weight to the arguments of the learned counsel and carefully examining the record, I have reached the conclusion, that there is no force in any of these contentions. I can find no warrant for the suggestion that the confessions made by the two appellants before Khan Faiz Mohammad Khan Sub-Divisional Magistrate were not made voluntarily. In his statement before the committing Magistrate Mehra admitted having made the confession, but stated that the police had beaten him and the Sub-Inspector "had told him to make that statement otherwise he would beat him again." Sher Mohammad before the committing Magistrate, denied having made the confession (P. W. No. 24-B), but before the learned Sessions Judge he stated that he was

tortured into making the confession before the Sub-Divisional Magistrate and that there was not a word of truth in it.

No evidence was led by either appellant to substantiate these allegations, nor was any suggestion made during the cross-examination of the prosecution witnesses that the police had extorted these confessions by any improper means. I, therefore, hold that both Mehra and Sher Mohammad made the confessions P. W. No. 24-A and B voluntarily.

Nor have I any doubt whatever that Mt. Sukhi and Mt. Ram Labhai were killed before the house was set on fire. It is quite true that the medical witness was not able to give a definite opinion on the point. It appears to me, however, that the offenders after killing the women set fire to the house in order to obliterate all evidence of their guilt. As pointed out by the learned Sessions Judge, had it been otherwise the two unfortunate women would have raised cries for help and could have easily crept through the door, which was admittedly found open the next morning. The charpais on which they had slept were found empty and their bodies were found burning on a heap of fire wood in the adjoining room.

In his confession before the Sub-Divisionol Magistrate, Mehra appellant stated that on the evening of 8th December 1926, Nawab, son of Fatta, and Sher Mohammad came to him and suggested that he should join in a dacoity which they had planned to commit in mauza Dabhamdar, which is a village four kos distant. After the khuftan azan Sher Mohammad, Mehra and their brothers, the two Nawabs, left for Dadhambar and reached there after the villagers had gone to sleep. There they went to the shop of a Hindu which they wanted to rob. Sher Mohammad made attempt to break open the lock, but this aroused the inmates of the house, who raised a hue-and-cry, on which the thieves ran back towards mauza Hasli. There they decided to loot the house of Dial Singh in which Mt. Sukhi was sleeping. They were armed with a pistol, a chhurra (P-2), a sambal (P-1) and a stick. Mehra stood outside the deorhi while his companions climbed the wall and went inside the courtyard and unchained the door. Mehra entered and stood in the courtyard with a loaded pistol in his hand while the others entered the kothri making a hole in the wall. This aroused the two women. A lamp was lighted and soon after Nawab, son of Fatta, caught Mt. Sukhi and Sher Mohammad caught Mt. Ram Labhai. The two Nawabs then pressed Sukhi's throat and killed her. Sher Mohammad questioned Mt. Ram Labhai as to the keys of the safes. She gave a clue to one key. They unlocked the lock of a wooden box and took out ornaments and clothes therefrom. They then opened other boxes but did not find any valuables in them. Then Sher Mohammad and Nawab, son of Aulia, pressed Mt. Ram Labhai's throat and killed her. They then tied up the clothes into a bundle and the ornaments into a potli and handed these over to Mehra. The bodies were placed on the wood-fuel in the adjoining kothri and set fire to. The party then ran towards their houses. Soon after, as the fire blazed, a clamour was raised in the village. After reaching his house Mehra buried the pistol and the oranments in a pit which he made in his cattle pen.

The story as given by Sher Mohammad appellant in his confession agrees in its main features with that narrated above, with this important difference that Sher Mohammad assigned to himself a minor part and stated that Mt. Sukhi was throttled by Mehra and Nawab, son of Fatta, and Mt. Ram Labhai by the two Nawabs and Mehra and that he himself was standing at a distance. He, how-

ever, admits that he unchained the door and let into the room Mehra, who throttled Mt. Sukhi to death. He also admits that he later on lighted the lamp and assisted Nawab in seating Mt. Ram Labhai on a charpai before she was throttled by Nawab and his companions.

The question arises: To what extent and against which of the appellant can these confessions be used? The rule is now firmly established, that, ordinarily, it is improper to use the retracted confession of an accused person against his co-accused and that, generally speaking, it is not safe to convict the maker of such a confession without corroboration in material particulars. I agree with the appellants' learned counsel that the present is not a case in which we should depart from the ordinary rule as suggested above, and I hold that the confessions of each appellant can be used against himself alone and not against the other.

Now from the summary of the two confessions given above it is clear that, though each of the appellants has tried to assign to himself a minor part in the crime, each of them admits:

(a) That he was a party of four that went out to commit theft on the night in question;

(b) that, in pursuance of this common design, they broke into the house of Dial Singh, where the two women were sleeping:

(c) that one of the party was armed with a loaded pistol, the other with a chhurra, the third with a lathi and the fouth with a sambal; and

(d) that on the women being roused, his companions killed them while the deponent was standing by keeping a watch with a pistol in his hand or helping the others to come in by unchaining the door and lighting the lamp.

On these facts, I am of opinion, that having regard to the provisions of S. 34, and to the decision of the Privy Council in the well-known case of *Barendra Kumar Ghose* v. *Emperor* (1), each of the appellants is equally guilty under S. 302, I. P. C. There can be no manner of doubt that they went to the house with the common intention to rob and, if necessary to kill, the inmates of the house or any other person who might raise an alarm or obstruct them in carrying out their design. In furtherance of this common intention the two women, Mt. Sukhi and Ram Labhai, were put to death. Material corroboration of the story, as related by each appellant in his confession, is found in the production, at the instance of each one of them, of articles which were stolen from the house at the time of the occurrence. As against Mehra further corroboration is supplied by the production of the revolver by him which the Sub-Inspector was unable to use, but which Mehra was able freely to handle, and also by the recovery of the chhurra (P-2) from the debris.

Both the appellants have, therefore, been rightly found guilty under S. 302, I. P. C. I would, accordingly uphold their conviction for the offence of murder and confirm the sentence of death passed against each appellant by the learned Sessions Judge.

The learned counsel for the appellants did not address any arguments against the conviction of the appellants under Ss. 457 and 436, I. P. C. The conviction under these sections and the sentences passed against each of the appellants therefore are also confirmed.

Coldstream, J.—I agree.

N.K. *Conviction and sentence upheld.*

(1) A. I. R. 1925 P. C. 1=52 Cal. 197=52 40 (P.C.).

A. I. R. 1927 Lahore 768

CAMPBELL, J.

Muhammad Aslam—Defendant — Appellant.

v.

F. Mehr Singh-Attar Singh—Plaintiff —Respondent.

Second Appeal No. 52 of 1927, Decided on 4th April 1927, from decree of Addl. Dist. Judge, Gujranwala, D/- 11th October 1926.

Civil P. C., O. 41, R. 30—Appellate judgment silent as to certain points in the grounds—Presumption is that they were abandoned.

Where the judgment of an appellate Court states specifically that certain points were argued before it and is silent as to other points taken in the grounds of appeal it must be presumed that those points were abandoned, more especially in the absence of an affidavit to the contrary by the counsel who appeared before the lower appellate Court : *A. I. R.* 1924 *Lah.* 107, *Foll.* [P 769 C 1]

Zafarullah Khan—for Appellant.

Mukand Lal Puri—for Respondent.

Judgment.—In this suit the plaintiffs sued for Rs. 445-2-3 plus Rs. 234 interest, total Rs. 679-2-3. The trial Court decreed the claim in full and the decree was upheld by the lower appellate Court.

Amongst other pleas raised by the defendant was one that there had been no agreement by him to pay interest. No issue on this question was struck by the trial Court. In ground 3 of the memorandum of appeal to the lower Court the defendant-appellant pleaded that the Subordinate Judge had erred in allowing interest as no agreement had been proved. In second appeal the complaint is made that the lower appellate Court failed to decide ground of appeal No. 3 and that the respondents were not entitled to any interest since no interest was agreed upon. This is the only point argued before me.

The principal amount was alleged to be due mainly as the price of goods supplied. The main piece of evidence was a bahi entry written by one Dina Nath and signed by the defendant accepting liability for Rs. 435. No mention in this entry was made about interest.

In *Harji Mal* v. *Devi Ditta Mal* (1) it was ruled that, where the judgment of an appellate Court states specifically that certain points were argued before it and is silent as to other points taken in the grounds of appeal it must be presumed that those points were abandoned, more especially in the absence of an affidavit to the contrary by the counsel who appeared before the lower appellate Court. Such a presumption arises in the present case, and it is strengthened by the fact that the record contains evidence for the plaintiff that there was an agreement to pay interest. Dina Nath, the writer of the entry above referred to, said so and the plaintiff himself as a witness also said so. I hold that ground of appeal No. 3 was abandoned in the lower appellate Court and that it cannot be taken in second appeal.

The appeal, therefore, fails and is dismissed with costs.

D.D. *Appeal dismissed.*

(1) A. I. R. 1924 Lah. 107=4 Lah. 364.

A. I. R. 1927 Lahore 769

JAI LAL, J.

Anant Ram and *others* — Plaintiffs—Appellants.

v.

Din Mohammad and *others* — Defendants—Respondents.

Second Appeal No. 2877 of 1922, Decided on 21st March 1927, from decree of Dist. Judge, Lyallpur, D/- 22-5-1922.

Civil P. C., O. 41, R. 25 — Remand by High Court to lower appellate Court for findings — Lower appellate Court cannot further remand to the trial Court unless so directed.

Where under O. 41, R. 25, a case is remanded by the High Court to the lower appellate Court for recording further evidence and for its findings thereon, it is not open to the lower appellate Court, in the absence of a discretion, to further remand the case to the trial Court for recording evidence and submiting its findings : 133 *P. W. R.* 1913, *Foll.* [P 769 C 2]

Badri Das—for Appellants.

Jagan Nath Agarwal—for Respondents.

Order.—This appeal was remanded by a Judge of this Court under O. 41, R. 25 to the District Judge. The order remanding the case ran as follows :

I accordingly remand the case to the learned District Judge and direct that he should allow the parties a fresh opportunity for producing evidence in support of their respective cases and then submit the record of the case to this Court with his own opinion thereon.

It appears that, on receipt of the order of remand, the District Judge sent the case to the trial Court—a Subordinate Judge of the Second Class—with directions to record the evidence of the parties and to submit the finding to him, that is, the District Judge, and on receipt of the report from the Subordinate Judge, submitted the record of evidence to this Court with his own finding which is to the same effect as the opinion of the Subordinate Judge.

Counsel for the respondents against whom the report is, objects to it on the ground that the order of remand made by this Court did not authorize the District Judge to send the case to the Subordinate Judge for recording further evidence and to submit a finding, but that it directed the District Judge to record the evidence himself and to submit his own finding to this Court. It is consequently contended that the finding of the District Judge is not valid as his proceedings were illegal and ultra vires. This contention is supported by a judgment of the Division

Bench of the Chief Court of the Punjab reported as *Mahiditta Mal* v. *Nicholson* (1). No authority is cited on the other side except an unpublished judgment in which under almost similar circumstances a Judge in Chamber of this Court accepted the report of the District Judge on the evidence recorded by the trial Court on the ground that when remanding the case it was his intention that the District Judge was at liberty to have the evidence recorded by the trial Court. In the case before me it is not possible for me to say that the intention of the learned Judge who remanded the case was otherwise than that is expressly stated by him in his order of remand.

I must consequently set aside the proceedings of the District Judge after remand and again remand the case to him so that he may carry out the previous order of this Court dated 22nd May 1923. There will be no order as to the costs of these proceedings.

G.B. *Proceedings set aside.*

(1) [1913] 105 P.R. 1913=224 P.L.R. 1913=19 I.C. 770=133 P.W.R. 1913.

A. I. R. 1927 Lahore 770

SKEMP, J.

(Shrimati) Lado Rani Gurtu—Applicant—Appellant.

v.

Mt. Sibhag Rani—Objector — Respondent.

Miscellaneous Appeal No. 2106 of 1926, Decided on 1st March 1927, from order of Dist. Judge, Amballa, D/- 21st July 1926.

Succession Act (1925), *S.* 2 (*c*) — *Executor by implication.*

The testator executed a will leaving the bulk of his property to his minor daughter and appointing his mother as her guardian. The will stated that she should have full right to spend the income although it would not be proper to spend the principal. No other specific duties were laid upon the testator's mother but there were directions that he did not wish certain ceremonies after death to be performed but merely that his mother should feast the poor on death anniversaries.

Held : that these facts were quite insufficient to make the mother executor by implication : 5 *Cal.* 756, *Dist.* [P 770 C 2]

Mehr Chand Mahajan—for Appellant.

Shamair Chand—for Respondent.

Judgment.—In this case one Pandit Manmohan Nath Gurtu executed a will leaving the bulk of his property to his minor daughter and appointing his mother as her guardian. He left a piece of land to his mother and disinherited his wife for misconduct.

The mother Mt. Lado Rani applied for probate and was opposed by the wife Mt. Sobhag Rani who urged that the document was not a will, that it was invalid because it was attested by only one witness and that as no executor had been appointed no application for probate lay. The learned District Judge found that the document was a will and that the attestation by only one witness was immaterial ; but he dismissed the application on the ground that there was no executor.

The petitioner has appealed on two grounds : (1) that she had been appointed as executor by implication and (2) that in any case the District Judge should have treated the application as one for grant of letters of administration with the will annexed.

Counsel for the appellant, Mr. Mehr Chand Mahajan, contended that the will appointed Mt. Lado Rani executor by implication. The relevant points are that the will appointed the petitioner guardian of the testator's minor daughter Mt. Uma Wati and stated that she should have full right to spend the income although it would not be proper to spend the principal. No other specific duties were laid upon the testator's mother but there were directions that he did not wish certain ceremonies after death to be performed but merely that his mother should feast the poor on death anniversaries. These facts are quite insufficient to make the appellant executor by implication ; see the notes on S. 222 (2), Indian Succession Act, in any annotated edition. *In the matter of Monohur Mookerjee* (1), which was cited for the appellant does not really help her, the facts being much stronger than in the present case. I, therefore, find that Mt. Lado Rani was not appointed executor by implication.

On the second point it seems pretty clear that the District Judge was not asked to grant letters of administration and that the possibility of doing so is raised here for the first time. Admittedly the application would have to be amended. Under the peculiar circumstances I think it just to give leave to amend. In this country, especially in the mufassil, the law as to wills is imperfectly known;

(1) [1880] 5 Cal. 756=6 C.L.R. 228.

otherwise Pandit Manmohan Nath who left an elaborate will would undoubtedly have appointed an executor. It does not appear just to defeat this will because of technical error made by the petitioner in the form of her application. I, therefore, accept the appeal and grant leave to the appellant to make a fresh application for letters of administration in the Court of the learned District Judge ; but as it is the petitioner's error which is responsible for this appeal she is to pay the respondent's costs in this Court.

R.D. *Appeal accepted.*

A. I. R. 1927 Lahore 771

SHADI LAL, C. J., AND BROADWAY, J.

Ghulam Muhammad and *others*—Plaintiffs—Appellants.

v.

Mehta Chandras Dat—Defendant—Respondent.

Letters Patent Appeal No. 79 of 1926, Decided on 5th February 1927, from judgment of Campbell, J., D/- 9th Feb. 1926, in Civil Appeal No. 2429 of 1925 reported as *A. I. R.* 1926 *Lah.* 453.

Civil P. C., O. 6, R. 17—Amendment seeking to substitute a totally different case should not be allowed.

Though the power of amendment possessed by the Court is to be liberally exercised, yet no power has been given to Court to enable one distinct cause of action to be substituted for another. The general rule is to the effect that any amendment must be such as is either raised in the pleadings or is consistent with the case as originally laid: *A.I.R.* 1922 *P. C.* 249, *Foll.*

[P 771 C 2, P 772 C 1]

M. M. Tufail—for Appellants.

Fakir Chand—for Respondent.

Judgment.—This is an appeal under Cl. 10, Letters Patent, from a judgment of Mr. Justice Campbell who decided that the plaintiffs-appellants had, by amending their plaint, changed the character of the suit and put forward a different and inconsistent cause of action.

The facts briefly are these: One Mt. Begam Jan, who was the owner of a one-third share in a holding, mortgaged her share to the defendant, who was proprietor of the remaining two-thirds share. The mortgage being with possession, the defendant acquired possession of the entire holding. In 1924 the plaintiffs brought an action for a declaration that they were cosharers in the holding and were in joint possession thereof with the defendant. In support of their title they asserted that in 1910 they had acquired the rights of Mt. Begam Jan, had redeemed the mortgage and had got possession of the property and that they had held joint possession with the defendant since that date.

The defendant pleaded that the suit for a declaration did not lie since the plaintiffs were not in possession; and that their right, if any, had been extinguished by adverse possession of the defendant for more than twelve years. The claim as laid in the plaint was tried by the Sub-Judge, who, after hearing the evidence produced by the parties, fixed the case for arguments on the 4th March 1925. On that date the plaintiffs applied for and obtained leave to amend their plaint.

On the 11th March 1925, they filed the amended plaint, which stated that Mt. Begam Jan herself had redeemed the mortgage in 1910 and received possession of her one-third share of the joint holding, that she continued to be in possession until 1916, when she married and thereby forfeited her life-estate; and that the plaintiffs, who were reversioners of her father, then succeeded to the estate.

Now in the original plaint the plaintiffs claimed that they had received the property in 1910 by an assignment from Mt. Begam Jan and asserted that they themselves had redeemed the mortgage in that year. In the amended plaint they put forward a totally different claim. They alleged that they had nothing to do with the land until 1916 when Mt. Begam Jan, who had herself redeemed the mortgage in 1910, lost her life-estate by marriage and they became owners of the property in 1916 by virtue of their right of succession of her father. In one case they based their title upon a transfer from Mt. Begam Jan; in the other case they relied upon their title as heirs to her father. The title in one case was wholly different from that asserted in the other.

It is true that the power of amendment possessed by the Court is to be liberally exercised, but as laid down by the Privy Council in *Ma Shwa Mya* v. *Maung Mo Hnaung* (1), no power has been given to enable one distinct cause of action to be substituted for another. The general rule is to the effect that any amendment must

(1) A.I.R. 1922 P. C. 249=48 Cal. 832=48 I.A. 214 (P.C.).

be such as is either raised in the pleadings or is consistent with the case as originally laid. The view taken by Campbell, J. is in conformity with the rule enunciated by the Privy Council.

The appeal is accordingly dismissed with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 772 (1)

SHADI LAL, C. J., AND BROADWAY, J.

Madan Mohan Singh—Appellant.

v.

Daulat Ram and *others*—Respondents.

Letters Patent Appeal No. 54 of 1925, Decided on 6th January 1927, from order of Le-Rossignol, J., D/- 23rd January 1925, in Misc. Appeal No. 2983 of 1924.

Hindu Law—Debts—Ancestral property is liable for debts if not immoral.

Ancestral property is liable for the debts of a father, unless it can be shown that they were contracted for immoral purposes. [P 772 C 1]

Nawal Kishore—for Appellant.

Judgment.—In execution of a decree against one Prem Chand, the decree-holders, Daulat Ram and others, asked for the attachment and sale of a certain house.

Madan Mohan Singh, the minor son of Prem Chand, instituted a suit praying for a declaration that the said house was a part of the ancestral property of the family and was not liable to be attached and sold in execution of the decree as the debt in respect of which it had been passed had not been contracted for any family purpose.

As no charge of immorality was brought against Prem Chand, the learned Senior Subordinate Judge rejected the plaint. Against the order rejecting the plaint Madan Mohan Singh has preferred an appeal to this Court which is pending. He also prayed for an order staying execution of the decree. Mr. Justice LeRossignol having refused to stay execution, this appeal has been preferred under the Letters Patent. Admittedly the ancestral property is liable for the debts of Prem Chand unless it can be shown that they were contracted for immoral purposes. No charge of immorality has been made against him as yet, and I would, therefore, dismiss this appeal.

J.V. *Appeal dismissed.*

A. I. R. 1927 Lahore 772 (2)

DALIP SINGH, J.

Ibrahim—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1126 of 1926, Decided on 8th January 1927, from order of Addl. Dist. Magistrate, Shahpur, D/- 18th October 1926.

Penal Code, S. 376—Rape on unchaste girl—Sentence of seven years' rigorous imprisonment is too severe.

Where evidence showed that the girl who was raped was unchaste the sentence of seven years rigorous imprisonment was held to be too severe. [P 772 C 2]

Niaz Muhammad—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—The appellant in this case has been convicted by the learned Magistrate under S. 376, I. P, C., and sentenced to rigorous imprisonment for seven years. The evidence of Mt. Sharif Khatun, the girl who was raped, corroborated by the evidence of Ali Muhammad, who is a disinterested witness, leaves no doubt that the girl was raped as she alleges, and I agree with the learned Magistrate in rejecting the defence evidence. At the same time the medical evidence shows that the girl was used to sexual intercourse and as she is unmarried it follows that she was unchaste. Her own story is that when the cattle of the accused trespassed on a grassy plot in which she was grazing her cattle she drove away the cattle and then went a distance of 60 or 70 karms to remonstrate with the accused. The accused thereupon seized her and proceeded to rape her. Her cries attracted the attention of Sultan (P W. 2) and Ali Muhammad (P. W. 3) who rescued her. I do not reject this evidence, but at the same time taking into consideration the circumstances of the case I consider that the sentence is too severe and I reduce it to four years' rigorous imprisonment. The appeal is accepted to this extent only.

J.V. *Sentence reduced.*

A. I. R. 1927 Lahore 773 (1)

DALIP SINGH AND HARRISON, JJ.

Pokhar Das and *another*—Defendants—Appellants.

v,

Mela Ram and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No. 1080 of 1922, Decided on 8th April 1927, from decree of 1st Cl. Sub-Judge, Amritsar, D/- 12 h Jan. 1922

(a) *Mahommadan law—Sale by mother of her minor son's property is void ab initio.*

Under Mahommadan law sale by mother, as guardian of the property of her minor son is void ab initio [P 773 C 1]

(b) *Specific Relief Act, S. 15—Agreement to sell property—Vendor not entitled to sell whole of the property—Vendee can claim specific performance in respect of property legally saleable by vendor.*

Where vendor agrees to sell certain property to vendee, but he is not legally entitled to sell whole of the property, the vendee can claim specific performance of contract in respect of so much of the property as is legally saleable by vendor provided the vendee consents to pay the full price: *A. I. R. 1924 Pat. 81, Foll.* [P 773 C 2]

Sardha Ram and *M. L. Puri*—for Appellants.

Judgment.—The plaintiffs in this case sued for possession of a shop with a site on the allegation that defendants 1 to 3 were the owners of the shop and on 3rd July 1919, defendant 1 in person and as guardian of defendant 3 and defendant 2 had sold the same to them and taken Rs. 500 as earnest-money, that, thereafter the defendants had sold the same shop to defendants 4 to 5 and the plaintiffs were, therefore, entitled to the possession of the shop on payment of the price fixed, namely, Rs. 6,500. Various pleadings were taken by the defendants, but it is unnecessary to enter into all of them as the case can be disposed of very shortly.

The trial Court decreed the plaintiffs' suit and defendants 4 and 5 have appealed. The other defendants and the plaintiffs are absent though served.

From an affidavit put in by the appellants it appears that proceedings in insolvency are being taken against both the plaintiffs. The Official Receiver was accordingly served also, but he has not appeared. Counsel for the appellants contends that the sale by defendant 1 as guardian of defendant 3 was void ab initio as the parties are Mahommadans and defendant 1 is the mother of defendant 3 This is undoubtedly correct. This being so counsel next contends that there can be no suit for specific performance of such a sale, as the property is undivided. He has cited *Abdul Haq* v. *Muhammad Yahya Khan* (1), in support of this contention and the ruling is certainly in his favour. It is unnecessary to decide whether this ruling is correct or otherwise because in any event under S. 15, Specific Relief Act, the plaintiffs might have specific performance of the sale, so far as the shares of defendants 1 and 2 are concerned, only if they consented to pay the full price. They are not present and, therefore, it is impossible to say whether they would so consent. There could, of course, be no specific performance against a minor.

It follows, therefore, that the appeal must succeed and the plaintiff's suit dismissed with costs throughout.

G.B. *Appeal accepted.*

(1) A. I. R. 1924 Pat. 81.

A. I. R. 1927 Lahore 773 (2)

SHADI LAL, C.J., AND LE ROSSIGNOL, J.

Mt. Kishan Dei and *another*—Plaintiffs—Appellants.

v.

Ram Chand—Defendant—Respondent.

First Appeal No. 2287 of 1921, Decided on 14th April 1925, from decree of Senior Sub-Judge, Delhi, D/- 27th June 1921.

Limitation Act, S. 10 — Applicability — Trusts by implication are excluded from its operation.

Section 10 is confined to cases in which property has become vested in trust for any specific purpose and exoludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations. [P 774 C 1]

Sarda Ram and *Jagan Nath Bhandari*—for Appellants

Moti Sagar and *Mul Chand*—for Respondent.

Judgment.—The sole question, upon which we have been invited by the learned vakil for the appellants to pronounce our opinion, is whether the action, which has given rise to this appeal, was or was not barred by time. Now according to the allegations made by Mt. Kishan Dei in her plaint the defendant Ram Chand took possession of the estate of her father-in-law Panna Lal on the

death of the latter when her husband Lachhmi Narain was still a minor and that he realized some debts due to Panna Lal. This event took place more than 30 years ago, and it is alleged that Ram Chand has since been managing the estate without rendering any account of the income accruing therefrom. On these allegations Mt. Kishan Debi and her alleged adopted son, Babu Lal, sue the defendant Ram Chand for an account of the rents and profits of the properties forming part of that estate and also for the recovery of the debts realized by him.

Mr. Sardha Ram for the appellants admits that the suit was barred by time, unless it could be brought within the purview of S. 10, Lim. Act. Now that section is confined to cases in which property has become vested in trust for any specific purpose; and we are unable to hold that any express trust, such as is contemplated by the legislature, was created in the present case. It must be remembered that the language of the section excludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations. For instance, the position of agents, factors and benamidars is a fiduciary one, and a suit against these persons is not governed by the provisions of S. 10.

The learned vakil places his reliance upon certain judgments in which a trustee de son tort has been treated as an express trustee for the purpose of the aforesaid section. But those judgments deal with cases in which there was, to start with, an express trust, and the defendant assumed to act in a fiduciary relation with regard to trust property, or knowingly assisted a trustee in a fraudulent or dishonest disposition of trust property. The case before us is, however, distinguishable on the ground that no trust for a specific purpose was ever created; and it is, therefore, not necessary to examine the correctness of the rule laid down in those judgments.

We have no hesitation in holding that S. 10 has no application to the present case. The appeal is accordingly dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1927 Lahore 774

ZAFAR ALI, J.

Raju and *another* — Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 236 of 1927, Decided on 23rd May 1927, from order of Sess. Judge, Montgomery, D/- 15th December 1926.

Criminal P. C., S. 310—Previous conviction should not be made known to assessors—Further charge of the same should be read after assessors have recorded their opinion on the main charge.

Where the charge against accused describing his present offence, as well as the further charge relating to his previous convictions was read out at the commencement of the trial, and his statement containing his admissions of those convictions was also read out in the presence of the assessors :

Held : that the provisions of S. 310 are imperative and that the further charge about previous convictions and the accused's statement in respect thereof should not have been read out and he should not have been questioned in respect thereof unless and until he had been convictedor the opinions of the assessors had been recorded on the charge of the subsequent offence. [P 774 C 2, P 775 C 1]

Muhammad Tufail—for Appellants.

Ram Lal—for the Crown.

Judgment.—Agreeing with the four assessors the learned Sessions Judge of Montgomery has convicted the appellants Raju and Kandu of house-breaking by night and theft, and has sentenced Raju who had three previous convictions against him, to rigorous imprisonment for seven years under S. 457 coupled with S. 75, I. P. C., and Kandu to rigorous imprisonment for one year under S. 457, I. P. C. As against Raju an order under S. 565, Criminal P. C., has also been passed.

It may be observed at the very outset that the learned Judge appears to have lost sight of the provisions of S. 310, Criminal P. C., and the assessors were consequently not kept ignorant of the fact that the prisoner Raju was an old offender, as they should have been. The record shows that the charge against Raju describing his present offence, as well as the further charge relating to his previous convictions was read out at the commencement of the trial, and that his statement containing his admissions of those convictions was also read out in the presence of the assessors. The further charge about previous convictions

and the accused's statement in respect thereof should not have been read out and he should not have been questioned in respect thereof unless and until he had been convicted or the opinions of the assessors had been recorded on the charge of the subsequent offence. The provisions of S. 310, Criminal P. C., are imperative and must have been complied with. (The judgment then discussed the evidence on merits, and concluding that the evidence was not worthy of credit proceeded.) I, therefore, accept the appeal, set aside the convictions and sentences and direct that the appellants be released forthwith.

R.K. *Appeal accepted.*

A. I. R. 1927 Lahore 775 (1)

CAMPBELL, J.

Zahur Ahmad and *others*—Accused—Petitioners.

v.

Niadar Mal—Complt.—Respondent.

Criminal Revn. Petn. No. 998 of 1926, Decided on 10th December 1926, from order of Addl. Sess. Judge, Karnal, D/- 13th April 1926.

Criminal P. C., Ss. 436 and 439—Order of discharge should be set aside and further inquiry directed only if it is perverse or foolish.

Further inquiry should be undertaken only in exceptional cases and for good reasons shown and, speaking generally, only if the order of discharge is perverse or foolish or based upon a record of evidence obviously incomplete, and where a Sessions Judge has considered the whole of the evidence in an exhaustive order and has held, after going through the whole record, that the order of discharge was perverse and set it aside, the High Court will not interfere in revision : 10 *P. R.* 1911, *Cr. (F. B.)*, [P 775 C 2]
Ref to.

Niaz Muhammad—for Petitioners.

Nawal Kishore for *Badri Das* and *Gokal Chand*—for Respondent.

Judgment.—In this case Niadar Mal filed a complaint under S. 458, I. P. C., against Zahur Ahmad, Muhammad Yusaf and Muhammad Ismail. At the close of the prosecution evidence and of the statements by the accused persons the Magistrate discharged the latter. On application being made to him the learned Sessions Judge exercised his powers under S. 436, Criminal P. C., and ordered further inquiry.

The accused have come to this Court for revision of the learned Sessions Judge's order. The manner in which such cases are to be dealt with was laid down by a Full Bench in *Emperor* v. *Kiru* (1). It was pointed out that no general rule could be stated as so much depends upon the particular circumstances under which an order of discharge has been given, but that, for general guidance, it should be observed that further inquiry should be undertaken only in exceptional cases and for good reasons shown, and, speaking generally, only if the order of discharge was perverse or foolish or based upon a record of evidence obviously incomplete.

In the present case the learned Sessions Judge has considered the whole of the evidence in an exhaustive order and has held after going through the whole record that the order of discharge was perverse. In these circumstances since the learned Sessions Judge's order has been made deliberately and after a very full consideration of all the circumstances I am not prepared to interfere with it. Exception has been taken by the learned counsel for the petitioners to a remark made by the learned Sessions Judge that it would be a denial of justice not to frame a charge. I wish to make it quite plain that the accused persons are entitled to have the whole of the evidence against them taken afresh by the Magistrate to whom the case will be entrusted, and that the Magistrate must not consider himself bound to frame a charge by anything which the learned Sessions Judge may have said. Anything in the learned Judge's order which might be thought to amount to a direction for the framing of a charge must be disregarded, and the Magistrate must decide whether the accused are to be charged or not.

To this extent only the petition is accepted. In other respects it is dismissed.

R.D. *Petition partly accepted.*

(1) [1911] 10 P. R. Cr. 1911=205 P. L. R. 1911=11 I. C. 132=24 P. W. R. Cr. 1911.

A. I. R. 1927 Lahore 775 (2)

HARRISON AND CAMPBELL, JJ.

Ujaggar Singh—Plaintiff—Appellant.

v.

Sohan Singh and *others*—Defendants—Respondents.

First Appeal No. 758 of 1921, Decided on 12th February 1925.

(a) *Civil P.C., O. 9, R. 13—Order setting aside d cree ex parte—No appeal lies.*

No appeal lies from an order setting aside an ex-parte dercee : *A. I. R.* 1923 *Lah.* 425 and *A. I. R.* 1925 *Lah.* 466, *Foll.* [P 776 C 1]

(b) *Court-fees Act, S. 12—Wrong assessment of fees is no ground for appeal.*

An order. of trial Court assessing Court fee wrongly is not appealable. [P 776 C 1]

G. S. Salariya and *Balkishan* — for Appellant.

Sagar Chand for *B. A. Cooper*—for Respondents.

Judgment.—The only points raised by the counsel in this first appeal are : (1) that an ex-parte decree passed against the defendants was erroneously set aside by the trial Court ; (2) that the land which formed the subject-matter of the pre-emption suit is not shown to be colony land and as such excluded from the operation of the Pre-emption Act ; and (3) that the amount of Court-fee has been wrongly assessed by the trial Court.

On the first point no appeal lies as was decided in the appeal reported as *Sundar Singh* v. *Nigahiya* (1), a decision of a single Judge upheld in a considered judgment by a Letters Patent Bench: *Sundar Singh* v. *Nighaiya* (2).

On the second point the appellant stands confronted with his own admission at p. 14 of the paper book, and on the third point S. 12, Court Fees Act lays down that no appeal lies. On these findings we dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) A. I. R. 1923 Lah. 425.
(2) A. I. R. 1925 Lah. 466=6 Lah. 94.

A. I. R. 1927 Lahore 776 (1)

CAMPBELL, J.

Ramzan—Plaintiff—Appellant.

v.

Kamal and *another*—Defendants—Respondents.

Second Appeal No. 47 of 1927, Decided on 23rd Mar. 1927, from decree of 1st Class Sub-Judge, Shahpur, D/- 18th Oct. 1926.

Mahomedan Law—Bequest to heir is void unless other heirs consent after death.

Under Mahomedan law a bequest to a person entitled to inherit is void unless the other inheritors give their consent after the death of the testator to its taking effect. [P 776 C 2]

Ram Chand Manchanda—for Applt.

Nanak Chand—for Respondents.

Judgment.—One Imam, a Mussalman hajam of Sahiwal in the Shahpur District, died leaving three half-brothers, to one of whom, Kamal, he bequeathed a certain house. Ramzan, another brother, sued for possession of one-third share of the house on the ground that the will was invalid. In his plaint Ramzan alleged that the house was ancestral and this statement appears to have been responsible for the learned Senior Subordinate Judge, making a mess of the appeal subsequently preferred to him. But later on all parties were agreed and stated that they were governed by Mahomedan law. The trial Court held that under that law a bequest to a person entitled to inherit is void unless the other inheritors give their consent after the death of the testator to its taking effect and decreed the suit.

Kamal appealed. The learned Senior Subordinate Judge without any reference to the memorandum of appeal treated the case as one indisputably falling under customary law. He fastened upon the superfluous issue which had been framed by the trial Court whether the house was ancestral, found that it was not ancestral and held that since the deceased was free to dispose of the house as he liked the will was valid and could not be challenged. Ramzan has come to this Court on second appeal. The learned counsel for Kamal, respondent, is unable to support the decision of the learned Senior Subordinate Judge, which proceeds upon a complete misapprehension of the case. The rule of Mahomedan law enunciated by the trial Court is stated in para. 272, p. 302 of Wilson's Anglo-Muhammadan Law and its correctness is not contested.

The appeal is accepted with costs, the order of the lower appellate Court is set aside and the decree of the trial Court is restored.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 776 (2)

ADDISON, J.

Gian Chand—Plaintiff—Appellant.

v

Hem Raj and *another*—Defendants—Respondents.

Second Appeal No. 48 of 1925, Decided on 16th May 1925, from order of District Judge, Multan, D/- 13th Dec. 1924.

Punjab Pre-emption Act (1 *of* 1923), *S.* 22—*Minority is no ground for extension of time.*

The mere fact that the plaintiff is a minor is no reason for extending time; S. 22 must be strictly construed: 55 *I. C.* 621 and *A. I. R.* 1925 *Lah.* 209, *Foll.* [P 777 C 2]

Hargopal—for Appellant.

Faqir Chand—for Respondents.

Judgment.—A minor under the guardianship of his mother sued for possession of a part of a house by pre-emption. It was ordered on 19th August 1924 that he should deposit 1/5th of the purchase-money or furnish security on or before 13th October. On the latter date the Judge did not attend Court as he was ill, but the reader recorded in the presence of counsel for plaintiff and defendant 2 that the deposit should be made or the security filed on or before 17th October. On 17th October, the Judge was present, but the suit was adjourned to 10th November as one defendant had not been served. No deposit was made on 17th October. On 10th November a new Judge had arrived. By that time also no deposit had been made or secur ty filed. He recorded the statement of the vakil for the plaintiff to the effect that one Bodh Raj had come two days previously to give security but had been put off by the reader; and that on the former hearing the Judge was not present and thus the deposit could not be made either for that reason or for some other reason. The vakil also then and there started to write a security bond making himself liable as surety. In the circumstances described the Judge refused to extend the time and rejected the plaint. An appeal was filed to the District Judge. He went into the matter and came to the conclusion that the circumstances did not warrant extension of the time. He accordingly dismissed the appeal. A second appeal has been filed in this Court.

There is an affidavit on the record that the plaintiff's guardian is a pardanashin lady and that she had left the city in October because of a plague epidemic and that her vakil also had suffered several deaths in his family on account of plague. She had asked Bodh Raj to stand as her surety and he had consented to do so, but had not filed the bond probably because he was in collusion with the other side. The facts in this affidavit are denied in an affidavit filed by the opposite party to the effect that she is not a pardanashin lady proper and is in fact appointed guardian of her minor son. It is also stated in this second affidavit that she had numerous relatives and that she had not left the city in October, nor were there any deaths in the family of the vakil until after the 10th November.

In *Inayat* v. *Darbara Singh* (1), it was held that the fact that the appellants were minors was absolutely no ground for interference in a pre-emption suit. In that case time was extended by the District Judge, but his order was set aside on appeal to this Court. The case of *Bahadur Shah* v. *Ahmad Shah* (2) shows how strictly the provisions of S. 22 Pre-emption Act, are construed. Following these rulings I hold that the fact that the appellant is a minor is no reason why the time should have been extended. Similarly it cannot be said that his guardian was a pardanashin lady in the strict sense of that term. There are no other reasons why time should be extended. I am in entire agreement with the findings of the Courts below and consider that they have exercised their discretion properly.

I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) [1920] 55 I. C. 621.

(2) A. I. R. 1925 Lah. 209=5 Lah. 492.

A. I. R. 1927 Lahore 777

BROADWAY AND ZAFAR ALI, JJ.

Dullah and *others*—Plaintiffs—Appellants.

v.

Mt. Sardarani and *others*—Defendants—Respondents.

Second Appeal No. 2459 of 1922, Decided on 22nd November 1926, from decree of Dist. Judge, Jhelum, D/- 15th July 1922.

Limitation Act, Art. 142—*Onus of proving adverse possession is on person asserting*—*Limitation Act, Art.* 144.

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession: *A. I. R.* 1916 *P. C.* 21, *Foll.* [P 778 C 1]

M. L. Puri—for Appellants.

Bishan Narain Mathur—for Respondents.

Judgment.—This second appeal has arisen out of a suit brought by Dulla and Wali sons of Muhammad against Muhammad Din son of Lakhan and Rahman, son of Sabhu. The parties are residents of Mauza Bhiki in the Phalia Tahsil of the

Gujrat District. The plaintiffs claimed possession of 32 kanals of land, alleging that they were the owners thereof and that the defendants had taken forcible possession of the same. The defendants set up the plea of adverse possession, and the trial Court found that the plaintiffs had proved, firstly that they were entered as owners certainly from 1906 to the date of suit, and that they were shown as in possession of the said lands in the jamabandis of 1906-07 through their tenants Kadu and Mula. Lastly he held that whether Arts. 142 or 144, Lim. Act, applied, the plaintiffs' suit was clearly within limitation. The plaintiffs were accordingly granted a decree against which the defendants preferred an appeal to the learned District Judge. The learned District Judge took a different view. He agreed with the findings of fact arrived at by the trial Court but came to the conclusion that the latest date on which the plaintiffs could be said to be in possession through the tenants was 1907 and that it could not be presumed from the absence of any documentary evidence that they were in actual possession up to 1910, that being the year when Lakhan's name appears as claiming to be proprietor of the land in suit, Lakhan being the father of Muhammad Din. He accordingly accepted the appeal and dismissed the plaintiffs' suit.

The plaintiffs have now come up to this Court in second appeal and it has been urged that the view taken by the trial Court was correct and that whether Arts. 142 or 144 applied, the suit is within time. It is further contended that it was for the defendants-respondents to establish that their possession was adverse. In support of this contention Mr. Mukand Lal Puri quoted various authorities but placed most reliance on the *Secreatary of State* v. *Chellikani Rama Rao* (1). At p. 631 their Lordships of the Judicial Committee say :

> nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the persons asserting such possession.

In the present case there can be no doubt that the plaintiffs were the owners and entered as such certainly up to 1910. The entries as to their ownership continued up to the present time. They were never in actual physical possession of the land and they never claimed such possession. Throughout their case has been that they held possession through tenants. In 1906-07 the tenants through whom they held were Kadu and Mula In 1910-11 the revenue records show that Lakhan, father of defendant Muhammad Din claimed to be the owner and in possession of the land cultivating through Mula and Jiwan tenants-at-will. Thus we see that Mula must have attorned to Lakhan in 1910-11. We disagree with the view expressed by the learned District Judge when he says that it cannot be presumed from the absence of any documentary evidence that the plaintiffs were in actual possession up to 1910, provided the word "actual" be regarded as possession through tenants, for in the present case the plaintiffs, as already pointed out, never claimed to be in actual possession of the land at all. As owners they have been in possession through tenants up to such time as some other person advanced a claim of ownership adverse to theirs. This, according to the evidence on this record, did not take place till 1910. The suit was brought in 1920 and whether Arts. 142 or 144 applies it is perfectly clear that the plaintiffs are entitled to a decree.

We, therefore, accept this appeal, set aside the order of the learned District Judge and restore the decree of the Additional Munsif. The plaintiffs will be entitled to their costs throughout.

G.B. *Appeal accepted.*

(1) A. I. R. 1916 P. C. 21=39 Mad. 617=43 I. A. 192 (P. C.).

A. I. R. 1927 Lahore 778

SHADI LAL, C. J., AND BROADWAY, J.

Tohar Mal-Uttam Chand—Plaintiffs—Appellants.

v.

James Finlay & Co. Ltd., Amritsar—Defendants—Appellants.

Letters Patent Appeal No. 74 of 1925, Decided on 4th January 1927, from judgment of Abdul Raoof J. D/- 11th Feb. 1925, in Civil Appeal No. 841 of 1924.

Civil P. C., S. 20 (c)—Suit to set aside a decree is maintainable in Court which executes such decree.

A Court has jurisdiction to entertain a suit to set aside a decree if the decree is put into execution within the territorial limits of the jurisdiction of that Court: *A. I. R.* 1926 *Lah.* 277, *Foll.* [P 779 C 1]

Badri Das—for Appellants.

Tek Chand—for Respondents.

Judgment. — The question of law raised in this appeal is concluded by the judgment of a Division Bench of this Court in *Jawahar Singh* v. *Sassoon & Co.* (1). It is laid down in that judgment that a Court has jurisdiction to entertain a suit to set aside a decree, if the decree is put into execution within the territorial limits of the jurisdiction of that Court. This requirement of the law has been satisfied in the present case and the Senior Subordinate Judge at Amritsar was consequently competent to hear and determine the suit. We accordingly accept the appeal, and setting aside the judgment of the Single Judge, as well as that of the Subordinate Judge, we remit the case to the latter and direct him to determine it on the merits. We leave the parties to bear their own costs in the High Court.

J.V. *Appeal accepted.*

(1) A. I. R. 1926 Lah. 277=7 Lah. 61.

A. I. R. 1927 Lahore 779

HARRISON AND DALIP SINGH, JJ.

Raghbar Dial and *others*—Defendants —Appellants.

v.

Ram Chandar and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No 1221 of 1922, Decided on 24th March 1927, from decree of Dist. Judge, Gurgaon at Hissar, D/- 7th February 1922.

Civil P. C., O. 22, Rr. 4 and 11—Pro forma respondent dying—There is no abatement.

Where in the case of the death of a pro forma respondent, his legal representatives are not brought on record, there is no abatement.

[P 779 C 1]

Jagan Nath Aggarwal—for Appellants.

Shamair Chand—for Respondents.

Harrison, J.—A preliminary objection was taken on the ground of abatement. It is true that two of the respondents have died and that their representatives were not brought upon the record within time. They were, however, purely formal respondents. No decree was passed in their favour, though doubtless they may be gratified or even remotely benefited by the decree which was passed. Holding that they are pro forma defendants we find that there has been no abatement, and, therefore, dismiss this preliminary objection. (His Lordship proceeded after considering Civil Appeal No. 1221 of 1922 and dismissing it). So far as Appeal No. 1222 is concerned counsel contends that the District Judge has failed to consider admissible and important evidence and that, had he done so, he could not have failed to come to a different decision from that to be found in his judgment. He relies on *Balwant Singh* v. *Baldev Singh* (1) and counsel for the respondents concedes that it governs this case provided always that the appellant is able to establish the position, which he has taken up. We have been taken through the judgment and the two points on which counsel lays particular stress are that certain leases have not been taken into consideration and that the statement of one Hardev Bakhsh in a previous case has been ruled out on insufficient grounds. We are of opinion that even though the leases are admissible, whether registered or not, as showing the nature of the possession of the defendants, their value is extremely small and this for the reasons given in the judgment of the learned District Judge.

We do not know to how many different plots or houses the leases refer; we do not know where those plots or houses are situated and what relation they bear to the land in suit, and there are no leases referring to the particular vacant sites in suit. So far as the statement of Hardev Bakhsh is concerned it is conceded by Mr. Shamair Chand that if he was one of the proprietary body his statement is admissible in evidence. He contends, however, that it is not proved that he was one of the proprietary body and that anyhow very little weight should be attached to such a statement. When read together with the history of the village as given in Ex. P-8 this statement establishes, in our opinion, that this man was one of the proprietary body. The statement was against his own interests, but, in spite of this, it is not of any great value as it merely explains a certain map, D. 35, and cannot bind the whole proprietary body. While explaining D. 35 Hardev Bakhsh does not do so in sufficient details to be of any real value, for he does not tell us, and there is no means of ascertaining, what exactly was meant by the red line on D.35 drawn by Mr. Grant, Deputy Commissioner. There doubtless was a dispute of some

(1) A. I. R. 1921 Lah. 119=2 Lah. 271.

sort and in settlement of that dispute Mr. Grant drew the line. More we do not know. The question, therefore, resolves itself into whether the District Judge, had he taken into consideration the statement of this man Hardev Bakhsh, could or would have come to the contrary decision. We are satisfied that he would have done so. We are of opinion that the defendants have failed to establish this position taken up by them. The decree was rightly given to the plaintiffs and we dismiss the appeal with costs.

R.D. *Appeals dismissed.*

A. I. R. 1927 Lahore 780 (1)

COLDSTREAM, J.

Jagiri Mal—Judgment-debtor—Appellant.

v.

Ram Chand—Decree-holder—Respondent.

Misc. Second Appeal No. 533 of 1926, Decided on 28th May 1926, from order of Dist. Judge, Jullundur, D/- 16th December 1926.

Execution—Objection that decree is preliminary and not final is not open when it is not taken in previous execution proceedings.

A judgment-debtor cannot object to the execution of a decree on the ground th t it is preliminary and not final when he has not raised that objection in previous execution proceedings : *A. I. R.* 1925 *Lah.* 640, *Foll.* ; (1919) *P. H. C. C.* 105 (*F. B.*), *Dist.* [P 780 C 2]

Shamair Chand—for Appellant.

Chuni Lal—for Respondent.

Judgment.—On 23rd December 1918, Ram Chand obtained a preliminary decree for Rs. 1,770 on a mortgage-debt. Six months were allowed for payment and it was noted in the decree that the judgment-debtor would be personally liable on an appeal to the District Judge, the amount of the decree was modified, and on further appeal the High Court finally fixed the amount of the decree at Rs. 1,300 on 12th January 1920. Upon an application mad, in July 1925, for execution against the present judgment-debtor the executing Court declined to proceed on the ground that the decree was a preliminary one and had never been made final. There was an appeal to the District Judge who reversed this decision on the ground that the dec ee of the High Court as it stood was capable of execution "especially as the property is alleged to have been sold." The judgment-debtor has appealed to this Court against the District Judge's order and it is urged by Mr. Shamair Chand that execution cannot proceed until a final decree has been obtained. In support of his contention Mr. Shamair Chand has cited several rulings including the Full Bench judgment of the Patna High Court: *Jungli Lall* v. *Laddu Ram* (1). These lay down the general principle that a preliminary decree is incapable of execution.

A reference to the record shows that in this case an application for execution was made on 14th July 1920. The judgment-debtor had notice and raised no objection. The mortgaged property was put up for sale and Rs. 900 was recovered by the mortgagee-dec ee-holder. A second application made on 3rd February 1923 was dismissed in default. It was not until a further application was made in July 1925 that the objection now under consideration was raised for the first time. In these circumstances it appears to me that the principle laid down by a Division Bench of this Court in *Banu Mal* v. *Paras Ram* (2) that a late objection of this kind is not open to a judgment-debtor against whom execution proceedings have been taken without the objection being raised is applicable. It appears to me that this judgment concludes the matter in favour of the respondent. I dismiss the appeal accordingly with costs.

R.D. *Appeal dismissed.*

(1) [1919] 4 P. L. J. 240=50 I. C. 529=(1919) P. H. C. C. 105 (F. B.).

(2) A. I. R. 1925 Lah. 640.

A. I. R. 1927 Lahore 780 (2)

FFORDE, J.

Iqbal Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 264 of 1927, Decided on 20th May 1927, from order of Sess. J., Jhelum D/- 11th January 1927.

Evidence Act, S. 24—Retracted confession.

Conviction based on a retracted confession which was voluntary and was sufficiently corroborated is legal. [P 780 C 2 ; P 781 C 1]

Judgment.—Having examined the evidence in this case I am satisfied that the appellant has been rightly convicted.

The conviction is based on a retracted confession coupled with some evidence of

a previous altercation between the appellant and the deceased. The statement of the appellant, in his confession, that he struck the deceased on the head with a stone, is corroborated by the finding of a heavy blood-stained stone near the head of the dead woman. I am satisfied that the confession was voluntary; and the trial Judge was, therefore, justified in acting upon it.

Agreeing with the trial Court that the guilt of the appellant has been established beyond any reasonable doubt, I dismiss the appeal.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 781

TEK CHAND AND COLDSTREAM, JJ.

Thakar Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 375 of 1927, Decided on 6th August 1927, from order of Sess. J., Amritsar, D/- 14th March 1927.

Criminal P. C., S. 353—Accused prosecuted in two trials for two murders—Accused consenting defence evidence in one trial being treated evidence in second—Procedure is illegal.

Three persons were prosecuted and tried for murder of two persons in two trials. The defence evidence given by the accused in the first trial was, with their consent, treated as evidence in the second.

Held: that the defence evidence in the second trial was not duly recorded as required by S. 353, that the fact of the accused consenting to the irregularity would not give the procedure legal sanction and that the irregularity vitiated the trial: *A. I. R.* 1924 *Lah.* 104, *Foll.* [P 782 C 1]

Pindi Das—for Appellants.

Ram Lal—for the Crown.

Order.—Thakur Singh, Kirpa Singh, and Atma Singh were tried by the Sessions Judge of Amritsar for the murder, on 23rd September 1926, of Harnam Singh. This was trial No. 9 of 1927. It is alleged by the prosecution that the same three accused, immediately after murdering Harnam Singh, had murdered Narain Singh, and for this murder of Narain Singh they were tried in a separate trial (trial No. 17 of 1927). This second trial took place after the defence evidence in the first trial had been heard, and at the request of counsel on both sides the assessors expressed their opinion in both cases after arguments in both cases had been heard. The Sessions Judge disposed of both the cases in one judgment convicting each of the three accused in both the cases and sentenced them to death in each case. Against these convictions and sentences Thakar Singh, Kirpa Singh and Atma Singh have appealed. Their appeals in the case of the murder of Harnam Singh (trial No. 9) is No. 375, and that in the case of the murder of Narain Singh (trial No. 17) is No. 376.

On appeal No. 375, coming before us, Dewan Ram Lal, who appears for the Crown, has brought to our notice the fact that the defence evidence in trial No. 17 (relating to the murder of Narain Singh) has not been duly recorded. What happened was that when after the prosecution evidence had been recorded in trial No. 17, the appellants were asked whether they had any defence witnesses to call, they stated that they would not call any witnesses, but wished that their defence evidence in trial No. 9 should be used as their defence evidence in trial No. 17 also. This procedure the Sessions Judge adopted without, however, so far as we can see, recording any distinct order on the point. The result is that the defence evidence has not been recorded in the presence of the accused in trial No. 17. Dewan Ram Lal submits that, in view of the decision in *Allu* v *Emperor* (1), this irregularity must be held to have been an incurable one which vitiated the proceedings. Dewan Pindi Das, who appears for the appellants, endorses his submissions. Counsel agree accordingly that the convictions and sentences in trial No. 17 must be set aside. We are of opinion that in this case we must follow the decision in *Allu* v. *Emperor* (1), and that the convictions and sentences in trial No. 17 must be set aside.

The only question is whether we should proceed to dispose forthwith of Appeal No. 375 (against the judgment in trial No. 9) or should postpone the hearing of this Appeal No. 375 until trial No. 17 has been properly carried through. The two cases are very closely connected and in the interests of justice we think that judgment in Appeal No. 375 should not be pronounced until trial No. 17 has been duly completed. Having regard to all the circumstances, we think that the best course will be to adjourn the hearing of Appeal No. 375 until after the vacation.

(1) A. I. R. 1924 Lah. 104=4 Lah. 376.

Meanwhile the Sessions Judge of Amritsar will be able to complete trial No. 17 according to law. We accordingly pass the following order :

We find that trial No. 17 has not been regular as the provisions of S. 353, Criminal P. C., have not been complied with. The fact that the accused in that case consented to the irregularity will not give the procedure legal sanction. The irregularity has vitiated the trial. The convictions and sentences passed by the Sessions Judge are set aside and the case is remanded to the Sessions Court for retrial from the stage at which the irregularity occurred. The Sessions Judge will summon the same assessors, or as many of them as possible, hear the evidence for the accused, record the finding of the assessors, and write a judgment. He will do all this with the least possible delay. He will summon the witnesses called by the accused in trial No. 9, but the accused will be at liberty to produce any other witnesses for whose attendance they can make their own arrangements. If there is an appeal it will be put up before a Bench for hearing along with Appeal No. 376, the hearing of which is postponed for two months.

J.V. *Order accordingly.*

A. I. R. 1927 Lahore 782

JAI LAL AND DALIP SINGH, JJ.

Ramji Lal—Plaintiff—Appellant.

v.

Bujan Mal—Defendant—Respondent.

First Appeal No. 1019 of 1922, Decided on 22nd December 1926, from decree of 1st Cl. Sub-Judge, Delhi, D/- 16th January 1922.

Accounts—Suit for—Primarily it is the duty of defendant to produce accounts—If he fails plaintiff should prove his case.

In a suit for accounts it is primarily the duty of the defendant to render accounts. When he fails to do so, it is for the plaintiff to endeavour to prove what was due to him so far as he could. [P 783 C 1]

Shamair Chand and *D. S. Chand*—for Appellant.

Maher Chand Mahajan for *Sardha Ram* and *Bishan Narain*—for Respondent.

Dalip Singh, J—Plaintiff-appellant in this appeal brought a suit for rendition of accounts against the defendant-respondent on 1st October 1927 and obtained a decree from the District Judge Delhi, on appeal on 9th July 1918. On the case being returned for taking of accounts the learned Subordinate Judge 1st class held that the Munsif had no jurisdiction to try the case, and therefore the decree of the learned District Judge was ultra vires. He decided therefore, to take up the case afresh. The suit was originally valued at Rs. 130 for purposes of jurisdiction. After obtaining the preliminary decree for accounts from the learned District Judge the suit was valued at Rs. 7,941-13-6. This figure was arrived at from an account alleged to be filed by the plaintiff but we have not been able to trace this account anywhere on the record. In revision from the order of the Subordinate Jude, First Class, this Court held that the District Judge's preliminary decree stood and the Subordinate Judge should decide the case taking as a starting point the fact that the plaintiff was entitled to an account as against the defendant.

The case was then sent back for disposal. The parties were called upon to file accounts. The learned District Judge had held that it was for the defendant to render accounts to the plaintiff. The plaintiff's counsel stated that the plaintiff could file no more accounts than he had already filed with the amended plaint. The defendant's counsel stated that the defendant could not file an account because he never conducted the business of the partnership and never possessed its account books. After some evidence had been recorded in the case the learned Subordinate Judge, 1st Class, held that the plaintiff was not entitled to prove that the present firm of which accounts were demanded had received all the assets of an older firm described as Todar Mal-Bansi Lal. The learned Subordinate Judge held that the plaintiff-appellant was not entitled to prove this fact at all as this was making out a new case. He thereupon passed an order disallowing the production of any evidence with respect to the firm Todar Mal-Bansi Lal, dated 24th November 1921. On 16th January 1922 no further evidence having been produced he dismissed the plaintiff's suit for want of proof. The plaintiff has appealed.

It seems to us that it was primarily the duty of the defendant to render accounts. When he failed to do so it was for the plaintiff to endeavour to prove what was due to him so far as he could. The plaintiff endeavoured to show that the capital of the firm Bujan Mal Bansi Lal namely, the present firm, was made up of all the assets and outstandings of the older firm Todar Mal-Bansi Mal. This, we consider, he was certainly entitled to do. We express no opinion as to whether he will succeed or not in so doing. In this connexion the Court will bear in mind the previous accounts alleged to be filed with plaint which we have not been able now to discover on the record. But prima facie the plaintiff is entitled to endeavour to prove in any way he can what sum is due from the respondent. We, therefore, accept the appeal and remand the case for re-disposal with reference to the above remarks. The plaintiff-appellant will have his costs of this appeal from the defendant-respondent and other costs will abide the event.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 783

ZAFAR ALI AND JAI LAL, JJ.

Jalal and *another*—Plaintiffs—Appellants.

v.

Bahawali and *others* — Defendants—Respondents.

First Appeal No. 1002 of 1922, Decided on 20th January 1927, from decree of Sr. Sub-Judge, Gujrat, D/- 13th February 1922.

Civil P. C., O. 22, R. 5—Suit for possession against transferor's reversioners—Some reversioners dying during pendency of appeal—Failure to bring the legal representatives on record in time will not cause the whole appeal to abate.

Where in a suit for possession against the reversioners of the deceased transferrer, some of the reversioners die during pendency of an appeal and their legal representatives are not brought on record in time, the appeal abates only as against the deceased reversioners and not against all : 23 *P. R.* 1917 and *A. I. R.* 1925 *Lah.* 331, *Foll.* [P 784 C 1, 2]

Tek Chand and *M. L. Puri*—for Appellants.

Amolak Ram Kapur and *Nand Lal*—for Respondents.

Jai Lal, J.—On the 18th October 1918 the plaintiffs-appellants instituted a suit in the Court of the Munsif of Dinga for possession of 284 kanals 3¾ marlas of land situated at Pindi Rawan, alleging that the same had been given to them in exchange of other land by defendant 14, Jiwan, and that defendants 1 to 13, cosharers in the joint khata, of which the land in suit was a part, prevented them from taking possession of the same without any justification. During the pendency of the suit Jiwan, defendant died, and the plaint was amended by the plaintiffs. In the amended plaint it was alleged that Jiwan transferred his rights in the land in dispute by means of an exchange to the plaintiffs, put them in proprietary possession and got the mutation attested, and that defendants 1 to 15 in the amended plaint, who were stated to be his reversionary heirs and cosharers in the joint khata comprising the land in dispute, were preventing the plaintiffs from taking possession of the same without any justification. In their written statements, in reply to this amended plaint the defendants pleaded that Jiwan, though recorded in the revenue records as owner of the land in suit, had been out of possession for more than 12 years and that the defendants had been in adverse possession for that period, and that Jiwan having relinquished his rights the plaintiffs had no claim to the land in dispute. They further claimed that they were the collaterals of Jiwan in the fifth degree and therefore the exchange of the land in dispute with the plaintiffs by him was invalid as the land was ancestral. The Senior Subordinate Judge dismissed the plaintiffs' suit. He held that Jiwan had not lost his rights in the land in suit at the time of the exchange as it had been proved that he was in possession thereof, that the defendants were Jiwan's collaterals in the fifth degree, that the land was ancestral *qua* the defendants and therefore that the exchange being without necessity the defendants were entitled to resist the plaintiffs' suit for possession. Form this decree the plaintiffs have preferred the present appeal.

A preliminary objection is taken on behalf of the respondents that the appeal has abated against Samail and Karm, respondents 13 and 14, and further that it having abated against them the right to sue does not survive against the remaining respondents and therefore it has

abated in its entirety. It appears that Samail died on the 12th October 1924 and an application to bring his legal representative on the record was made on the 10th February 1925, and that Karm died on the 28th September 1925, and an application to bring his legal representatives on the record was made on the 12th April 1926. It is admitted that both these applications were made after the ordinary limitation provided for them had expired. But an affidavit has been filed on behalf of the appellants, alleging that they came to know of the death of Samail in the beginning of February 1925 and of Karm in the beginning of April 1926. The allegations made in this affidavit are denied by the respondents who allege that the distance between the respective villages of the parties is four *kos* only and this fact is supported by the evidence on the record. It thus appears to us that there is no valid ground for extending the ordinary period for making the applications for bringing the legal representatives of the deceased respondents on the record in the present case. In our opinion the appellants, who must have known of the deaths of the respondents, have been negligent and are not entitled to any extension of time. We therefore hold that the appeal has abated so far as Samail and Karm respondents, are concerned.

With regard to the next objection of the respondents that the appeal has abated in its entirety, we are of opinion that this is not so. According to the allegations made in the plaint as amended, with which alone we are now concerned, the defendants have taken possession of the land in suit as collaterals of Jiwan and are preventing the plaintiffs from getting possession in that capacity. According to the judgment of the learned Senior Subordinate Judge, Jiwan was in possession of the land and the plea of adverse possession raised by the defendants has been found against them. Therefore having regard to the allegations in the plaint and the conclusions of the Senior Subordinate Judge, the present appeal is against the reversioners of Jiwan who are alleged to have taken illegal and forcible possession of the land in dispute in their capacity as such. It, therefore, follows that the interest of each defendant is ascertainable and that originally a suit could have been brought against some of the defendants in respect of that portion of the land which fell to their share. The present case is fully covered by *Zainabe Bibi* v. *Rahila* (1), which was followed in *Raghbir Saran* v. *Sohan Devi* (2), and agreeing with the view expressed therein, we hold that the appeal has not abated in its entirety. We have not thought it necessary to notice in detail the several judgments cited on behalf of the respondents because in our opinion they are all distinguishable from the present case. (His Lordship then dealt with the merits and concluded.) We accept the appeal, set aside the decree of the learned Senior Subordinate Judge, except as regards Samail and Karm, and in lieu thereof grant the plaintiffs-appellants a decree for joint possession of the land in suit so far as the shares of the remaining respondents are concerned. The appellants will have their costs throughout against these respondents.

G.B. *Appeal accepted.*

(1) [1917] 23 P. R. 1917=39 I. C. 277.
(2) A. I. R. 1925 Lah. 331=6 Lah. 233.

A. I. R. 1927 Lahore 784

CAMPBELL, J.

Partab Singh and *others*—Defendants—Appellants.

v.

Gulab and *others*—Plaintiffs—Respondents.

Second Appeal No. 699 of 1925, Decided on 26th November 1925, from decree of Dist. Judge, Amritsar, D/- 17th December 1924.

Limitation Act, Art. 10—*Property in the tenant's possession—Limitation for the suit of pre-emption runs from the date of registration.*

Land in possession of a tenant is property which does not admit of physical possession by the new owner within the meaning of Art. 10, Lim. Act, and for the suit of pre-emption of such land, limitation runs from the date of registration; 49 *P.R.* 1908 (*F.B*) *Foll.* [P 785 C 1]

The question whether the subject of a sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards becomes susceptible of physical possession : *A. I. R.* 1924 *Lah* 302, *Foll.* [P 785 C 1]

Mehr Chand Mahajan—for Appellants.
Sagar Chand—for Respondents.

Judgment.—This second appeal concerns a suit for pre-emption. The sale-deed was executed on 6th March 1922.

It was registered on 26th April 1922, and the suit was instituted on 3rd April 1923.

The lower appellate Court held that the suit was within time and this is the sole point arising in second appeal.

The appeal is concluded by the lower appellate Court's finding of fact that at least up to 12th March 1922 the land sold was in possession of a tenant. Land so held, according to numerous decisions of this Court, is property which does not admit of physical possession by the new owner within the meaning of Art. 10, Lim. Act. The lower appellate Court has applied the Full Bench ruling *Gulam Mustafa* v. *Sahab-ud-din Khan* (1) and has held that limitation runs from the date of registration. This is correct.

Ground 2, that the District Judge failed to give a clear finding whether the land was in actual possession of a tenant when it was sold, has no force. There is a clear finding that the sale took place on 6th March 1922, when the tenant was in possession, and it was unnecessary to decide when the tenant vacated. This has been emphasized by a subsequent decision by a Division Bench of this Court printed as *Ganwa* v. *Jotiprasad* (2). There it was laid down that the question, whether the subject of a sale does or does not admit of physical possession, must be determined with reference to the date of the sale and it is immaterial whether the property afterwards becomes susceptible of physical possession.

I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) [1903] 49 P. R. 1903=1 P. W. R. 1908=63 P. L. R. 1908 (F. B.).
(2) A. I. R. 1924 Lah. 302.

A. I. R. 1927 Lahore 785

SHADI LAL, C. J., AND JAI LAL, J.

Mt. Sat Bhirai Khurd—Plaintiff—Appellant.

v.

Ahmad and *others*—Defendants—Respondents.

Second Appeal No. 30 of 1923, Decided on 6th May 1927, from decree of Dist. Judge, Shahpur, D/- 24th November 1922.

Limitation Act, S. 14—Proceedings by defendant—Plaintiff cannot avail of the time occupied by them.

When defendant sued plaintiff for a declaration that a certain sale was invalid and after his suit was finally dismissed, plaintiff sued for possession of the land sold to him :

Held : that the time occupied by defendant's suit cannot be availed of by plaintiff under S. 14, especially where causes of action for two suits were different and defendant's suit was not in a wrong Court. [P 786 C 1, 2]

Nanak Chand—for Appellant.

Mukand Lal Puri and *Mulk Raj Kapur*—for Respondents.

Jai Lal, J.—The relevant facts which have given rise to this second appeal, may be briefly stated. On 12th May 1900 one Sammun sold 20 bighas of shamilat land to one Hukum Chand. One of the conditions in the sale-deed was that the vendee would be entitled to take possession of the land sold on the partition of the shamilat. It is admitted that the partition took place on 27th May 1905. In the meantime one Mian Allah Yar Khan successfully pre-empted the sale, a decree on compromise having been granted in his favour on 15th January 1902 and the market value of the land in suit having been paid by him on 19th February 1902, to the original vendee.

On 25th March 1902, Mohammad, son of Sammun, instituted a suit against Hukam Chand, and Mian Allah Yar Khan for a declaration that he was the owner of the land and that the defendants had no rights therein. This suit was decreed by the trial Court, but was finally dismissed by the Chief Court of the Punjab on 23rd March 1915, mainly on the ground that Sammun had an unrestricted power of alienation in respect of the ancestral property.

The present action was then commenced by Mt. Sat Bhirai, widow of Mian Allah Yar Khan, on 23rd May 1921, against the sons of Mohammad for possession of 20 bighas of the shamilat land which was originally sold to Hukam Chand and was decreed in her husband's favour in the pre-emption suit. Her suit has been dismissed by the District Judge on the ground inter alia, that it is barred by time and the only question that we have to consider is whether the view of the District Judge is correct.

The learned Judge is of opinion that the plaintiff should have executed the decree for pre-emption within the ordinary period provided for the execution of decrees and that the only alternative cause of action was a suit for possession

by pre-emption and, as the period provided for such suit has expired, therefore, the present suit is not maintainable. In this the learned Judge has fallen into a confusion. The plaintiff's present action was not directed against the original vendee Hukam Chand. On the other hand he had perfected his title by paying the pre-emption money in Court within the time fixed according to the compromise made with him and, therefore, he was entitled to step into the shoes of Hukam Chand and was entitled to the same remedies as the latter had against his vendor. The present suit, which is to obtain possession from the original vendor, is governed by the same law as a suit brought by Hukam Chand would have been.

According to the sale-deed Hukam Chand was entitled to get actual possession of the land sold to him after partition, which admittedly took place on 27th May 1905. Limitation for suit for possession, whether by Hukam Chand or by the present plaintiff, therefore, started on 27th May 1905, but the suit, having been brought on 23rd May 1921, is prima facie barred by time, unless the plaintiff can show that she is entitled to some exemption provided by law. The only section under which exemption was claimed by the counsel for the appellant is S. 14, Lim. Act, which provides that, in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the defendants shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other causes of a like nature, is unable to entertain it. We cannot understand how this section can help the plaintiff.

It is claimed on her behalf that the time during which Mohammad's suit, which was instituted on 25th March 1902 and finally dismissed on 23rd March 1913, should be excluded in computing the period of limitation for the present suit. But the Court in which that suit was instituted did not refuse to entertain it, and, moreover, there was no question relating to a defect of jurisdiction or other cause of a like nature in that case. It is obvious, therefore, that S. 14, Lim. Act, has no application to the facts of this case. There was absolutely nothing to debar the plaintiff from suing for possession immediately after the partition of the shamilat land effected in 1905, We consider, therefore, that the conclusion of the learned District Judge is correct and maintain his decree though on different grounds. We dismiss the appeal, but leave the parties to bear their own costs in this Court.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 786

TEK CHAND, J.

Hazura Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 506 of 1927, Decided on 22nd July 1927, from order of Sess. Judge, Jhelum, D/- 18th December 1926.

(a) *Penal Code, S. 97—Onus lies on the person bringing the plea of self-defence—Evidence Act, S.* 105.

It lies upon the person bringing the plea of self-defence to establish the circumstances under which each blow that causes an injury to a member of the opposite party is inflicted. [P 788 C 1]

(b) *Penal Code, Ss.* 147 *and* 324.

Inflicting separate sentences for the offences of rioting and hurt are not justified. When the causing of hurt by some members of the assembly converts it into unlawful one, separate sentences for rioting and causing hurt are not justifiable. [P 788 C 1]

G. C. Narang—for Petitioners.

D. R. Sawhney—for the Crown.

Judgment.—Criminal Revision Nos. 506 and 658 of 1927 are connected and may be disposed of together.

The petitioners in both cases are closely related, being the grandsons and great-grandsons of one Hazari Mal of mauza Bohat, in the Phalia tahsil of the Gujrat District. It appears that Karam Singh, one of the descendants of Hazari Mal, died childless some years ago and disputes between his nephews and cousins ensued with regard to succession to his property. A civil suit was instituted by Gopal Singh, father of Hazura Singh, against Ganesha Singh, and Jiwan Singh in the Court of Lala Sardari Lal, Sub-Judge. The Sub-Judge went to the village, on the 11th August 1925, to inspect the spot, accompanied by Lala

Saran Das, pleader for Gopal Singh, etc., and Lala Amar Nath, pleader for Ganesha Singh and others. As was natural, a large number of persons including the adherents of both parties assembled on the spot and while the Sub-Judge was inspecting the properties concerned, a verbal altercation began between Ganesha Singh and Hazura Singh. Ganesha Singh remarked that Lasuriwali haveli belonged to them exclusively. On this Hazura Singh began to abuse him and stated that the haveli had been purchased by his father. Ganesha Singh challenged Hazura Singh to produce the registered deed by which his father had purchased the haveli. Thereupon hot words began to be exchanged between them. This incident, however, ended there as the Sub-Judge left the spot and went to inspect the other properties of which inspection was necessary. When he and the pleaders were inspecting the houses alleged to have been left by Karam Singh deceased, Jiwan Singh came out of his house with a hatchet in his hand and aimed a blow at Hazura Singh. Hazura Singh, however, stepped aside and the blow fell upon the hand of Lala Amar Nath who was the pleader for Jiwan Singh's party. Hazura Singh ran away and Jiwan Singh pursued him. Shortly afterwards the adherents of both parties came in and a free fight seems to have ensued in which a number of members of each party received several injuries some of which were caused with sharp-edged weapons and others with lathis.

As a result of these happenings three prosecutions were started. Jiwan Singh was tried under S. 228/324, I. P. C., for having struck Lala Amar Nath, pleader, with a hatchet, and convicted. There is no revision petition against this conviction and we are not concerned with that case.

The second case was under S. 147/324, I. P. C., against Ganesha Singh and ten other members of his party. In the third case Hazura Singh and nine other members of his party were tried under S. 147/324. The learned trial Magistrate acquitted Pardhan Singh of Ganesha Singh's party and convicted the other ten accused. He also convicted ten members of Hazura Singh's party. He sentenced each convict of either parties under 147/324, I. P. C., but having regard to the fact that the parties are near relations and well-to-do persons, he did not think it proper to impose a sentence of imprisonment. He, accordingly, sentenced each accused to pay a fine of Rs. 400 for each offence. Thus, each accused in each of these trials was required to pay a fine of Rs. 800 and the aggregate fine imposed on all the accused in both cases amounted to Rs. 16,000. The convicts in both cases preferred appeals to the learned Sessions Judge who has maintained the conviction as well as the sentences. Petitions for revision were presented to this Court and I have heard at length Dr. Gokal Chand on behalf of Hazura Singh and others, Mr. Cooper on behalf of Ganesha Singh and others and Mr. Sawhney for the Crown.

The principal point urged by Dr. Gokal Chand on behalf of Hazura Singh and others is that the injuries inflicted (if at all) by his clients on the members of the opposite party were inflicted in the exercise of the right of private defence and that, having regard to the fact that the fight was first started by Jiwan Singh of the opposite party attempting to strike Hazura Singh with a hatchet and subsequently pursuing him, his clients cannot be said to have either committed an offence under S. 147 or under S. 324. As this aspect of the case was not discussed in the judgment of either the learned trial Magistrate or the learned Sessions Judge, I allowed counsel to read to me the relevant portions of the evidence.

After examining the evidence and giving due weight to the arguments addressed by counsel for both sides I am of opinion that the petitioners on whom the onus lay to establish that they acted in the exercise of the right of private defence have failed to establish the plea. As pointed out already, the quarrel originally arose out of a verbal altercation which was started by Hazura Singh, petitioner. Later on Jiwan Singh came out of his house with a hatchet with which he inflicted a blow on his pleader Lala Amar Nath. He then pursued Hazura Singh. On this the adherents of both parties collected together and a free fight seems to have ensued in which the members of both parties used deadly weapons and inflicted injuries on the members of the opposite faction. The fact that four members of Ganesha Singh's party and

six members of Hazura Singh's party received injuries indicates that these weapons were used on both sides. In order to establish that Hazura Singh and others acted in the exercise of the right of self-defence it lay upon them to establish the circumstances under which each blow that caused an injury to a member of the opposite party was inflicted. From the evidence read before me it does not appear that any effort was made by any member of Hazura Singh's party to explain the circumstances under which he gave a blow to his opponents. Indeed, the case put forward on behalf of these persons was that they did not use any weapon against the members of the opposite faction at all. Nor has my attention been drawn to any other facts established on the record from which I could draw the inference that Hazura Singh and his companions inflicted these injuries in the exercise of the right of self-defence. It is also significant that this point was not taken in the grounds of appeal before the learned Sessions Judge and does not appear to have been argued before him. I, therefore, hold that the convictions in both cases are correct and ought to be maintained.

As to the sentences : the first point to be decided is whether a separate sentence of Rs. 400 fine imposed upon each petitioner under each offence is legal. From the statement of facts given above and the findings of the learned trial Magistrate it is quite clear that in either case the assembly was not an unlawful one from the very beginning but that it was only when the parties had met face to face after the hatchet blow on Lala Amar Nath had been inflicted, that the fight started in which hurt was caused by some members of one party to some members of the opposite party. In these circumstances, it was the causing of hurt which converted the assembly into an unlawful one. The learned trial Magistrate, therefore, was not justified in inflicting separate sentences for the offences of rioting and hurt. The law on the point has been clearly and authoritatively laid down in the Full Bench ruling *Bhagwan Singh* v. *Empress* (1) which is regarded as the leading case on the subject and has been followed in numerous cases see for example : *Mangal Singh* v. *Emperor* (2). The learned Public Prosecutor has conceded that on the findings of the Courts below, and the facts disclosed on the record, a single sentence could only be imposed upon each of the petitioners in these cases. I must, therefore, hold that the lower Courts were wrong in passing separate sentences under each section against each petitioner.

As to the sentence of Rs. 400 fine against each petitioner : Mr. Sawhney for the Crown has left the matter entirely in my hands. After fully considering the argument of the petitioners' counsel and examining the record, I am of opinion that the ends of justice will be met by imposing a sentence of Rs. 200 fine on each petitioner. I, therefore, accept the petitions to this extent, that the sentence against each petitioner shall be reduced to a fine of Rs. 200 only. In all other respects the petitions are dismissed. The excess fine, if paid, must be refunded.

N.K. *Sentence reduced.*

(1) [1901] 4 P. R. Cr. 1901 = 52 P. L. R. 1901 (F. B).

(2) [1916] 31 P. R. Cr. 1916 = 38 I. C. 756= 18 Cr. L. J. 372.

A. I. R. 1927 Lahore 788

SHADI LAL, C. J., AND JAI LAL, J.

Kamar-ud-din and *others* — Plaintiffs—Appellants.

v.

Sham Das—Defendant — Respondent.

Second Appeal No. 408 of 1923, Decided on 24th April 1927, from decree of Addl. J. Amritsar, D/- 20th Nov. 1922.

Specific Relief Act, S. 42—Suit for mere declaration does not lie when consequential relief was claimable but not claimed.

A suit for mere declaration that an ex-parte decree against plaintiff was obtained by fraud does not lie when, at the date of suit, the ex-parte decree-holder had executed it and had entered into possession of the property which was the subject-matter of the suit. [P 789 C 1]

Ghulam Rasul—for Appellants.

Gobind Ram Khanna—for Respondent.

Judgment.-- On 22nd December 1919, Sham Das, who is the defendant in the present case, obtained an ex-parte decree against seven persons, including the three plaintiffs, for possession of 4 kanals of land. On 7th February 1920, the plaintiffs, transferred their share in the property to one Hans Raj, but it is admitted that the decree-holder subsequently executed his decree and recovered from Hans Raj a part of the property on 21st

April 1921, and the rest on 7th May 1921. On 14th May 1921, the plaintiffs, who had no longer any interest in the land which was the subject of the ex-parte decree, brought the present action for a declaration that that decree was not binding upon them as it was obtained by fraud. The suit has been dismissed on the ground that the plaintiffs being out of possession are entitled to consequential relief and cannot sue for a mere declaration. It is clear that the dispute is really between Hans Raj on the one side and Sham Das on the other, and, as pointed out in *Jhuna* v. *Beni Ram* (1), the plaintiffs having parted with their interest in the property, have no locus standi to bring the suit.

It is, however, unnecessary to discuss this question, because the appeal must fail on the short ground that the suit for a declaration does not lie. It will be observed that the suit was brought on 14th May 1921, and not on 7th May 1921, as wrongly stated by the Court of first instance and that before the presentation of the plaint the defendant had obtained possesssion of the whole of the property. A suit for possession should, therefore, have been filed, and the learned counsel for the appellants admits that a declaratory decree, even if granted to them, would not enable them to recover the property which is in the possession of the defendant.

We accordingly hold that the suit as filed does not lie. It is, however, urged that the plaintiffs should be allowed to amend their plaint, but this prayer was never made in either of the Courts below. Indeed, the plaintiffs strenuously contended that they were entitled to sue only for a declaration and declined to pay the necessary amount of Court-fee. In these circumstances we cannot grant the prayer for amendment at this late stage of the case and dismiss the appeal with costs.

D.D. *Appeal dismissed.*

(1) [1887] 9 All. 439=(1889) A. W. N. 75.

A. I. R. 1927 Lahore 789

ADDISON, J.

Usaf Ali Mamooji—Applicant—Appellant.

v.

Alibhoy Mamoonji and *others*—Opposite Party—Respondents.

Misc. First Appeal No. 3107 of 1925, Decided on 12th January 1927, from order of Dist. Judge, Rawalpindi, D/- 31st August 1925.

Guardians and Wards Act, S. 7—Previous family arrangement satisfactory to protect minor's interest—Guardian need not be appointed.

An appointment of a guardian for the minor's property is not necessary where the previous family arrangements are quite satisfactory for the protection of the minors' interests : 93 *P.R.* 1914, *Foll.* [P 790 C 1]

Hargopal—for Appellant.

Aziz Ahmad—for Respondents.

Judgment.—Seth Hassan Ali Mamooji, one of five full brothers, died on 6th July 1916. He left a widow, Mt. Khadeja Bai, a minor daughter Zura Bai and mother Fatima Bai, besides his four full brothers and some sisters. Three brothers, who are the principal respondents in this appeal, have been looking after the minor daughter of Hasan Ali since the death of her father in 1916. Her father died when she was an infant. The other brother Usaf Ali separated from the family before the death of their father. He waited till the 7th March 1924, and then presented an application in the Court of the District Judge, Rawalpindi, to the effect that a guardian should be appointed by Court for the proper management of the property of the minor Mt. Zura Bai.

In the meantime the mother of Hassan Ali had also died. Before doing so she gifted her share of Hassan Ali's property to her three sons, who are respondent's but she excluded the petitioner from the gift. The minor's mother Mt. Khadija Bai also died and her share of Hassan Ali's property has gone partly to her minor daughter and partly to her father, brothers and sisters. The property has continued joint in spite of all these deaths and in spite of the fact that the cosharers had now become very numerous. The District Judge has held that the petitioner Usaf Ali himself is absolutely unfit to be the guardian of the minor Mt. Zura Bai,

against whom he filed a suit claiming her father's property. Even when he gave up this claim he still continued to assert in the very act of doing so that he was entitled to the property.

It has also been established that the father of the minor left a will bequeathing the whole of the property to his brothers who are the principal respondents subject to certain bequests and annuities. At the same time he handed over his minor daughter, Mt. Zura Bai, to those three brothers as their own daughter. The brothers, however, refused to act on this bequest and allowed the property to vest in the proper heirs according to Shiah Mahomedan law. The above will shows the trust that the father had in those three brothers and his desires that they should look after his minor daughter. They have continued to do so and, therefore, kept complete accounts of the estate of the deceased Hassan Ali. Most of the money, apart from the house property, is invested in, the firm M. Hakimji in which she, her father, and three brothers whom he trusted, are cosharers. Obviously this is a very satisfactory family arrangement under which the minor's interest are being very well looked after. The petition of the brother who separated from the family very early has been presented merely out of spite. There is no necessity in my opinion formally to appoint any of the three brothers to act as guardian of the minor when her interests are being looked after very well without this being done. It is most unlikely that by the present arrangement she will suffer any loss. The only possible loss she could suffer would be in the case of the whole family being ruined. It is not necessary to provide for such an unlikely contingency.

In my judgment the learned District Judge has given very good reasons for refusing to appoint any guardian for the minor Mt. Zura Bai, and I see no reason to disagree with his conclusions on any point. It was held in *Hayat Khatun* v. *Sharin Khatun* (1), that the District Judge should not have entertained an application for a guardian to be appointed for the minor in that case as the previous family arrangements were quite satisfactory. Similarly, in the present case, the family arrangements could not be more satisfactory than they are. I dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) [1914] 93 P. R. 1914=26 I. C. 524=238 P. L. R. 1915.

A. I. R. 1927 Lahore 790

ADDISON, J.

Mt. Allah Jawai and *others*—Defendants—Appellants.

v.

Muhammad Baksh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1478 of 1925, Decided on 4th January 1927, from decree of Senior Sub-Judge, Jhang, D/- 27-3-1925.

(a) *Limitation Act, Sch. 1, Art. 144 — Suit by a Mahomedan heir for his share against person in adverse possession thereof—Art. 144 applies.*

On the death of a Mahomedan, each of his heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. 144. Limitation Act : *A. I. R.* 1923 *Lah.* 519, *Foll.* ; *A. I. R.* 1922 *All.* 433 and *A.I.R.* 1924 *All.* 920, *Ref.* [P 790 C 2, P 791 C 1]

(b) *Adverse possession — Claim adverse to plaintiff put in a criminal case by defendant—Limitation runs from the time when defendant so sets up the claim.*

Obiter —Where in a criminal case a defendant-cosharer denied the cosharer plaintiff's claim to share in certain property,

Held : that the assertion would certainly start adverse possession against plaintiff and other cosharers. [P 791 C 1]

Jiwan Lal Kapur—for Appellants.

G. S. Salaria for *Sain Das* — for Respondents.

Judgment.—The facts of this appeal are succinctly stated in the judgment of Mr. Justice Martineau, dated 30th November 1925. Later he set aside that judgment, which was delivered ex parte, on the ground that there was sufficient cause for the non-appearance of the opposite party. The appeal has now again been heard by me.

Mt. Jawai has been for a long time in possession of the property in question to the exclusion of the other heirs. The family is a Mahomedan one, so that the estate of Raushan must be deemed to have descended to the heirs not as a joint tenancy, but as a tenancy-in-common. For that reason alone on the authority of *Zainab* v. *Ghulam Rasul* (1) this suit is long timebarred. It was held there that on the death of a Mahomedan each of

(1) A.I.R. 1923 Lah. 519=4 Lah. 402.

his heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. .144, Sch. 1, Limitation Act. In this connexion I would also refer to *Mustafa Khan* v. *Dulari* (2) and *Basu* v. *Nanhi* (3).

Further, it has been held that Mt. Jawari in a criminal case denied the plaintiffs' claim to a share in this house. This was in 1911. The lower appellate Court thought that this was not sufficient to start adverse possession. In my opinion the fact that she definitely asserted her own right to this house as against the plaintiffs and all others in 1911 would certainly start adverse possession. Apart, however, from this finding the suit is obviously time barred for the reasons given in the first portion of this judgment. The appeal is accordingly accepted, the decree of the lower appellate Court is set aside and that of the trial Court is restored. The appellant will have her costs throughout.

J.V. *Appeal accepted.*

(2) A.I.R. 1922 All. 433.
(3) A.I.R. 1924 All. 920.

A. I. R. 1927 Lahore 791 (1)

DALIP SINGH, J.

Chuni Lal—Plaintiff—Petitioner.

v.

Gandu Mal and *another*—Defendants—Respondents.

Civil Revn. No. 706 of 1926, Decided on 28th January 1927, from order of Dist. Judge, Jullundur, D/- 26th May 1926.

Civil P. C., S. 115 — Suit dismissed for default of counsel—Revision will not lie.

Where the suit was dismissed for default after several calls and the excuse was that the pleader was engaged in some other case.

Held: there was no sufficient cause to restore the suit. [P 791 C 1]

Obedullah—for Petitioner.

Nand Lal—for Respondents.

Judgment. — This revision lies against an order dismissing a case for default under O. 9, R. 8, Civil P. C. The facts are that the case was called several times, defendants and their witnesses were present and the reason for the absence of the petitioner's counsel was that he was engaged in another Court. This is not sufficient and the Courts below have dismissed the application to restore. I see no reason to interfere in this revision and I dismiss it with costs.

J.V. *Petition dismissed.*

A. I. R. 1927 Lahore 791 (2)

JAI LAL, J.

Khuda Dad—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 949 of 1926, Decided on 22nd November 1926, from order of 1st Cl. Magistrate, Rawalpindi, D/- 31st July 1926.

Penal Code, S. 397 — Only offender using deadly weapon is liable—Others are not.

It is only the offender who actually uses the deadly weapon that can be convicted under S. 397, and the constructive liability of his companions in the crime does not arise under the section: *A. I. R.* 1924 *Lah.* 409, *Fell.* [P 792 C 1]

Mohammad Tufail—for Appellant.

Sleem—for Respondent.

Judgment.—Khuda Dad, appellant has been convicted under S. 397, I. P. C., and sentenced to rigorous imprisonment for seven years including three months' solitary confinement and a fine of Rs. 200.

The Magistrate has found him guilty of having committed a dacoity at the house of Teja Singh on the night between the 24th and 25th December 1925. It has been found that there were 15 or 16 culprits and that some of them were armed with revolvers which were fired to frighten the villagers from coming to the rescue of Teja Singh, and that owing to Teja Singh not having given information as to the whereabouts of cash in the house on the ground that he had spent it in the purchase of grain, the dacoits were unable to obtain any property except two gold earrings which were in the ears of Mt. Hiran Devi, wife of Teja Singh. It also appears that simple hurts were caused both to Teja Singh and Mt. Hiran Devi.

The above facts have been proved from the evidence of a large number of witnesses on the record and both Teja Singh and Mt. Hiran Devi have identified Khuda Dad as being the person who actually took the earrings from Mt. Hiran Devi. These earrings were discovered during police investigation from the bed of a *kas* near the village Mator, a long distance from the village of Teja Singh on information given by the appellant.

The facts of the information given by Khuda Dad and the recovery of earrings have been established by reliable evidence. I have, therefore, no hesitation in holding that it has been estab-

lished that Khuda Dad was one of the culprits who committed the dacoity in the house of Teja Singh.

It is next contended by the learned counsel for the appellant that Khuda Dad could not be convicted under S. 397, I. P. C., as it has not been proved that he used any deadly weapon or caused grievous hurt to any of the inmates of the house or to any other persons in the village. The learned Magistrate has convicted him under that section on the ground that some of the dacoits used revolvers in committing the dacoity. He has not been able to determine that it was Khuda Dad who used a revolver and therefore, applying S. 37, I. P. C., he has convicted Khuda Dad under S. 397, I. P. C. In my opinion this section has no application to the facts of the present case. S. 397 provides that if, at the time of committing dacoity, the offender inter alia uses any deadly weapon the imprisonment with which such offender shall be punished shall not be less than seven years. It, therefore, follows that it is only the offender who actually uses the deadly weapon that can be convicted under S. 397, I. P. C., and that the constructive liability of his companions in the crime does not arise under the section. This was the view taken by one of the learned Judges of this Court in *Ilahia* v. *Emperor* (1) and it clearly follows from the wording of S. 397.

I hold, therefore, that the proper section with which the appellant should have been convicted was S. 395, I. P. C., and, accepting this appeal, I alter the conviction to one under that section and reduce the sentence to five years' rigorous imprisonment including three months' solitary confinement.

R.D. *Sentence reduced.*

(1) A. I. R. 1924 Lah. 409.

A. I. R. 1927 Lahore 792

BROADWAY, J.

Teja Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 884 of 1927, Decided on 10th August 1927, from order of District Magistrate, Sialkot, D/- 23rd March 1927.

Criminal P. C., S. 522 — No finding that force was used by accused—Order under S. 522 is bad.

In the absence of any finding that criminal force was used by an accused person, an order under S. 522 is without jurisdiction: 27 *Cal.* 174; 16 *P. R. Cr.* 1919; 26 *Mad.* 49 and 25 *All.* 341, *Rel. on.* [P 792 C 2]

M. L. Puri—for Petitioner.

Judgment.—Teja Singh, son of Jagat Singh, obstructed a certain lane by building a wall across it. Proceedings were taken against him under S. 283, I. P. C., and he was convicted under that section and sentenced to pay a fine of Rs. 50. He appealed to the District Magistrate who came to a clear finding that the lane which had been obstructed had been dedicated to the public and was a public thoroughfare and that, therefore, the obstruction of that lane by the building of the wall was an offence falling within the purview of S. 283, I. P. C.

It was further held, however, that Teja Singh had acted in a bona fide belief that he had the right to close the lane by building this wall and the learned District Magistrate, therefore, reduced the punishment to fine of Re. 1, or in default to one day's simple imprisonment. He then proceeded to make an order under S. 522, Criminal P. C., directing Teja Singh to demolish the wall within one month from the date of the judgment.

Teja Singh moved this Court under S. 439, Criminal P. C., and the learned Judge in Chambers, before whom this petition first came up for hearing, while upholding the conviction and sentence under S. 283, I. P. C., issued notice in connexion with the order passed under S. 522, Criminal P. C.

It has been contended before me by Mr. Mukand Lal Puri that in the absence of any finding that any criminal force had been used by Teja Singh, the order under S. 522, Criminal P. C., was without jurisdiction and bad in law. He had placed reliance principally on *Ishan Chandra* v. *Dina Nath* (1), *Hari Chand* v. *Emperor* (2), *In re Batakala Pottiavadu* (3) and *Churaman* v. *Ramlal* (4). A reference to S. 522 appears to me to support the contention advanced by the

(1) [1900] 27 Cal. 174=4 C. W. N. 307.
(2) [1919] 16 P. R. Cr. 1919=51 I. C. 472=20 Cr. L. J. 488.
(3) [1903] 26 Mad. 49=12 M. L. J. 447=2 Weir. 675.
(4) [1903] 25 All. 341=(1903) A. W. N. 59.

learned counsel. There is no finding by the District Magistrate that any force was used by Teja Singh and, therefore, it seems to me that the order passed under S. 522, Criminal P. C., was without jurisdiction. I, therefore, set it aside.

J.V. *Order set aside.*

A. I. R. 1927 Lahore 793 (1)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Sakhawat Ali and *others*—Plaintiffs—Appellants.

v.

Hashmat Ali and *others*—Defendants—Respondents.

First Appeal No. 3011 of 1922, Decided on 1st April 1927, from decree of Sr. Sub-Judge, Rohtak, D/- 8th August 1922.

Custom (Punjab)—Succession — Sayyeds of Kharkhaunda (Rohtak District) are governed by custom—Daughter of deceased brother excludes sons of sister.

Agricultural Sayyeds of village Kharkhaunda in the Rohtak District in matters of inheritance are governed by custom, and according to that custom the daughter of a predeceased brother of the last male proprietor excludes the son of a sister: *A. I. R.* 1925 *P. C.* 99, *Foll.* [P 793 C 1]

Nand Lal and *Amolak Ram Kapur*—for Appellants.

Shamair Chand, *Amar Nath Chona*, *Amin Chand Mehta* and *B. N. Sethi*—for Respondents.

Zafar Ali, J.—The parties to this litigation are members of a family of agricultural Sayyeds of village Kharkhaunda in the Rohtak District, and the vital question, on which they joined issue, was whether in matters of inheritance the family was governed by custom and whether according to that custom the daughter of a predeceased brother of the last male proprietor excluded the sons of a sister. The last male owner was Barkat Ali who had three sisters. Nasib-ul-Nisa, the daughter of his predeceased brother, claimed his land to the exclusion of his sister's sons. In a suit between Afzal Ali (a sister's son) and Nasib-ul-Nisa a Division Bench of the High Court by its judgment, dated 23rd July 1921, decided that, according to custom, Nasib-ul-Nisa was entitled to exclude sisters' sons from inheritance. The latter's appeal against the judgment of the High Court was dismissed by their Lordships of the Privy Council who affirmed the rule of custom laid down by the High Court.

Without waiting for the decision of the High Court in the said case, the three brothers of Afzal Ali instituted a suit to contest Mt. Nasib-ul-Nisa's right of succession and one of them instituted another suit on 4th April 1922, to dispute Mt. Nasib-ul-Nisa's succession to the land left by Rahmat Ali, paternal uncle of Barkal Ali. The trial Court has dismissed both these suits applying the rule of custom laid down by the High Court in the former suit.

The plaintiffs in both cases have come up to this Court in first appeal, but in face of the ruling of their Lordships of the Judicial Committee their learned counsel is unable to show that the said rule of custom does not govern the present case. This rule goes to the root of both these cases and no other point need be considered. We, therefore, dismiss the appeal in both cases with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 793 (2)

ZAFAR ALI AND JAI LAL, JJ.

Anant Ram—Plaintiff—Appellant.

v.

Abdul Haq—Defendant—Respondent.

First Appeal No. 3090 of 1922, Decided on 21st March 1927, from decree of Sr. Sub-Judge, Sialkot, D/- 4th December 1922.

Hindu Law—Presumption—No presumption exists as to joint family possessing any property—Presumption is that all property possessed by family is joint if it lives in commensality.

There is no presumption that a family, because it is joint, possesses joint property or any property. But where it is proved or admitted as to a Hindu family that it lived in commensality and possessed joint property, the presumption of law is that all the property they are possessed of is joint. It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property: 33 *All.* 677 and 13 *Bom.* 61, *Foll.* [P 795 C 1]

Badri Das and *J. L. Kapur*—for Appellant.

Moti Sagar and *Niaz Mohammad*—for Respondent.

Zafar Ali, J.—The plaintiff Ralla Ram, a Brahmin of Sialkot (who died during the pendency of the suit in the Court below and is represented by his

only son Anant Ram), laid claim to the whole of house No. 205 and to a moiety of house No. 206, stating that he acquired the former by purchase and that the latter had devolved upon him and his brother Dina Nath in equal shares on the death of their father Ram Dhan. In the Khasra abadi or register of houses prepared in 1868 the owner of house No. 206 was shown to be Ram Dhan, while Tara Singh and Ganda Singh, sons of Arjan Singh Arora, were entered as owners of house No. 205. By a registered deed, dated 6th October 1870, the Arora brothers sold house No. 205 to Ralla Ram for Rs. 300. These two houses, Nos. 205 and 206, formed together a rectangular block bounded on the north by a lane or bazar. House No. 206 consisted of two adjoining rooms or shops with a small room to one side containing a staircase leading to the baithak on the top of them all. House No. 205 consisted of a shop and a deorhi or passage in front and a two-storeyed haveli at the back abutting on the shop and the passage and also on the rooms of house No. 206. Some time after he had acquired house No. 205, Ralla Ram built two shops on the site of the original shop and deorhi and removing the stair case of house No. 206 he converted the place into a passage or deorhi for the common use of the occupants of both the houses. There was already in existence a staircase in the courtyard of house No. 205 just at the back of house No. 206. This was accessible from the new passage and it was made subservient to house No. 206 as well. The courtyard of the haveli is surrounded by rooms on all sides but one where this new staircase is. Just opposite to the staircase there is a big room called dalan. This entire block of houses, Nos. 205 and 206 could be divided into eastern and western halves by erecting a wall from the passage right across the courtyard and the dalan. Dina Nath died long before his brother Ralla Ram leaving him surviving his son Badri Nath who figures as defendant-respondent 2 in this case.

Acting on this assumption that both the houses were joint property of the family of Ram Dhan and that the eastern half thereof had fallen to the share of his father Dina Nath, Badri Das at first mortgaged that eastern half to the brothers Guran Ditta and Nand Gopal, money-lenders, for Rs. 1,000. This mortgage was executed on the 19th March 1917. Though it was stated to be with possession, Badri Nath did not part with possession but agreed to pay rent. Adding Rs. 105 on account of rent and Rs. 390 received cash, Badri Nath executed a fresh mortgage in favour of the same money-lenders on the 22nd May 1918. On the 3rd November 1918, he borrowed Rs. 99 from one Chuni Shah on the security of that very property. Subsequent to that he borrowed Rupees 2,200 more from Guran Ditta and Nand Gopal, mortgagees, and executed a deed in respect of that additional charge on the property on the 24th February 1919. On the 8th June 1919, he sold the property to Hafiz Abdul Haq (defendant-respondent 1) for Rs. 10,000. Out of this amount he left Rs. 4,300 with the vendee for payment to mortgagees and an unsecured creditor.

Disputes arose between the vendee and Ralla Ram when the former proceeded to take possession of the property with the result that they lodged criminal cases against each other. At last, on the 26th May, 1920, Ralla Ram instituted the suit out of which this first appeal has arisen.

The sole question for determination is whether Ram Dhan and his sons were coparceners in 1870, and Ralla Ram purchased house No. 205 on behalf, and for the benefit, of the family, with the money taken from the coparcenary funds, or whether he did so with his own earnings for his own personal use. This question was not directly put in issue, but one of the two issues framed by the trial Court, viz., "Does the property in suit belong solely to plaintiff?" was comprehensive enough to cover it, and it appears that the parties understood what they had to establish and produced evidence accordingly. The trial Court has found against the plaintiff, but on a careful consideration of all the evidence on the record and of the rule of Hindu law applicable to the case we come to the contrary conclusion. (The judgment then dealt with the evidence, and finding that the family had neither joint property nor a coparcenary fund, proceeded.) We have also found that the family was not in possession of any joint or ancestral property, nor had any joint family funds. Coupled with these findings there is the

direct evidence that Ralla Ram purchased the house in his own name and treated it as his own separate property. In these circumstances the rule of Hindu law that is applicable is quite clear and will be found enunciated in para. 191, Cl. (4) of Mulla's Hindu Law, which runs thus :

> There is no presumption that a family, because it is joint, possesses joint property or any property. But where it is proved or admitted as to a Hindu family that it lived in comensality and possesses joint property the presumption of law is that all the property they are possessed of is joint.

The leading case on the point is *Ram Kishan Das* v. *Tanda Mal* (1), where it was held that

> it is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. There is no presumption that a Hindu family has any joint property.

Toolseydas Ludha v. *Premji Triamdas* (2) is to the same effect. Mr. Moti Sagar relied upon *Kundan Lal* v. *Shankar Lal* (3), where it was decided that property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. But in the present case it was not proved that the house in question acquired by Ralla Ram was in the joint possession of the family. It does not seem necessary to refer to several other cases referred to by counsel on this point because the principle cited above was followed in all those cases. We, therefore, find that Ralla Ram was entitled to whole of house No. 205 and half of house No. 206. The mortgages or sale effected by his nephew, Badri Nath, could not affect his rights.

We, therefore, accept the appeal and, reversing the judgment and decree of the Court below, decree the plaintiff's suit with costs throughout.

R.D. *Appeal accepted.*

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(1) [1911] 33 All. 677=10 I. C. 543=8 A. L. J. 723.
(2) [1889] 13 Bom. 61.
(3) [1913] 35 All. 564=21 I. C. 13=11 A. L. J. 910.

A. I. R. 1927 Lahore 795

CAMPBELL AND TEK CHAND, JJ.

Firm Dina Nath Sri Ram—Defendants—Appellants.

v.

Ramji Das—Plaintiff—Respondent.

First Appeal No. 737 of 1922, Decided on 21st February 1927, from decree of Sr. Sub-Judge, Delhi, D/- 30th November 1921.

Practice—New plea cannot be taken in appeal for the first time.

Where the plea that the resale by the plaintiff was invalid by reason of its not having taken place within a reasonable time after the date of breach was not raised in the trial Court and was taken in the memorandum of appeal,

Held: the plea could not be raised for the first time in the appeal. [P 796 C 2, P 797 C 1]

Sardha Ram and *Maya Das Narain*—for Appellant.

Jagan Nath Aggarwal and *Bishan Narain*—for Respondent.

Campbell, J.—In this suit the plaintiff is the Firm Behari Lal-Ramji Das of Delhi and the defendant is the Firm Dina Nath-Sri Ram of the same place. On 17th August 1918, the plaintiff sold to the defendant 25 bales of a species of cloth called bolra, delivery to be made against payment on 25th August 1918. On 4th August the defendant sold to the plaintiff ten bales of Zephyr prints, delivery to be made against payment on 19th August 1918.

On 22nd August 1918, the plaintiff paid the defendant Rs. 3,475 on account of the Zephyr prints contract ,which sum represents the price of two out of the ten bales. Otherwise neither contract was fulfilled. Admittedly time for performance in each case was extended by consent up to 17th October 1918, on which date there were some proceedings in the office of the Hindustani Mercantile Association. Subsequently, on 28th February 1919, the defendant resold the Zephyr prints, and on 1st March 1919, the plaintiff resold the bolra. The suit is by the plaintiff to recover damages for alleged breach of the bolra contract based on the difference between the contract price and the auction price, for recovery of the Rs. 3,475 paid in part performance of the Zephyr prints contract and for damages for non-delivery of the Zephyr prints. In all the plaintiff claimed Rs. 13,562-7-3.

The lower Court has held as follows:

(1) The bolra contract was broken by the defendant, the property in the goods had passed

to the defendant and the plaintiff had a right of resale. (2) The resale was a valid one and resulted in a loss to the plaintiff of Rs. 7,600-5-0 which he was entitled to recover as damages. (3) The Zephyr contract was broken by the plaintiff and the defendant had a right of resale. (4) The resale by the defendant was also a valid one and the loss to the defendant was Rs. 3,233-1-9. (5) The plaintiff was entitled to a decree for Rs. 7,600-5-0 and Rs. 3,475—Rs. 3,233-1-9, total=Rs. 7,842-3-3.

The defendant had instituted a separate suit for damages on account of breach of the Zephyr prints contract estimated at Rs. 4,376-12-0—Rs.3,475= Rs. 901-12-0. By order, dated 18th February 1921, the lower Court directed that "the cases shall stand consolidated as agreed upon." In the bolra contract suit a decree was passed in favour of the plaintiff for Rs. 7,842-3-3. The final order in the defendant's suit is not before us, but we are informed that it was one dismissing the suit.

The present appeal is by the defendant against the decree in the bolra suit. The memorandum of appeal includes a claim that the full amount of Rs. 901-12-0 should have been allowed to the defendant on the Zephyr prints contract, but this claim has been abandoned before us, and the appeal has been confined to one against the decision that the plaintiff was entitled to damages for breach of the bolra contract. Hence the question of the effect of the defendant omitting to appeal against the dismissal of his suit does not arise.

The plaintiff has filed cross-objections asserting that the party entitled to damages on the Zephyr prints contract was the plaintiff, and claiming that the amount of such damages should be added to the decree as well as the difference between the damages claimed on the bolra contract and those allowed by the Court. The contentions put before us are these:

(a) By the defendant.

(i) The bolra contract was a nullity on account of fraud by the plaintiff Ramji Dass, in that he caused the contract to be signed by his son Ghanshyam Das, whom he knew to be a minor, with the intention of repudiating it or enforcing it according as the market price stood on the due date. (ii) The plaintiff has failed to prove that he was ready and willing to perform his part of the contract on 17th October. (iii) The resale was belated and hence invalid.

(b) By the plaintiff.

(i) The plaintiff was ready and willing to perform his part of the Zephyr prints contract on 17th October.

In my opinion the decision of the trial Court upon all these points was correct and both appeal and cross-objection must fail.

The minority of Ghanshyam Dass did not preclude his acting as the agent of Ramji Dass, if duly authorized and it is an essential feature of the defendant's charge of fraud that he was authorized by Ramji Dass to sign the contract. Proof has been given of a statement made by Ramji Dass in a suit brought by Moti Ram-Sri Ram against his firm on another contract signed by Ghanshyam Das. Ramji Das there said that Ghanshyam Das wrote the contract, that he did not do the business of the shop, and that he (Ramji Dass) did not know how Ghanshyam Dass came to make the contract. No other details about that suit are forthcoming. On the other hand the present Zephyr prints contract was also signed by Ghanshyam Dass, and the plaintiff has never sought to get out of it on that ground. This is all the evidence on the point and it is not sufficient to establish fraud.

The evidence of what took place on 17th October at the Hindustani Mercantile Association's office shows that the plaintiff actually carted 25 bales of bolra to that office, and offered them to the defendant. Three bales were found not to be those appropriated to the contract, but an offer to change them without delay was made. At the same time the defendant offered the plaintiff a delivery order for the Zephyr prints on King & Co., in return for the price which was not forthcoming from the plaintiff. I agree with the learned Sub-Judge that the statements of the plaintiffs' witnesses Budha Ram, Gauri Shankar and Munshi Lal, that the plaintiff had in his pocket Rs. 12,000 to pay for the Zephyr prints cannot be relied upon. It is clear that neither side was prepared on that day to pay the cash price of the goods which he had purchased and that in each case the seller was ready to give delivery in return for the price. Hence the plaintiff and the dafendant were ready and willing each in regard only to the contract in which he was the seller.

The plea that the resale by the plaintiff was invalid by reason of its not having taken place within a reasonable time after the date of breach was not raised in the trial Court, and was taken in the memorandum of appeal. It cannot there-

fore be effective at this stage. If the plaintiff had been given an opportunity he might have established one of several possible reasons for the delay which took place between 17th October 1918 and 16th February 1919, when notice of resale was given.

I would dismiss both appeal and cross-objections and would order that the parties bear their own costs in this Court.

Tek Chand, J.—I agree.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 797 (1)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Devi Ditta Mal—Deft.—Appellant.

v.

Standard Bank of India—Plaintiff—Respondent.

Letters Patent Appeal No. 94 of 1925, Decided on 23rd March 1927, from judgment of Broadway, J., D/- 3rd Feb. 1925, in Civil Appeal No. 2030 of 1924.

(a) *Companies Act, S. 28, and Table A, S. 20—Transfer of share to take effect must be recognized.*

A transfer of a share cannot take effect without the sanction of the Company. [P 797 C 1]

(b) *Companies Act, S. 86—Director, invalidly appointed cannot bind share-holders.*

A Director invalidly appointed cannot, in the absence of a provision in the Articles of Association, bind the shareholders unless the defect is unknown at the time. [P 797 C 2]

Hargopal—for Appellant.

Madan Gopal—for Respondent.

Judgment.—This appeal and the Letters Patent Appeal No. 95 of 1925 arise out of the proceedings taken by the District Judge in the winding up of the Standard Bank of India Limited. Two persons, namely, Trilok Chand and Devi Ditta, have been settled on list A of the contributors of the Company, and their contention is that their names should be removed from the list, as they had transferred their shares to one Kishen Singh. This Kishen Singh was the Managing Director as well as the Manager of the Bank, and it appears that Trilok Chand executed in his favour a deed of transfer in respect of his shares on 8th July 1922, and that Devi Ditta executed a similar deed four days afterwards. It is, however, beyond dispute that neither of the transfers could take effect without the sanction of the Company. It is true that the question of the transfer was brought up before the Directors on 19th February 1923, and 9th March 1923, but these meetings were attended only by Kishen Singh who was the transferee of the shares, and a creature of his known as Isher Singh; but neither of them was entitled to vote on the matter. Kishen Singh was prohibited from voting because he was directly interested in the matter, vide S. 91-B, Indian Companies Act, and Isher Singh had never been validly appointed a Director of the Company. It is beyond dispute that a Director invalidly appointed cannot, in the absence of a provision in the Articles of Association, bind the shareholders unless the defect is unknown at the time.

There can be no doubt that according to the Articles of Association the presence of at least three directors was necessary to constitute a quorum, but as pointed out above, there was not a single director present at either of the meetings who could legally vote on the question of the propriety or otherwise of the transfers. It cannot, therefore, be said that the transfers were approved by the Company and are binding upon the liquidator.

We are accordingly of opinion that the names of both the appellants have been placed on the list of the contributories, and we dismiss their appeals with costs.

D.D. *Appeals dismissed.*

A. I. R. 1927 Lahore 797 (2)

ADDISON, J.

Sardul Singh—Convict—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revn. No. 481 of 1927, Decided on 24th June 1927, from order of Sess. Judge, Hoshiarpur, D/- 12th Feb. 1927.

Penal Code, S. 420—The only reliable witness contradicting himself in material particular—Conviction is bad—Criminal trial.

Where the only witness of the complainant on whom any reliance could be placed had contradicted himself on a very material particular,

Held: that it would be most unsafe to convict the accused of the offence charged against him, especially when there was previous enmity between the accused and the complainant. [P 798 C 2]

Amar Nath Chona—for Petitioner.

Ram Lal—for the Crown.

Judgment.—Sardul Singh, alias Pohlo, was sentenced by a 1st Class Magistrate to two years' rigorous imprisonment

dent upon agriculture or occupations subservient thereto. When they are occupied by the persons who are engaged mainly in commercial pursuits, rural areas in the vicinity of a town grow into a suburb of the town. Such areas are governed by rules applying to urban properties.

Applying the above test I hold that on the facts found by the learned District Judge, which are not contested before me, the property in suit is situated in a town and consequently that there is no force in this second appeal which is hereby dismissed. I pass no order as to costs of this appeal in view of the fact that respondent made a statement as to the death of the appellant which turned out to be wrong and which necessitated an adjournment of the appeal on 2nd November 1926.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 800

JAI LAL, J.

Khetu Ram—Plaintiff—Appellant.

v.

Harphool—Defendant—Respondent.

Second Appeal No. 918 of 1927, Decided on 21st September 1927, from decree of Addl. Dist. Judge, Karnal, D/- 9th February 1927.

Evidence Act, S. 21—Executant of a bond or his representative is bound by admission made therein as to the receipt of consideration —Burden of proving want of consideration is on him.

The representative of the original executant of a document is as much bound by the admissions made therein as the executant himself. A person who signs an acknowledgment for any liability must be deemed to have admitted that liability and consequently the burden of proving that such liability did not exist at the time when he signed for it is on him : *A. I. R.* 1925 *Lah.* 471 (*F. B.*) ; 35 *All.* 194 and 35 *All.* 353, *Rel. on.* [P 800 C 2]

Shamair Chand—for Appellant.

N. C. Mehra—for Respondent.

Judgment.— This second appeal is directed against the decree of the Additional District Judge of Karnal who, affirming the decree of the Additional Subordinate Judge, 4th Class, Karnal, dismissed the plaintiff's suit.

The suit was based on a bond alleged to have been executed by the defendant's father in favour of the plaintiff's father, both the original parties to the transaction having admittedly died before the date of the suit. The defendant denied the execution of the bond or the receipt of consideration in respect thereof and put the plaintiff to the proof of both.

The trial Court framed an issue which runs as follows :

Did the defendant's father execute the bond in suit for consideration and what was the rate of interest agreed to be paid ?

The burden of this issue was placed on the plaintiff. After discussing the evidence produced by the parties the trial Court decided this issue against the plaintiff without giving any definite finding whether it held the execution of the bond proved or not.

The District Judge on appeal has held that the bond was executed by the defendant's father, but he has arrived at the conclusion that payment of consideration in respect thereof to the defendant's father had not been proved. *Ram Chand* v. *Chhunnu Mal* (1), which is a judgment of a Full Bench of this Court and in which it has been held that when the execution of a document is proved the burden of proving want of consideration admitted in respect thereof and as recited therein lies on the person who denies the same, was cited before him, but it was held that that case was operative only as between the original parties to the document.

In my opinion there is no justification for limiting the operation of that case in the manner held by the learned District Judge. S. 21, Indian Evidence Act, lays it down that an admission made by a party is binding on him and also on his representatives. To the same effect are *Bihari Lal* v. *Makhdum Bakhsh* (2) and *Bakhshi Ram* v. *Liladhar* (3). The *ratio decidendi* of *Ram Chand* v. *Chhunnu Mal* (1), is that a person who signs an acknowledgment for any liability must be deemed to have admitted that liability and consequently that the burden of proving that such liability did not exist at the time when he signed for it is on him. Interpreting this judgment along with S. 21, Indian Evidence Act, it is quite clear that the representative of the original executant of a document is as much bound by the admissions made therein as the executant himself. That

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(1) A. I. R. 1925 Lah. 471=6 Lah. 470 (F. B.).

(2) [1913] 35 All. 194=18 I. C. 744=11 A. L. J. 221.

(3) [1913] 35 All. 353=21 I. C. 619=11 A. L. J. 371.

being so it is clear that the burden of proving the consideration for the bond in suit was wrongly placed on the plaintiff.

It was then contended by the counsel for the appellant that the parties having produced the whole of the evidence there was no necessity for a remand in order to enable the defendant to prove want of consideration but having regard to the fact that both the parties to this litigation are minors and the suit is not between the original parties to the transaction but between their representatives, I consider that it is only fair that there should be a retrial of the issue as to consideration, the burden of proving want whereof must be on the defendant.

I remand the case to the learned District Judge under O. 41, R. 25 with direction to record the parties' evidence on the question of consideration of the bond in suit, and to submit a report to this Court within three months after which the parties will have ten days for objections. It will be open to the District Judge to have the evidence recorded by the trial Court if he considers such a course necessary.

N.K. *Case remanded.*

A. I. R. 1927 Lahore 801

SKEMP, J.

Natha—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 284 of 1927, Decided on 25th April 1927, from order of 1st Class Magistrate, Ferozepore, D/- 23rd January 1927.

Penal Code, Ss. 325 and 308—Accused severely beating a person suspecting him to be a thief—No intention to kill—Conviction under S. 325 is proper.

A poor old sweeper went out towards the latter part of the night and was taking cowdung cakes belongi g to the accused's master when the accused fell on him with a dang, beating him severely on the head and arms, whereby the arms were disabled completely. There was no evidence whatever that the accused had any intention of killing the sweeper, or that he knew that he was likely to kill him.

Held : that the accused could not be convicted under S. 308 out was guilty of an offence under S. 325. [P 802 C 1]

Jagan Nath Bhandari—for Appellant.

Judgment.—The appellant Natha, Machhi, has been convicted under S. 308, I. P. C., and sentenced to five years' rigorous imprisonment and Rs. 200 fine.

The Magistrate's finding is given in the following words :

On 9th December 1926 Jowahira, a weak and old man of about 65 years went out to ease himself. This was at about 6-30 or 7 a. m. He was coming back after easing himself and passed by the place where some cowdung cakes of the accused where lying. It appears that the accused suspected Jowahira and thought he had come there to steal his cowdung cakes. Without making any enquiry the accused rushed up armed with a dang and forthwith struck a violent blow on Jawahira's back Jowahira fell down but rose up again. The accused then struck over and over again towards the head of Jowahira who again and again tried to save his skull by lifting up his arms and receiving the blows on them.

Jowahira actually received five injuries four of which were grievous. The ulna bone of each arm was broken, the radius bone of the left arm and also what the medical witness in the Magistrate's Court called the spine of the right shoulder blade.

The appellant has throughout admitted inflicting this beating. Before me it is urged that he is the servant of certain zamindars whose cowdung cakes had been stolen from time to time by Jowahira who is a sweeper and others. He was justified in defending property under S. 104, I. P. C. The accused produced no defence evidence ; he was tried in camp and not defended ; did not put a single question to any of the prosecution witnesses ; in his statement taken before the charge he was asked only two questions (1) whether he pleaded guilty ; (2) whether he had anything further to say. Even so it is urged that the statement of the prosecution witnesses themselves and other circumstances on the record greatly mitigate the offence of the accused.

The Magistrate's finding depends on the statement of Jowahira alone, who naturally wanted to make the case as bad as possible. There are two other eyewitnesses, Sawan Singh and Sher Singh. Sawan Singh says that he heard a raula. Sher Singh say that he heard the cry of "thief, thief," and went to the spot. Both say that it was "towards the latter end of the night." Sawan Singh states that some cowdung cakes were lying on the ground and that a chadar of Jowahira was also lying there. Sher Singh deposes that the accused said he had assaulted

Jowahira because he was stealing his cowdung cakes.

Bhai Atma Singh, a Municipal Commissioner, deposes that on the same day at noon the accused told him that he had beaten Jowahira because he attempted to steal his cowdung cakes.

The Sub-Inspector took into police custody 13 cowdung cakes found lying at the spot, an indication that the cowdung cakes had a bearing on the case.

The first report does not mention Natha but gives the names of the assailants as Atru, Nandu and Karam Singh, Jats, Atru and Nandu being brothers and Karam Singh their nephew. It also gives the time by saying that one watch of night was left. In Court Jowahira merely stated that he made a first report and that the names were given by his nephew and others. He also stated that he did not previously know Natha who is the *siri* of Nandu. Fitting all these bits of evidence together it would appear that Jowahira, a poor sweeper, went out towards the latter part of the night and was taking cowdung cakes belonging to Nandu when Nandu's servant fell on him with a stick beating him severely. S. 104 does not apply because there is no evidence to show that violence was necessary to protect the property. Jowahira was a weak old man, Natha is a young man and had a stick, still it is considerable mitigation of the offence if Natha beat a man whom he did not even know because that man was stealing his master's property. The Magistrate has been led by his legitimate sympathy with Jowahira to overlook this aspect of the case. He might, however, have arrived at it had he summoned as Court witness the chaukidar who accompanied to the thana. Natha himself made a first report which is inadmissible in evidence but the statement of the chaukidar Wazir Singh who accompanied him would apparently have been valuable evidence in favour of Natha.

However, the record as it stands leads to a less severe view than that taken by the Magistrate. There is no evidence whatever that Natha had any intention of killing Jowahira or that he knew that he was likely to kill him. Except the statement of Jowahira there is no evidence that Natha aimed at Jowahira's head. I, therefore, alter the conviction to one under S. 325, I. P C. At the same time the beating was a brutal one inflicted on an old man by a young one and Jowahira according to the medical evidence, has lost the use of both his arms for the rest of his life. Taking all the circumstances into consideration I reduce the sentence to one of eighteen months' rigorous imprisonment. The fine which is quite unsuitable to a poor labourer is remitted.

G.B. *Conviction altered.*

A. I. R. 1927 Lahore 802

FFORDE AND TEK CHAND, JJ.

Shera and *others*—Plaintiffs—Apellants.

v.

Gahna and *others*—Defendants—Respondents.

First Appeal No. 802 of 1922, Decided on 14th March 1927, from decree of Sr. Sub-Judge, Sheikhupura, D/- 4th January 1922.

Practice—Finding not based on pleadings and inconsistent with them—Retrial was ordered

Where the lower Court upheld the plea of estoppel on grounds which were not only not pleaded in the written statement, but which were inconsistent with what was stated therein and with regard to which no issue had been framed :

Held : that there was no proper trial of the suit in the lower Court and it should be remanded for retrial. [P 804 C 1,2]

Shambhu Lal Puri for *Mukand Lal Puri*—for Appellants.

Muhammad Amin and *Anant Ram Khosla* for *Khurshid Zaman*—for Respondents.

Judgment.—On 22nd February 1922 the plaintiffs, nine in number, representing themselves to be collaterals in the third degree of one Azmat, instituted a suit for possession of the land measuring 376 kanals and 11 marlas on the allegation that the land was ancestral of the plaintiffs and the alienor, that it had been sold by Azmat to the ancestor of the defendants in 1893 without consideration and necessity, and that though Azmat, alienor, had died in 1899, he had left a widow Mt. Muradan, who died in 1920 and, therefore. the suit was within time.

The defendants pleaded that the suit was time barred, that

the plaintiffs' ancestors had brought a declaratory suit before 1893 in respect of this very

land and the alienation made by Azmat ; but that they relinquished their rights as against the defendants,

and, therefore, the plaintiffs were estopped from maintaining the suit, and that the sale had been effected for consideration and valid necessity. The defendant Murad was examined in Court on 30th June 1921, and stated that before the alienation now sought to be impeached there had been another sale of the same land to the defendants for Rs. 400, that Khadim and Ismail and other reversioners of Azmat had sued to contest that sale, but ultimately withdrew the suit on a compromise, under which Rs. 200 more was paid to the vendor and a fresh sale-deed for Rs. 600 executed. It was stated that it is this subsequent sale for Rs. 600 which is the subject of the present suit.

On these pleadings the Court framed the following three issues :

(1) Is the suit barred by time ?

(2) Was the sale for consideration and valid necessity ?

(3) Was this sale the result of a compromise between the plaintiffs' predecessors and the vendees, and are plaintiffs estopped from suing ?

It seems that on 24th August 1921 the defendants were permitted to file a better statement of their defence. The better statement, however, has not been printed in the paper-book and is not before us. The learned Judge, Mr. Din Muhammad passed an order on that date in the following terms :

A better statement has been permitted to be filed. The following fresh issues arise. The parties to be examined.

Murad, defendant, and Ziada, plaintiff, were accordingly examined the same day and it was noted that it was necessary to send for records of suits decided in 1893 and 1895 before any fresh issues could be framed and an order was passed that the defendants should furnish particulars of these records. The case was again adjourned to 15th October 1921. On that date it was discovered the records could not be sent for as the requisite particulars had not been furnished by the defendants. They were ordered to do so within a week and the case was adjourned to 27th October 1921. On that date one of the records required was received in the Court, but not the other as the particulars filed by the defendants were incorrect. The case had again to be adjourned, but on the next hearing (18th November 1921) it was reported that the required record was missing. An enquiry was ordered in this matter and the case adjourned once again to the 14th December 1921. In the meantime Mr. Din Muhammad was transferred and Mr. Asad Jan succeeded him. On 14th December 1921 the record which was supposed to have been missing, was received from the record room. No fresh issues were framed by Mr. Asad Jan and though the defendants' counsel urged that in order to determine the question of limitation it was necessary to find whether Azmat had left a " legal widow " or not, the learned Judge refused to grant this request, remarking that he did not see its importance. The case was adjourned for arguments to the 19th December and on 4th January 1922 judgment was pronounced dismissing the suit on the ground that the plaintiffs were estopped from maintaining the present suit,

because Khadim and Umar had instituted a suit to contest the sale of 1893 which ended in a compromise effected on 12th May 1893.

The learned Judge in support of his finding that the plaintiffs were estopped from suing also referred to another suit between Sakhar and Sukho as plaintiffs and Azmat and Nawab as defendants, which had been dismissed on 15th July 1895.

Against this judgment and decree a first appeal has been preferred by the plaintiffs and it has been contended on their behalf that the learned Judge was not justified in upholding the plea of estoppel on the ground that Khadim and Umar had instituted a suit to contest the sale in question in 1893 which had resulted in a compromise. It is clear from the written statement of the defendants as well as from the oral statement of Murad, defendant, and the form in which issue 3 was put that the defendants had originally based their plea of estoppel upon a compromise which they alleged had been arrived at between the ancestors of the plaintiffs and Azmat vendor in a suit relating to a sale prior to 1893. Mr. Anant Ram for the defendants-respondents, however, now concedes that as a matter of fact no such prior sale had been effected nor any suit filed, which was adjusted by a compromise resulting in the sale now in question. He states that the plea of estoppel as raised in the pleadings on which issue 3 had been

framed was really put forward by his clients in complete ignorance of the real facts. Mr. Anant Ram, however, seeks to support the lower Court's finding on th issue of estoppel on the ground that Khadim and Ismail had filed a suit to contest the sale in question, which suit they had subsequently withdrawn. He states that these facts were pleaded in the better statement with regard to which Mr. D n Muhammad had intended to frame fresh issues. But no such issues we e actually framed by Mr. Din Muhamm d or by his successor and the plaintiffs had no opportunity of meeting the defendants' case as put in the better statement. Moreover the compromise dated 12th May 1893, on which the learned Judge had largely relied, had not been incorporated in any judgment and was not proved or exhibited in this case. It is also a question for consideration whether the compromise arrived at in a suit which according to the defendants' own showing, was instituted by Khadim and Ismail, whose descendants are plaintiffs 4 to 8, is binding on Shah Muhammad, plaintiff 1, Taja, plaintiff 2, Allah Ditta, plaintiff 3, and Shahabali, plaintiff 9, who or whose direct lineal ancestors were not parties to it. The learned Subordinate Judge has not addressed himself to this aspect of the case, nor have all the relevant materials been placed on the record, on which this Court could come to a definite finding.

For the appellants it is further urged that the litigation of 1895 can have no bearing on the present suit as the plaintiffs in that suit were Sakhar and Sakhu, who are not mentioned in the pedigree table printed at p. 4 as being related to Azmat, but who were probably collaterals of a very remote degree. It is contended that the plaintiffs did not derive their title through Sakhar and Sakhu and are in no way bound by the dismissal of their suit in 1895.

I do not, however, think it necessary to give a finding on this point, as I am of opinion that this appeal must succeed on the short ground that the learned Judge ought not to have upheld the plea of estoppel on grounds which were not only not pleaded in the written statement, but which were inconsistent with what was stated therein and with regard to which no issue had been framed. Issue 3 had been struck with reference to allegations which the defendants had abandoned and issues 1 and 2 have not been decided. Under these circumstances there has been no proper trial of the suit in the lower Court and it is unfortunate that the case has to be remanded for retrial and fresh decision, after proper issues have been framed and parties given an opportunity to prove their respective contentions.

In order to avoid another possible remand it seems necessary to point out that the question whether Mt. Muradan was or was not the widow of Azmat alienor is of vital importance in this case for the decision of the issues as to limitation, and the learned Subordinate Judge was wholly wrong in supposing that this question was of no importance. If Mt. Muradan was not the married wife of Azmat, the present suit is obviously time-barred. If, however, Mt. Muradan did succeed him as his widow, it is a matter for consideration whether time could run against the reversioners during her lifetime.

The attention of the Court below is also drawn to the necessity of having any documents on which the parties wish to rely formally proved and exhibited and the provisions of O 13, R. 4, Civil P. C., complied with.

For the foregoing reasons, I would accept this appeal and setting aside the judgment and decre of the learned Subordinate Judge remand the case under O. 41, 23, Civil P. C., for disposal in accordance with law. Court-fee on appeal will be refunded and costs will be costs in the cause.

Fforde, J.—I agree.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 804

ZAFAR ALI, J.

Bishan Singh and *others*—Plaintiffs—Appellants.

v.

Jiwan Singh and *others*—Defendants—Respondents.

Second Appeal No. 1126 of 1926, Decided on 12th March 1927, from decree of Dist. Judge, Attock, D/- 10th February 1926.

Civil P. C., S. 11—*Bar of res judicata—Previous decision must be final and necessary for the determination of that suit.*

Section 11, though not exhaustive, is binding as far as it goes, and, according to that section

there is no bar of res judicata unless there is a final decision. [P 805 C 2]

A finding in the former suit in order to have the authority of res judicata must have been necessary to the determination of that suit. [P 805 C 2]

C. H. Oertal and *Anant Ram*—for Appellants.

Mehar Chand Mahajan—for Respondents.

Judgment.—The parties in this case are Bishen Singh and his sons (plaintiffs-appellants) and Jiwan Singh and his sons and grandsons (defendants-respondents). Sita, father of Bishan Singh, and Maya, father of Jiwan Singh, were brothers, sons of Sobha. The defendants are shown in the revenue records to be the owners of certain agricultural lands. The plaintiffs' case was that though the lands were entered in the names of the defendants alone as owners, they (plaintiffs) were cosharers therein to the extent of ½ as they and the defendants constituted a joint Hindu family Bo h the Courts below have concurred in dismissing the plaintiff's suit finding that the two parties did not form a joint Hindu family. It was contended before the learned District Judge that the defendants were precluded by the rule of res judicata from pleading that the parties did not constitute a joint family because in another suit it was finally decided that they did.

That other suit was brought by one Godar Mal against the parties to the present suit while it was pending, to recover an upaid balance of account. The balance was executed by Bishen Singh alone, but Godar Mal contended that Bishen Singh and Jiwan Singh were coparceners and were as such equally liable to pay the debt. It was found that the parties did form a joint Hindu family, but Godar Mal's suit as against Jiwan Singh was dismissed on the ground that Bishen Singh was not the manager of the family The learned District Judge came to the conclusion that the finding in Godar Mal's case that the parties formed a joint Hindu family did not operate as res judicata in the present case because the final dismissal of that suit as against Jiwan Singh made that finding necessary and superfluous.

In second appeal it is argued on the authority of *Sahibzadi Begam* v. *Mohammad Umar* (1), and certain other rulings that the District Judge's view was erroneous. The defendants' counsel replies that the findings in Godar Mal's case being: (1) that Jiwan Singh and Bishen Singh and their descendants constituted a joint family, (2) that Bishen Singh was not the manager of that family and (3) that, even if he was, he did not contract the debt as such, that suit could be disposed of without recording finding No. 1, and that finding, therefore, cannot operate as res judicata in the present case. The argument must prevail. A finding in the former suit, in order to have the authority of res judicata, must have been necessary to the determination of that suit. As it was not, it could not have that authority.

Section 11, Civil P. C., though not exhaustive, is binding as far as it goes. According to that section there is no bar of res judicata unless there is a final decision. I, therefore, dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(1) A. I. R. 1926 Lah. 603=8 Lah. 15.

A. I. R. 1927 Lahore 805

ABDUL RAOOF, J.

Dhaniram and *another* — Accused — Petitioners.

v.

Kaliram—Complainant—Respondent.

Criminal Petition No. 1112 of 1925, Decided on 21st July 1925, from order of Magistrate, 1st Class, Hoshiarpur, D/- 9th June 1925.

Criminal P. C., S. 145—Requirements should be strictly followed—Formal order as to existence of dispute likely to cause breach of peace is absolutely necessary to give the Magistrate jurisdiction.

The powers conferred upon criminal Courts by S. 145 are somewhat of an exceptional character because they enable the Magistrate mentioned in the section to partially deal with a matter over which civil Courts have jurisdiction. Therefore the requirements of the section should be strictly followed A Magistrate would have no jurisdiction unless he was satisfied that there existed a dispute concerning land etc., and which dispute is likely to induce a breach of the peace A formal order to this effect under sub-S. (1) is absolutely necessary to give the Magistrate jurisdiction : *A. I. R.* 1924 *Lah.* 91, *Foll.* [P 807 C 1]

Fakir Chand—for Petitioners.

N. C. Pandit and *G. S. Salariya*—for Respondent.

Judgment.—The following pedigree table will help in understanding the facts of this case :

Jawahar Singh

Kali Ram.	Dhani Ram.
	Ram Lal.

On 27th March 1925, Kaliram applied under S. 145, Criminal P. C., complaining that Dhaniram and Ramlal were trying to take wrongful possession of two plots of land situated in the abadi of the village and possessed by the complainant and that there was a fear of a breach of peace. He stated in the petition that the accused had collected bricks on the plots and were going to construct a building thereon. On 30th March 1925, the Magistrate took down the statement of the petitioner and granted an injunction prohibiting the construction of the building and fixed the 23rd April 1925 for the hearing of the case. He recorded no preliminary order as required by S. 145, Criminal P. C. When the accused persons appeared before the Court on the date fixed, they were asked to file written statements which they did and pleaded that the building had already been constructed and that very little was left to complete it. They further pleaded that the injunction, if given effect to, would cause much loss as a good deal of expense had been incurred in constructing it. After recording evidence and hearing the parties the Magistrate was not satisfied as to which of the parties was in actual possession of the plots. He, therefore, decided to take action under S. 146, Criminal P. C. However, instead of attaching the land, he made an order in the following terms :

I, therefore, deem it proper that, unless the parties seek in civil Court a remedy in respect of plot D (shown in the plan attached to the record) on which the accused persons are constructing the house, and get decided in whose land it is situate and who possesses the land of which it forms a part, the building should, under S. 146, Criminal P. C., remain in the condition in which it now is. Besides an injunction under S. 146, Criminal P. C., be issued in this behalf and got served on the parties.

Against this order the present petition for revision has been presented, and it has been contended by Mr. Fakir Chand, the learned vakil for the petitioners, that inasmuch as the Magistrate, by omitting to record the preliminary order required by S. 145, Criminal P. C., committed an illegality, the order is bad in law and should be set aside. In support of his contention Mr. Fakir Chand has relied upon the decision in case of *Hakam* v. *Ralia Ram* (1). Pandit Nanak Chand, the learned counsel for Kaliram, on the other hand, has contended that the omission to record the preliminary order was a mere irregularity and, unless it was shown that the petitioners had been materially prejudiced by this irregularity the order could not be set aside. He has relied upon the following cases : *Debi Prasad* v. *Sheodat Rai* (2), *Nur Bakhsh* v. *Emperor* (3), *Sajad Hussain* v. *Nanak Chand* (4), *Muhammad Sharif* v. *Dhanput Rai* (5), *In the matter of Chinnappudayan* (6). These rulings were relied upon also in the case reported as *Hakam* v. *Ralia Ram* (1), and were distinguished by the learned Judge who decided the case.

It is impossible to say upon meagre facts established in the present case that the petitioners have not been prejudiced by the procedure adopted by the learned Magistrate. S. 145, Cl. (1), of the Code provides that

whenever a District Magistrate, Sub-Divisional Magistrate of the first Class is satisfied from a police report of other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

The words of the section clearly indicate that a Magistrate is to make an order in writing stating grounds of his being satisfied that a dispute likely to cause a breach of the peace exists. The reason for this provision is obviously this that the parties should know before attending his Court what case they have to meet. This facility, however, was not afforded to the petitioners and, before coming to Court, they could not sufficiently prepare themselves to put forward their claim respecting the fact of actual possession of

(1) A. I. R 1924 Lah. 91=4 Lah. 66.
(2) [1907] 30 All. 41=(1907) A. W. N. 265=4 A. L. J. 705.
(3) [1917] 26 P. W. R. Cr. 1917=39 I. C. 1001 =18 Cr. L. J. 633.
(4) [1917] 22 P. W. R. Cr. 1917=39 I. C. 301 =18 Cr. L. 461.
(5) [1914] 68 P. L. R. 1914=23 I. C. 487=15 P. W. R. Cr. 1914.
(6) [1907] 30 Mad. 548.

the subject of dispute. The powers conferred upon criminal Courts by S. 145, Criminal P. C., are somewhat of an exceptional character because they enable the Magistrate mentioned in the section to partially deal with a matter over which civil Courts have jurisdiction. Therefore, it appears to me that tha requirements of the section should be strictly followed A Magistrate would have no jurisdiction unless he was satisfied that there existed a dispute concerning land, etc., and which dispute is likely to induce a breach of the peace. A formal order to this effect under sub-S. (1) is absolutely necessary to give the Magistrate jurisdiction. Thus the order conplained against is not according to law and must be set aside.

I accordingly accept this petition and set aside the orders passed by the learned Magistrate. It is open to the Magistrate to take fresh proceedings according to law if he thinks necessary to do so, or he may leave the parties to get their dispute settled by a civil Court.

R.D. *Orders set aside.*

A. I. R. 1927 Lahore 807

ZAFAR ALI, J.

Dulla and *another*—Plaintiffs—Appellants.

v.

Lakhu and *others*—Defendants— Respondents.

Second Appeal No. 1420 of 1925, Decided on 23rd February 1927, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 21st April 1925.

Cosharers—Shamilat—"Hasab Rasad khewat" means in riverside villages, 'according to area of khewat holding.'

Although in ordinary village the meaning of the word "hasab rasad khewat" in respect to partition of shamilat land is "according to the revenue assessed on the holding" in a village subject to river action, where the revenue assessed is fluctuating and the khewat holding includes submerged land, it must be held to mean according to the area of the khewat holding : 69 *P. R.* 1913, *Foll.* [P 803 C 1]

Niaz Muhammad—for Appellants.

Aziz Ahmad—for Respondents.

Judgment.—Where the rule for partition of shamilat land is expressed by the well-known phrase "hasab rasad khewat" a controversy not infrequently arises over the interpretation of the word "khewat" which may mean either a proprietary holding as distinguished from a shamilat or any other holding or the land revenue assessed on a proprietary holding. The rule for partition in the present case also, as stated in the wajib-ul-arz prepared at the Settlement of 1884 and repeated in the wajib-ul-arz of the Settlement of 1911-12 was "hasab rasad khewat" and the proprietors originally agreed that khewat meant "revenue assessment" but they disagreed as to which assessment, that of 1884 or 1911-12, was to be taken into account for determining their rights. An application for partition was made to the revenue authorities in 1922 and the revenue officer decided that partition was to be made according to the revenue assessed in 1884.

On appeal the Collector directed that the revenue officer should proceed to decide the question as a civil Court. The parties accordingly filed their pleadings and the plaintiffs' case was that partition should be "hasab rasad zar khewat 1911-12" (in accordance with the amount of revenue assessed in 1911-12). The defence was that it should be according to ancestral shares and land (hasab hisas jaddi wa arazi). The following were the issues framed :

(1) Whether partition should be effected according to the land revenue of the last settlement as laid down in the wajib-ul-arz of 1912-13.

(2) Or according to the land revenue of 1884 settlement as laid down in the wajib-ul-arz of that settlement.

(3) Or according to the ancestral shares.

The trial Court found in favour of the plaintiffs holding that it was the assessment of 1911-12 according to which partition should be made.

On appeal, the learned District Judge arrived at the conclusion that the measure of rights in the shamilat land should be the area of the holding including the land submerged and not the land revenue assessed at the time of partition.

The plaintiffs appeal, and it is argued on their behalf that the learned District Judge has overstepped the pleadings of the parties and has applied a rule which was not comtemplated or relied upon by either of them. This contention does not appear to be well founded.

The village in question being a riverine one, it is subject to the action of the water and the "revenue assessment" is, therefore, not a fixed but a fluctuating

quantity . It is obvious, however, that the rights or shares of proprietors in the shamilat are not variable, and it cannot be said with any show of reason that if a proprietor paid less revenue in 1911-12 than what he did in 1884, his share in the shamilat should decrease in proportion to the decrease in the assessment.

The village was not owned on ancestral shares but possession was the measure of right. What the defendants, therefore, meant by the plea that partition should be made according to ancestral shares and land was that each proprietor's shares in the shamilat was in proportion to the area of his proprietary land. There can be no other measure of right in shamilat in riverine village and the pleadings of the parties and the term "khewat" should be interpreted in a reasonable and equitable manner. The same was the view taken in *Sahib Khan* v. *Ladiani* (1) where it was held that

> although in ordinary villages the meaning of the words "hasab.rasad khewat" in respect to partition of shamilat land is "according to the revenue assessed on the holdings" in a village subject to river action, where the revenue assessed is fluctuating and the khewat holding includes submerged land, it must be held to mean "according to the area of the khewat holding"

In my opinion the judgment of the learned District Judge which is based upon the above ruling is correct and I, therefore, dismiss the appeal with costs.

D.D. *Appeal dismissed.*

(1) [1913] 69 P R. 1913=86 P. W. R. 1913 =18 I. C. 137=57 P. L. R. 1913.

A. I. R. 1927 Lahore 803 (1)

FFORDE AND ADDISON, JJ.

Sher Alam—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1320 of 1926, Decided on 21st February 1927, from order of Sess. Judge, Rawalpindi, D/- 7th December 1926.

Penal Code, S. 300—Deceased not armed and unable to defend when attacked—Offence is murder and does not come within Excep. 4.

Where the accused took undue advantage of the victim, who was lying on his charpoy when he was attacked with a formidable weapon, was not armed and was not in a position to defend himself,

***Held*: that the crime was one of murder even though committed without premeditation and in the heat of passion.** [P 808 C 2]

Ghulam Mohy-ud-Din—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—This is a very clear case of murder as a result of a sudden violent impulse. Mr Ghulam Mohy-ud-Din has sought to bring the case within Ex. 4, S. 300, I P C. He says that the deceased met his death as the result of a sudden fight in which there was no premeditation on the part of his client and that the fight arose out of a sudden quarrel. It is quite obvious upon the facts of this case that Excep. 4 could not be applied. The appellant, no doubt, acted without premeditation and, it may be conceded in the heat of passion provoked by a sudden quarrel, but there is not the slightest doubt that he did take undue advantage of the victim of his violence inasmuch as the latter was lying on his charpoy when he was attacked with a formidable weapon. The deceased was not armed and was not in a position to defend himself. Under the circumstances the crime is one of murder and the trial Judge has awarded the smallest sentence which the law permits for such a crime.

This appeal must be dismissed.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 808 (2)

DALIP SINGH, J.

Jhanda—Petitioner.

v.

Muhammad Ismail and *another*—Respondents.

Civil Revn. Petn. No. 85 of 1927, Decided on 30th January 1927, from order of Dist. Judge, Sialkot, D/ 29th June 1926.

Civil P. C., S. 115—Misconstruing the law underlying trial Court's judgment as also omission to decide a material question of law are a good ground for revision.

Where a lower appellate Court misconstrued the law on which the judgment of a trial Court was based, i. e., where it wrongly held from the tenor of trial Court's judgment that the trial Court's order was under O. 21, R.92. where as its judgment was equally consistent with an order under S. 151, which was appropriate to the case; or where it also omitted to decide the question (which was material to the case), whether the word "interests" in.O. 21, R. 90, includes the interests a so of an intending auction-purchaser.

***Held*: that a revision would lie.** [P 809 C 2]

Mool Chand—for Petitioner.

Akbar Ali—for Respondents

Judgment.—In execution of a decree against a minor judgment-debtor a house belonging to the judgment-debtor was ordered to be sold on 3rd May 1926, at 10 o'clock. On 6th May one Jhanda put in an application to the Court stating that he was an intending auction-purchaser, but that no auction had been held on 3rd May at all, that subsequently he had learnt that there had been auction on 4th May 1926, that the property had been sold at this auction for Rs. 2,950 and that he himself was willing to pay Rs. 3,400. He suggested that the auction had been improperly held and personally benefited some persons. The Court called for the report of the auctioneer, held that the sale had taken place on 4th and not on 3rd, set aside the sale and directed a resale on 9th. On 9th it appears that the property was sold to Jhanda for Rs. 7,000. The Court had given no notice to the first auction-purchaser, but proceeded to act on the application of Jhanda and the auctioneer's report. The auction-purchaser then appealed to the learned District Judge. The learned District Judge held that the Court has purported to act under O. 21, R. 92 as shown by the trend of its judgment and that the application was under O. 21, R. 90 because its contents, conveyed that idea. He then held that Jhanda had no interest to enable him to apply under O. 21, R 90 and he, therefore, accepted the appeal and confirmed this sale in favour of the first auction-purchaser the appellant before him. Jhanda has appealed to this Court.

A preliminary objection is taken by counsel for the respondent that no appeal lies. He contends that if the order of the Court was under O. 21, R. 92 then no second appeal lies to this Court and that if the order of the Court was under S.151, then also no second appeal lies to this Court. The learned counsel for the appellant concedes that this is so, but urges that the appeal should be treated as a revision. He contends that the Court is wrong in holding that the application was made under O. 21, R. 90 or that the order of the Court was under O. 21, R. 92 and that, therefore, the order must be taken to have been made under S. 151 and, therefore, no appeal lay to the District Judge. In the alternative he contends that the word "interest" in O. 21, R. 90 is wide enough to cover the case of an intending auction-purchaser. It seems to me that there is force in his contention. There is nothing in the application or in the order to show that the trial Court purported to act under O. 21, R. 92, because I am unable to see how the trend of the judgment would have been different if it had purported to act under S. 151. If, therefore, it is correct that the word "interests" does not apply to the case of intending auction-purchaser it must be taken that the Court acted under S. 151 and not under O. 21, R. 92. If on the other hand the applicant's interests were affected within the meaning of the phrase in O. 21, R. 90 then the Court was wrong in holding that he had do such interests. In either event the order passed in appeal cannot stand.

I, therefore, accept this revision, but I find that the auction-purchaser, the respondent here, was never given a chance to make good any contention he might have had to raise as to the proper conduct of the sale. It was necessary to give him notice before proceeding to act on the application of Jhanda. I, therefore, treating this appeal as a revision, accept it and remand the case to the trial Court to determine after giving notice to the respondent auction-purchaser whether the sale was properly held or not. The Court will also decide the point as to whether Jhanda is applying under O. 21, R, 90 or under S. 151 and what section if any it purports to act under and also whether S. 151, applie to the case or not. I also set aside the order of the trial Court confirming the sale in favour of Jhanda. The Court will also give notice to the judgment-debtor and his guardian ad litem to enquire if they wish to abide by the compromise in the appellate Court in the present circumstances.

J.V. *Case remanded.*

A. I. R. 1927 Lahore 809

CAMPBELL, J.

Qutab Din—Judgment-debtor—Appellant.

v.

Hazuri Mal—Decree-holder—Respondent.

Misc. Second Appeal No. 693 of 1925, Decided on 18th March 1925, from order of Dist. J., Multan D/- 5th June 1924.

(a) *Civil P. C., Ss. 2, 47, O. 21, R. 2—Application to record adjustment of a decree—Order of refusal is a decree.*

An order refusing the application to record the adjustment of a decree is also a decree, and until set aside or varied by a Court of appeal or in review by the Court which passed it, it is final : 16 *All.* 129; 11 *Bom.* 57 ; 18 *Mad.* 26, *Foll.* [P 810 C 2]

(b) *Civil P. C., O. 47, R. 9—Order dismissing an application for review is not appealable.*

An order dismissing an application for review is not appealable. [P 810 C 2]

Sheikh Iftikhar Ali—for Appellant.

Judgment.— This appeal was converted into an application for revision at the instance of the Court office when it was presented, but the learned counsel who appears in support of it claims that an appeal lies and he is correct. I deal with the appeal as an appeal.

In execution proceedings before the Senior Subordinate Judge the judgment-debtor applied for certification of an alleged payment made by him to the decree-holder of Rs. 3,800. This application was dismissed on the 5th February 1924, the finding being that judgment-debtor had failed to prove payment. On the 7th February 1924, the judgment-debtor put in an application stating that he was unable owing to his wife's illness to appear with his evidence in the shape of a receipt on the 5th February and he asked for another opportunity to be given to him to prove payment. This application was rejected by the Court on the 27th February. The Court held, firstly, that a second application for certification after dismissal of a previous one could not lie and, secondly, that there were no grounds for review of the previous order treating the application as one for review at the request of the judgment-debtor's counsel. No appeal was preferred against the order of the 5th February, but an appeal was lodged in the District Court against the second order of the 27th February passed on the second application. The learned District Judge held that no appeal lay against the dismissal of a petition for review and consequently he dismissed the appeal.

In second appeal before this Court it is contended that the order of the 27th February was one passed under S. 47, Civil P. C., and hence was a decree and appealable. The appellant, however, is confronted with the difficulty that the order of the 5th February refusing the application to record the adjustment of the decree was also a decree [this has been ruled in *Jamna Prasad* v. *Mathura Prasad* (1), *Rangji* v. *Bhaiji Harjivan* (2) and *Guruvayya* v. *Vudayappa* (3) and, until set aside or varied by a Court of appeal or, in review by the Court which passed it, was final. The application of the 7th February, therefore, lay only as an application for review and its refusal was, as the learned District Judge has held, not appealable.

I am unable to interfere, and I dismiss the appeal.

N.K. *Appeal dismissed.*

(1) [1894] 16 All. 129=(1894) A. W. N. 6.
(2) [1887] 11 Bom. 57.
(3) [1895] 18 Mad. 26.

A. I. R. 1927 Lahore 810

ADDISON, J.

Bute Shah—Decree-holder—Petitioner.

v.

Guranditta—Judgment-debtor — Respondent.

Civil Revn. Petn. No. 613 of 1926, Decided on 5th January 1927, from order of Sr. Sub-J., Sialkot D/- 25th May 1926.

Civil P. C., S. 60 (c)—Judgment-debtor must prove that he is agriculturist in fact, to claim exemption.

It lies on the judgment-debtor to establish that he is an agriculturist in fact and not in name, before he can claim exemption under S. 60 : 35 *All.* 307 ; 65 *P. R.* 1909 and 28 *Bom.* 125, *Foll.* [P 811 C 1]

J. N. Malhotra—for Petitioner.

Judgment.—The decree-holder attached two houses belonging to his judgment-debtor in order to bring them to sale in execution of his money-decree. The judgment-debtor objected that they were not liable to attachment and sale as he was an agriculturist. The executing Court held that the judgment-debtor was only an agriculturist in name as he had mortgaged the whole of his holding and had no cattle. It considered that one house was sufficient for the judgment-debtor and released the house, marked X on the plan, from attachment. It ordered the second house, to be sold. The judgment-debtor appealed to the Senior Subordinate Judge. He accepted the appeal as regards the house ordered to be sold by the executing Court on the ground that it was the residential house of the judgment-debtor who was an agriculturist.

The lower appellate Court, however, has accepted the finding that he was only an agriculturist in name as his land was all under mortgage and he had no cattle. Against this decision revision petition has been presented in this Court.

It was held in *Jamna Prasad Raut* v. *Raghunath Prasad* (1) that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of S. 60 (c), Civil P. C., i.e., the burden of proof lay on the judgment-debtor to establish that he was an agriculturist not in name but in the strict sense of the term and occupied the house as such agriculturist. A similar view seems to have been taken by the Punjab Chief Court in *Attar Singh* v. *Bhagwan Das* (2): see also *Pandurang Balaji* v. *Krishnaji Govind* (3). Following these authorities I hold that it was for the judgment-debtor to eatablish that he was an agriculturist in fact and not in name before he could claim exemption. I, therefore, accept this revision petition and setting aside the order of the appellate Court, restore that of the executing Court. The respondent has not appeared and, therefore, I order the parties to bear their own costs here and before the appellate Court.

J.V. *Order set aside.*

(1) [1913] 35 All. 307=19 I. C. 125=11 A. L. J. 437.
(2) [1909] 65 P. R. 1909=141 P. L. R. 1909=2 I. C. 933=104 P. W. R. 1909.
(3) [1903] 28 Bom. 125=5 Bom. L. R. 799.

A. I. R. 1927 Lahore 811

JAI LAL, J.

Kartar Singh and *another*—Plaintiffs—Appellants.

v.

Mt. Lachhmi — Defendant — Respondent.

Second Appeal No. 469 of 1927, Decided on 10th May 1927, from decree of Dist. J., Shahpur, D/- 3rd January 1927.

(a) Custom (Punjab) — Marriage — Woman living with a man for four years and then turned out—Man marrying another woman—Former not attempting to assert her conjugal rights—Presumption of marriage cannot be drawn.

A woman lived with a man for four years and gave birth to two children. No form of marriage was performed between the parties. The man then married another woman and had two sons by her. After this marriage the first woman was turned out and though the man was alive for nearly ten years after that incident, she never asserted her rights as his wife,

Held : that such continued cohabitation had not been established as to raise a legal inference of valid marriage. [P 811 C 2]

(b) Civil P. C., S. 100—Inference from facts is not question of fact.

Whether the facts found justify the legal inference of valid marriage is not a question of fact. [P 812 C 1]

Shambu Lal Puri and *M. L. Puri*—for Appellant.

Ram Chand Manchanda—for Respondent.

Judgment.—The only question in this case is whether Mt. Lachhmi is the widow of Attar Singh and as such entitled to be maintained out of his estate. It is admitted that she was originally married to another person who had died before 1907 and that Attar Singh also had a wife who died in 1907. The District Judge has found that from 1907 to 1913, Mt. Lachhmi lived with Attar Singh in his house and bore two daughters to him who, however, died in infancy. In 1913 Attar Singh married another woman, Mt. Bhagwanti, from whom he got two sons, the appellants before me. They are both minors and have sought a declaration in this action that Mt. Lachhmi is not widow of Attar Singh, but was only his concubine.

Some evidence was given at the trial about the factum of the ceremony of chadar andazi between Mt Lachhmi and Attar Singh, but this evidence has been disbelieved. The District Judge has, however, held that the law being against a presumption of concubinage, the fact of continued cohabitation and the birth of two daughters to Mt. Lachhmi by Attar Singh, should raise a strong presumption of a legal marriage between the two and therefore that Mt. Lachhmi was a widow of Attar Singh. In coming to this conclusion, however, the learned Judge has ignored the important fact that immediately on the marriage of Mt. Bhagwanti with Attar Singh Mt. Lachhmi was turned out and during the 12 or 13 years that Attar Singh survived after that marriage she took no steps whatsoever to assert her rights as the wife of Attar Singh. In my opinion such continued cohabitation has not been established in this case as to raise a legal inference of valid marriage. The marriage with Attar Singh of Mt. Bhagwanti and the repudi-

ation by the power of Mt. Lachhmi are very important factors which counterbalance the presumption of valid marriage between the two.

I have carefully considered the objection of the learned counsel of the respondent that I am in fact setting aside a finding of fact by the District Judge, but I do not think that I am doing so. On the other hand, assuming the facts to be as found by the District Judge, I have arrived at the conclusion that they do not justify the legal inference of valid marriage, it being admitted that there is no reliable direct evidence of the ceremony of chadar andazi.

The result is that I accept this appeal, set aside the decree of the learned District Judge, and restore that of the trial Court. I leave the parties to bear their own costs throughout.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 812

TEK CHAND AND AGHA HAIDAR, JJ.

Kali Charan—Defendant—Appellant.

v.

Jagan Nath and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 1903 of 1925, Decided on 4th May 1927, from decree of 1st Cl. Sub Judge, Delhi, D/- 29th June 1925.

Hindu Law — Joint family — Debts— Son's liability.

The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity ; but if he is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt : *A. I. R.* 1924 *P. C.* 50, *Foll.* [P 813 C 2]

Sardha Ram and *Lal Chand*—for Appellant.

Des Raj Sawhney and *Behari Lal*—for Respondents.

Agha Haidar, J.—This is a defendant's appeal arising out of a suit for a declaration that a certain decree passed by the learned Subordinate Judge of Delhi on 25th October 1925, in favour of defendant 1, is fictitious and collusive, and has been obtained fraudulently and that, therefore, it is null and void and ineffectual and is not at all binding upon the plaintiff. It is further prayed that in satisfaction of the said decree the whole or any part of the family property, detailed at the foot of the plaint, which is ancestral and undivided property and is owned jointly by the plaintiff and defendant 1 is not liable to be put to auction and sold in execution of the decree obtained by Kali Charan. The learned Subordinate Judge decreed the plaintiff's suit in respect of ¼th share of the house in suit. Defendant 1, Kali Charan, has come up in appeal to this Court. The facts are briefly these :—

Under two sale-deeds dated respectively the 17th August 1916 and 27th August 1917 Ram Gopal the father of Jagan Nath or Jaggu, plaintiff-respondent and Nikka the brother of Ram Gopal transferred a certain house to Kali Charan, defendant 1 for a consideration of Rs. 4,000. Out of this consideration a sum of Rs. 2,000 was paid to Nikka defendant 3 in the present suit, Rs. 1,000 was paid to Ram Gopal defendant 2. It is further alleged that a sum of Rs. 1,000 was left with the vendee to be paid to Jaggu, the present plaintiff on his attaining majority. On 21st November 1917, Jaggu, while he was a minor, brought a suit against Kali Charan on the allegation that the property transferred to him was joint family property and that there was no antecedent debt and that the alienation was without any valid necessity and, therefore, it was not binding upon him, as a member of the joint family. The trial Court decreed the suit for possession of half of the house. The lower appellate Court decreed the plaintiff's suit for exclusive possession of the whole house. The matter came up in second appeal before this Court, and on 21st December 1921, a Bench of two learned Judges allowed the appeal of Kali Charan defendant This judgment is reported as *Kali Charan* v. *Jaggu* (1). The learned Judges held

that the plaintiff, i.e., Jaggu, is however entitled only to joint, and not to exclusive, possession, and in this respect the decree requires to be modified.

They accordingly modified the decree.

Jaggu applied for execution of this decree against Kali Charan. Kali Charan objected. The matter ultimately came up again to this Court and it was held that Jaggu might be put in joint possession with Kali Charan. This order is dated 22nd May 1923.

In the meantime on 31st August 1920, Kali Charan brought a suit against Nikka

(1) [1921] 67 I.C. 89.

and Ram Gopal for the refund of the sum of Rs. 3,000 which he had paid to them plus costs which he had incurred in the litigation. On 25th October 1922, Kali Charan's suit was decreed for a sum of Rs. 3,427 odd.

It may be mentioned here that Kali Charan had a money claim, independently of this alienation, against Nikka only. He obtained a decree on the foot of this money claim and in execution of that decree he attached and put up ¼th share in the house for sale and ultimately purchased it himself. This ¼th share i not now the property of Nikka and in respect of it there is no dispute in the present litigation.

Now Kali Charan applied for execution of the decree which he had obtained against Ram Gopal and Nikka for the sum of Rs. 3,427 odd on 25th October, 1922. He proceeded to attach ¾th of the house in execution of that decree. Jaggu raised certain objections against the attachment proceedings under O. 21, R 58, Civil P. C. Those objections were overruled and Jaggu has accordingly brought the present suit against Kali Charan under the provisions of O. 21, R 63, Civil P. C., on 12th November 1923. In this suit he impleaded Ram Gopal and Nikka as well. The learned Subordinate Judge in a judgment, which is somewhat difficult to understand, gave him a decree in respect of ¼th share of the house only. In other words he decreed the suit to this extent that he exempted ¼th share of the house from the attachment and sale of the property in execution of Kali Charan's decree.

Kali Charan has come up in appeal to this Court and has challenged the decree of the Court below. The main points urged on behalf of Jagan Nath plaintiff-respondent, are two. At first he pleaded that the debt incurred by Nikka and Ram Gopal, i. e., his uncle and his father respectively, were immoral and not binding upon him. In the second place he tried to make out that the property had ceased to be joint Hindu family property, because there had been a disruption of the coparcenary body.

On the first point Mr. Sardha Ram has taken us through the evidence. I find that there is no reliable and satisfactory evidence to prove that Ram Gopal and Nikka were men of immoral character or that the property was transferred by them in order to raise money for immoral purposes. I may also observe that the finding of the Subordinate Judge is in favour of Kali Charan and the learned Judge had definitely come to the conclusion that the debts were not contracted for immoral purposes.

As to the second point the position is very anomalous. While it was urged on behalf of Jagan Nath that there was a disruption of the joint Hindu family, we find in the relief claimed by him in the plaint that he distinctly says that the property is ancestral and undivided and "is at present jointly owned" by him and Kali Charan. Further his statement was taken before the se tlement of issues by the learned Judge. It is printed at p. 18 and puts the matter beyond all possibility of doubt. He says :

> I and Ram Gopal and Nikka constitute a joint Hindu family. Our property is joint. It has never been partitioned.

We have been taken through the evidence of the plaintiff Jagan Nath, his uncle Nikka and his father Ram Gopal and we find that there is nothing to show that there has been any such disruption of the coparcenary as would amount to a partition of the shares belonging to the various members of the family. In fact there was no issue raised on the point and the argument directed to it is merely an after-thought. The law on the subject is clearly laid down by their Lordships of the Privy Council in the leading case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2). Their Lordships for the guidance of the Courts in India, have laid down once and for all various cannons at the conclusion of their judgment. The relevant portion is as follows :

> The managing coparcener of a joint undivided estate cannot alienate or burde the estate qua manager except for purposes of necessity ; but if he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

Applying this principle laid down by the highest authority, I find that Kali Charan in execution of the decree, which he obtained against the father of the plaintiff could proceed against the whole of the joint Hindu family property in order to satisfy his decree.

(2) A.I.R. 1924 P.C. 50=46 All. 95=51 I.A. 129 (P.C.).

This being our view I allow the appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs in all the Courts.

Tek Chand, J.—I agree.

R.K. *Appeal allowed.*

A. I. R. 1927 Lahore 814

COLDSTREAM, J.

Ichhar Singh—Plaintiff—Appellant.

v.

Bur Singh and *others*—Defendants—Respondents.

Second Appeal No. 1109 of 1926, Decided on 9th November 1926, from decree of Addl. Dist Judge, Amritsar, D/- 25th January 1926.

Cosharer — Partition—Suit for partition of a portion only of joint property is not maintainable.

If a sharer in joint property chooses to select a portion of the joint property for partition and to sue for partition of that alone his suit cannot proceed without the acquiescence of the defendant: 77 *P. R.* 1887, *Foll.*; 124 *P. R* 1879 and 43 *P. R.* 1906, *Dist.* (P 815 C 1]

Sain Das—for Appellant.

Duni Chand—for Respondents.

Judgment.—Ichhar Cingh, the plaintiff-appellant, was owner of a ⅓rd share in a certain parcel of land consisting of three portions numbered as 115, 45 and 52 in the revenue records and measuring together about 8½ kanals, the other sharers being Bhagat Singh, defendant 2, whose share was ⅓rd, and defendants 3, 4, 5 and 6 who jointly owned the remaining ⅓rd share. By a deed, dated 4th August 1917, Bhagat Singh sold the whole of this parcel to Bur Singh, defendant 1. Ichhar Singh sued against the vendee and the cosharers for possession of 2 kanals 16 marlas being his ⅓rd share. The trial Court found that the area No. 115 had become Bhagat Singh's exclusive property by a partition effected through the revenue officers and consequently Ichhar Singh had no title therein. As regards the other two areas it held that partition was proved by long separate possession. It further held that Ichhar Singh could not maintain a suit for possession of his share in Nos. 45 and 52 without bringing into the hotchpot the rest of the holding (of which the parcel in dispute was only a part) in which he and the defendants (other than Bur Singh) were cosharers.

Ichhar Singh appealed. The learned District Judge remarked that the dispute concerned only Nos. 45 and 52. As regards these two numbers he found that Bhagat Singh, 'the alienor and his brother had been in separate possession of them and had mortgaged them to one Rallia Ram in 1892 After the brother's death Bhagat Singh had sold them to Bur Singh in 1917. He held in agreement with the first Court that the suit for possession of a share of these two fields alone was not maintainable and dismissed the appeal.

Against this order Ichhar Singh has preferred the present appeal. Mr. Sain Das does not press the appeal in respect of field No. 115. His contention is simply that the suit is maintainable, and on being asked whether his client asks to be given symbolical joint possession of a third share he says that he does not, but seeks, as stated in the plaint, to be put in physical possession of an area equal to third of the area of fields Nos. 45 and 52. He relies on the ruling *Lachman Das* v. *Sunder Das* (1) and *Sura Singh* v. *Sant Singh* (2).

How there came to be a partial partition affecting field No. 115 alone is not explained by either counsel. In reply Mr. Duni Chand cites *Phani Singh* v. *Nawab Singh* (3) and *Muhommad Hayat* v. *Mahammed Ali* (4) as supporting the lower Court's decisions.

The plaintiff's own statement in Court was that the holding of which he and defendants 2 to 6 were share-holders measured some 47 bighas and the plaint stated that the khata had not been partitioned.

In the case *Lachman Das* v. *Sunder Das* (1) the Chief Court held that where one of several sharers executed a sale-deed purporting to convey the whole interest in a portion of the joint property another joint owner could maintain a suit for possession in common with the purchaser of the specific property sold, with a definition of the portion in which each party was to have a sole interest. But common possession is not the relief here sought. The plaintiff asks for separate possession of his portion. The ruling *Sura Singh* v. *Sant Singh* (2) also held that a suit for joint possession in circum-

(1) [1879] 124 P. R. 1879.
(2) [1906] 43 P. R. 1906=122 P. L. R. 1906.
(3) [1905] 28 All. 161=(1905) A. W. N. 233.
(4) [1915] 94 P. R. 1915=31 I. C. 489=210 P. W. R. 1915.

stances such as the present was maintainable. In the judgment, however, the Hon'ble Judges quoted with approval the principle laid down in *Shadi* v. *Sainditta* (5) that if a sharer in joint property chooses to select a portion of the joint property for partition and to sue for partition of that alone his suit cannot proceed without the acquiescence of the defendant. If the latter object the plaint must either be amended so as to include the whole property or such less portion as the parties agree to divide or submit to have his suit dismissed.

The suit, as framed, would, if decreed, involve the eviction of the vendee cosharer and is, in my opinion, clearly not maintainable, and I accordingly dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(5) [1887] 77 P. R. 1887.

A. I. R. 1927 Lahore 815 (1)

HARRISON, J.

Ghulam Nabi and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 236 of 1927, Decided on 3rd May 1927, from order of Dist. Magistrate, Jullundur, D/- 8th January 1927.

Criminal P. C., S. 436—Order of discharge—Further enquiry should not be directed unless the order is perverse.

Further enquiry after an order of discharge should not take place unless that order is perverse or foolish or based on an incomplete record of evidence: 10 *P. R. Cr.* 1911 and *A. I. R.* 1926 *Lah.* 130, *Foll.* [P 815 C 2]

Ghulam Mohy-ud-Din — for Petitioners.

Anant Ram Khosla for *Govt. Advocate*—for the Crown.

Judgment.—In this case after all the evidence of the prosecution had been concluded the Magistrate wrote a lengthy order discharging the accused. He discussed the evidence at length and gave his reasons for holding that no prima facie case had been made out. On application to the District Magistrate a further enquiry has been ordered.

The law on the subject is very clear, the ruling case being *Emperor* v. *Kiri* (1) in which it is explained that further enquiry after an order of discharge should not take place unless that order is perverse or foolish or based on an incomplete record of evidence. Since 1911 there has been a long succession of rulings following the Full Bench, the last of which is *Harnam Singh* v. *Emperor* (2). The order of the Magistrate may not commend itself to the District Magistrate, the Magistrate may or may not have attached too much importance to the discrepancies, and too little to the probabilities; but by no straining of the meaning of the words can the order be said to be perverse or foolish.

I find that the necessary requirements have not been fulfilled and the order for further enquiry should not have been passed and I set it aside.

G.B. *Order accordingly.*

(1) [1911] 10 P. R. Cr. 1911=205 P. L. R. 1911=11 I. C. 182=24 P. W. R. Cr. 1911.

(2) A. I. R. 1926 Lah. 130.

A. I. R. 1927 Lahore 815 (2)

SHADI LAL, C. J., AND JAI LAL, J.

Kharati Ram—Defendant—Appellant.

v.

Dina Nath—Plaintiff—Respondent.

Second Appeal No. 192 of 1923, Decided on 7th May 1927, from decree of Dist. J., Jullundur, D/- 16th Oct. 1922.

Mortgage—Construction—Mortgagor undertaking to pay for "murrammat shikast:rekht" is liable to pay also cost of reconstruction.

Where a deed of usufructuary mortgage provided that the mortgagor shall pay the cost of "*murrammat shikast rekht*" with interest,

Held: that the mortgagor shall pay not only for the ordinary repairs but also the expenses reasonably incurred in rebuilding the whole or a portion of the house mortgaged together with interest: *A. I. R.* 1921 *Lah.* 238, *Foll.* [P 817 C 2]

Shamair Chand—for Appellant.

Badri Das—for Respondent.

Jai Lal, J.—The facts which have given rise to this litigation may briefly by stated: On the 14th May 1913, on Sain Das mortgaged with possession a house to Kharati Ram, appellant for Rs. 600, out of which Rs. 118 was left in deposit with the mortgagee to be spent on the construction of a staircase in the house and the rest was paid. It is admitted that the Rs. 118 was not spent by the mortgagee. It was provided in the mortgage-deed that the principal amount would carry interest at 13 annas per cent. per month, that the mortgagee

would be entitled to do "muramuat shikast rekht" to the house and add the expenses incurred thereon with the stipulated rate of interest to the amount due under the mortgage and that the rent realized by the mortgagee was to be credited to the mortgagor.

It appears that the property was found by the Municipal Committee of Jullundur to be in a dangerous condition and therefore, on the 2nd October 1917, a notice under the Punjab Municipal Act was served on the mortgagee to demolish the house within six hours. It is alleged that part of the house fell down before the rest was demolished, but it is common ground that the whole of it was rebuilt by the mortgagee. On the 3rd January 1920, the equity of redemption in the house in suit was purchased by one Chanan Mal who is represented by the respondent Dina Nath before us. On the 17th April 1920 Chanan Mal instituted a suit for possession by redemption of the house on payment of Rs 400. The suit was defended by the mortgagee on various pleas, but the principal one with which we are now concerned, was that he had spent R. 1,117 on rebuilding the house in pursuance of the notice by the Municipal Committee and that no redemption could be claimed unless in addition to the principal advanced and interest thereon the mortgagor paid him this amount with the stipulated rate of interest. A total sum of Rs. 2,315 was thus claimed by the mortgagee.

The Sub-Judge held that Rs. 1,152 was actually spent on the rebuilding of the house, and, deducting therefrom Rs. 32, the value of the materials of the old house taken by the mortgagee, he fixed the net amount recoverable by him at Rs. 1,120, and adding interest at 13 annas per cent. per mensem thereto and giving credit for Rs. 244 rent found to be recovered by the mortgagee, he granted a decree for redemption on payment of Rs. 2,106. The plaintiff thereupon filed an appeal in the Court of the District Judge and the defendant filed cross-objections regarding the value of improvements. The learned Judge held that Rs. 925 was payable by the mortgagor to the mortgagee and varied the decree of the Sub-Judge accordingly. He considered that Rs. 240 was a sufficient allowance for repairs done by the mortgagee, and without giving any good reason, reduced the amount of rent realized by the mortgagee to Rs. 204 and adding interest on the principal amount of Rs. 600 arrived at the figure of Rs. 925.

This is an appeal by the mortgagee against the decree of the District Judge, and it is contended on his behalf that the learned Judge has based his conclusions on mere conjectures disregarding the evidence on the record and has misinterpreted the mortgage-deed and otherwise has misunderstood the law applicable to the facts of this case. We confess we are unable to follow the reasoning of the learned Judge both with regard to the facts found by him and the law applied to the case.

The controversy before us has mainly ranged round the question of the cost of reconstruction of the house. The trial Court has, as already stated, held that Rs. 1,120 was the net cost of the mortgagee. This estimate was based on certain receipts and a note-book produced by the mortgagee which showed an expenditure of Rs 1,177-6-0 and also on the report of a commissioner appointed by the Sub-Judge who estimated the cost at Rs. 1,152 in 1917, when the house was rebuilt. The District Judge did not consider the note-book produced by the mortgagee as sufficient to support his contention, but he did not express any opinion on the receipts produced by him and entirely failed to consider the report of the commissioner. He found himself unable to remand the case "to determine the amounts reasonably spent by the mortgagee on ordinary and necessary repairs" on the ground that in his opinion "such remand would only mean production of additional worthless evidence by the parties." In our opinion the District Judge gave no cogent reasons for setting aside the well-considered conclusion of the Sub-Judge, and we hold that Rs 1,120 was the amount spent by the mortgagee in re-building the house.

The next question is whether the mortgagee is entitled to add this amount to the mortgage debt. The District Judge has disallowed this amount merely on the ground that in cases of redemption reasonable improvements are ordinarily permissible, that in the present case the deed provides that "ordinary and necessary repairs" should be allowed to the mortgagee, and that the result of allowing the claim of the mortgagee would

be that the mortgagor would be practically debarred from redeeming the property.

It is not contended on behalf of the respondent that the house as rebuilt was larger than the one that existed at the time of the mortgage, though it does appear that it was better constructed. It is also to be noted that the rent of the house was Re. 1 p. m before its reconstruction and was increased to Rs. 4 p. m. immediately afterwards. We consider that the learned District Judge has misinterpreted the mortgage-deed. Murammat shikast rekht" does not mean petty repairs as held by him, the word "murammat" means repairs " shikast" means breakage, " rekht" means destruction. We think that the condition that the mortgagor shall pay the cost of " murammat shikast rekht," with interest means that he shall pay not only for the ordinary repairs but also the expenses reasonably incurred in rebuilding the whole or a portion of the house mortgaged. This was the view taken by a Division Bench of this Court in a case reported in *Kirpa Ram* v. *State of Jammu and Kashmir* (1), in which the expenses incurred on " shikast rekht" were held to include expenses incurred on reconstructing and repairing the mortgaged property. It is not the case for the respondent that when the house in question was pulled down it was not necessary to do so and to reconstruct it, but it was contended by the learned counsel that the ruinous condition of the house was due to the action of the mortgagee in not keeping it in good condition by doing ordinary repairs, and therefore that even if the mortgagee was otherwise entitled to claim the expenses of rebuilding, he was not so entitled in this case by virtue of his default. But we find that there was no such plea taken in the Courts below and there is no evidence on the record to enable us to come to a conclusion that the mortgagee neglected to repair the house and thus allowed it to fall into a state of disrepair. We hold, therefore, that under the terms of the mortgage-deed the mortgagee was entitled to the cost of the rebuilding of the house with interest thereon.

The next contention of the learned counsel for the respondent was that the mortgagee was not in any case entitled to claim interest on the money spent by him. We have already observed that the mortgage-deed clearly provides that interest is payable on the expenses incurred by the mortgagee. S. 72, T. P. Act, also provides that in the absence of a contract to the contrary the mortgagee is entitled to add the amount spent by him to the principal money at the rate of interest payable on the principal. In our opinion there is no force in this contention either.

The result is that we hold that on a proper interpretation of the mortgage-deed in question the appellant is entitled to be paid the amount spent by him on rebuilding the house with the stipulated rate of interest, that is, 13 annas per cent. per annum. We accept this appeal, set aside the decree of the District Judge and remand the case to the trial Court with direction to pass a preliminary decree for redemption with due regard to the observations made above and to proceed with the case in accordance with law. The respondent shall pay the costs of the appellant throughout.

G.B. *Appeal accepted.*
Case remanded.

(1) A. I. R. 1921 Lah. 238.

1927 L/103 & 104

A. I. R. 1927 Lahore 817

TEK CHAND AND AGHA HAIDAR, JJ.

Badhawa Ram and *another*—Defendants—Appellants.

v.

Akbar Ali—Plaintiff—Respondent.

Second Appeal No. 2045 of 1923, Decided on 14th June 1927, from decree of Dist. Judge, Ambala, D/- 29th June 1923.

(a) Evidence Act, S. 65—S. 57, Registration Act, explained—Certified copies of registered documents are admissible only when case for reception of secondary evidence is made out under Evidence Act, S. 65.

It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. S. 57, Registration Act, only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original: 22 *W. R.* 303 and 11 *I. C.* 50, *Ref.* [P 818 C 2]

(b) Mortgage—Interest due is a charge on the property and payable on redemption.

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mort-

gaged property in the absence of any contract to the contrary, and is payable upon redemption: *A I.R.* 1924 *P. C.* 183, *Foll.* [P 819 C 1]

Fakir Chand—for Appellants.

Muhammad Akbar Khan for *F. K. Byron*—for Respondent.

Tek Chand, J.—The plaintiff-respondent instituted the suit, out of which this second appeal arises, for redemption of certain land on payment of Rs. 310. In the plaint he alleged that the land in dispute had been mortgaged by his predecesors-in-interest with the defendants-appellants but that he was unable to produce the mortgage-deeds as they were in the possession of the defendants. No particulars of the mortgage-deeds were given. The defendants pleaded that they held the land under four mortgages registered respectively (1) on the 16th July 1861, for Rs. 160. (2) on the 29th July 1871, for Rs. 76-10-8; (3) on the 5th June 1887, for Rs. 163, out of which Rs. 100 was to be without interest and on the remaining Rs. 65 interest was to be paid in lump sum at the rate of Rs. 8 per annum; and (4) on the 31st March 1897, for Rs. 200, out of which Rs. 100 was to be without interest and the remaining Rs. 100 was to bear annual interest at Rs. 18.

On foot of these four mortgages they claimed that Rs. 1,331-10-8 was the amount due to them on the date of the suit, on payment of which the plaintiff could get back possession of the land.

The defendants did not produce the original mortgage-deeds relating to transactions Nos. (1) and (2) above. They, however, sought to prove these mortgages by producing certified copies of registered mortgage-deeds bearing these dates. The first Court held that as the loss of the original mortgage deeds had not been proved, secondary evidence of the terms thereof was not admissible. It, however, held that mortgages Nos. (3) and (4) had been proved and it allowed the full amount of principal and interest claimed on (3). As regards the mortgage-deed No. (4) the Court found that, out of the nominal consideration of Rs. 200 for this mortgage, only Rs. 102 was actually paid, which was to bear no interest according to the terms of the mortgage. As a result of these findings a decree for redemption was passed in favour of the plaintiff-respondent on payment of Rs. 545 on or before the 20th July 1923.

The defendants appealed to the District Judge and the plaintiff preferred cross-objections. The learned District Judge reduced the amount payable to the defendants from Rs. 545 to Rs. 310. The defendants-mortgagees have preferred a second appeal to this Court, and on their behalf Mr. Fakir Chand has assailed the findings of the learned District Judge on three points.

Firstly, it is argued that the lower Courts were in error in excluding secondary evidence of the existence and the terms of mortgages Nos. (1) and (2). I am, however, of opinion that this contention is devoid of all force. Both the lower Courts have found as a fact that the loss or destruction of the originals has not been proved. Mr. Fakir Chand, however, argues that notwithstanding this finding he was entitled to lead secondary evidence under Cls. (b) and (f) of S. 65, Evidence Act. He relies on certain recitals in the mortgage-deed No. 3 dated 5th June 1887, in which reference is made to certain prior mortgages of 1861 and 1871 and contends that the existence of these two mortgage-deeds has been admitted in writing in that deed and, therefore, under Cl. (b) secondary evidence of the existence, conditions or contents thereof is admissible. The reference to the former deeds in the deed of 1887 is, however, very vague and does not contain sufficient particulars from which the identity of the alleged mortgages Nos. (1) and (2) can be established. This argument, therefore, fails. Cl. (f) is obviously inapplicable.

It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. It has been held that such a deed of sale is not a document of which a certified copy is permitted by law to be given in evidence in the first instance without having been introduced by other evidence. S. 57. Registration Act only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original documents, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original. That is to say, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy, and shall be taken as a true

copy; but that does not make such a copy a document which may be given in evidence without other evidence to introduce it: see *Hurish Chunder* v. *Prosunno Commar* (1) and *Munnan* v. *Najmun* (2). I am of opinion that the lower Courts were right in refusing to admit secondary evidence. The defendants' claim with regard to mortgages Nos. (1) and (2) has therefore, been rightly rejected.

Mr. Fakir Chand next claims that on the mortgage-deed No. (4) the appellants should have been allowed the mortgage money recited in the deed, Rs. 200, together with interest on Rs. 100, as provided in the deed. But in the mortgage-deed it was stated that out of the principal sum Rs. 102 only had been paid to the mortgagor and that the remaining Rs. 98 was left in trust with the mortgagees which was to be taken later. There is absolutely no evidence on the record to show that this sum of Rs. 98 was ever paid by the mortgagees to the mortgagor. The amount actually advanced on the mortgage was Rs. 102 only which the lowor Courts have allowed to the plaintiff.

As to the mortgage-deed No. (3), however, the learned District Judge has gone wrong in disallowing interest on the sum of Rs. 65, which was to bear interest at Rs. 8 per annum. The stipulation on the point is quite clear that the mortgagor will be entitled to redeem on payment of the principal sum together with the interest due on the portion of the principal which has to bear interest according to the terms of the deed. The learned District Judge has relied upon *Aulia Khan* v. *Kanshi Ram* (3), but the phraseology of the deed which was the subject-matter of that case was entirely different. Moreover, the rule of law on this point has now been finally and authoritatively laid down by their Lordships of the Privy Council in *Ganga Ram* v. *Nath Singh* (4) where it was held that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary, and that, as a general rule, the interest due must be considered to be a charge on the property and payable upon redemption. On these findings I must restore the findings of the Sub-Judge that the defendants are entitled to charge interest on Rs. 65 at Rs. 8 per annum from the date of the mortgage-deed till redemption. The learned Sub-Judge, however, seems to have made a slight mistake in calculation. After working out the figures with both counsel, the total sum due to the defendants on our findings above is as follows:

Rs.	
102,	the principal sum duo on mortgage No. (4);
165,	the principal sum, due on mortgage No. (3); and
288,	interest on Rs. 65 at Rs. 8 per annum from the 5th June 1887 to the 23rd July 1903.
555	Total.

I would, therefore, accept the appeal and modify the decree of the lower Courts to this extent that the plaintiff is entitled to claim redemption on payment of Rs. 555.

In the circumstances of the case, I think the parties should be left to bear their own costs throughout.

Agha Haidar, J.—I agree.

R.D. *Decree modified.*

(1) 22 W. R. 303.
(2) [1911] 11 I. C. 50.
(3) [1913] 45 P. R. 1913=145 P. L. R. 1913=17 I. C. 677=25 P. W. R. 1913.
(4) A.I R. 1924 P. C. 183=5 Lah. 425=51 I.A. 377 (P.C.).

A. I. R. 1927 Lahore 819

TEK CHAND AND AGHA HAIDAR, JJ.

Muhammad Ismail Khan—Plaintiff—Appellant.

v.

Said-ud-Din Khan—Defendant—Respondent.

Second Appeal No, 2187 of 1923, Decided on 27th June 1927, from decree of Dist. Judge, Ambala, D/- 31st May 1923.

(a) *Civil P. C., O. 6, R.17—Power of amendment.*

The Courts have full power of amendment, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which had accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case: *A.I.R.* 1921 *P.C.* 50, *Foll.* [P 820 C 2 P 821 C 1]

(b) *Contract Act, S. 43—One partner contracting for the partnership—Promisee can sue all or any one of the partners—Civil P. C., O. 30, R. 1.*

In a suit upon a contract made by a partner on behalf of the partnership the promisee can compel all or any one of such partners to per-

form the whole of the promise, and therefore non-joinder of a co-promisor is no ground of defence to such a suit : 6 *Bom.* 700 ; 17 *Bom.* 6; 21 *Mad.* 256 : 22 *All.* 307 *and* 37 *P. R.* 1902, *Foll.* [P 821 C 2]

Man Singh for *Khazan Singh* — for Appellant.

Barkat Ali—for Respondent.

Agha Haidar, J.—This appeal arises out of a suit for the recovery of Rs. 3848. The facts are briefly these : The plaintiff Muhammad Ismail Khan brought a suit on the allegation that the defendant borrowed a sum of Rs. 3,000 from him on 22nd July 1920, and undertook to pay munafa (profit) by way of interest at the rate of Rs. 1 per cent per mensem and passed a memorandum to the plaintiff written and signed by himself evidencing the transaction. He claims the principal sum with interest in the present suit which he brought on 1st December 1922.

The memorandum mentioned above runs as follows, and we take it that its translation made by the two Courts below is accurate, seeing that the learned counsel appearing for the parties to this appeal did not take any exception to its correctness :

The Indian Darri Factory is in need of funds. Muhammad Ismail Khan, my relative, puts in Rs. 3000 in the factory on the condition that he will be given munafa at the rate of Re. 1 per cent. The factory accepts the term, but that this munafa will continue to be paid at the end of every year after the accounts have been taken. In case a part of the munafa was required to be paid before time, it would be paid under a receipt. In case the principal is desired back a month' previous notice was necessary. Accordingly this writing by way of pro-note is given as sanad.

Then the date of the document is given as the 22nd July 1920, which is followed by the remark that " the munafa will be paid with effect from the 1st August." This document is signed by Said-ud-Din Khan, " Pensioner Inspector of Police, " who described himself as " the proprietor of the Darri Factory, Ambala. "

The main plea raised by the defendant and with which we are concerned in this appeal is contained in para. 1 of the additional pleas and is to the effect that, as the defendant has not taken any personal debt from the plaintiff, the suit in its present form is not maintainable, and that the plaintiff has got no cause of action against the defendant in his personal capacity. The learned Senior Subordinate Judge came to the conclusion that the suit ought to have been against the partnership or firm according to the provisions of O. 30, Civil P. C., and the form prescribed in App. A, Sch. 1.

The plaintiff went in appeal to the learned District Judge who held that, having regard to the wording of the document on which the plaintiff based his claim, the suit should have been brought against the firm and not against the defendant in his personal capacity. He further held that there were other members of the firm besides the defendant and it was obvious that the suit was wrongly framed.

There seems to have been some discussion before the learned Judge of the lower appellate Court as to whether or not the plaintiff made an oral application before the trial Judge for the amendment of the plaint. On the argument which was apparently addressed to him on the question of amendment the learned District Judge observed :

The plaintiff made no attempt to amend the plaint in the lower Court, but, on the contrary not only decided that it was correctly framed, but even in the grounds of appeal has maintained that it does not require amendment. This is not a case in which amendment should be allowed on appeal even if he had directly applied for it.

Now the learned District Judge has not noticed that in para. 9 of the memorandum of appeal before him the plaintiff distinctly raised the plea of amendment in the following terms :

At the worst the suit should have been returned for amendment and the Indian Darri Factory should have been ordered to be impleaded as a defendant. It is a mistake to dismiss the suit.

It was perfectly competent to the plaintiff in one part of the memorandum of appeal to justify the position that the suit, as brought, was maintainable and in another part to raise the plea that the amendment may be allowed if it was found necessary.

After all Courts of justice are not intended to enforce discipline, but substantial justice is the aim and object of all the rules of procedure. In this connexion a recent pronouncement of their Lordships of the Privy Council may profitably be quoted:

The Courts have full power of amendment, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which had accrued to him by lapse of time, yet there are cases where such considerations are out-

weighted by the special circumstances of the case : *Charan Das* v. *Amir Khan* (1).

In the present case the learned District Judge delivered the judgment on 31st May 1923, that is to say, well within three years of the date of the document in suit, and there could not possibly be any objection to the darri factory being impleaded as a party defendant.

I may further quote the case of *Satchidananda Dutt* v. *Nritya Nath Mitter* (2) where two learned Judges observed that it was competent to the Court to allow the plaint to be amended even after the expiry of the period prescribed for the institution of a new suit. In the face of these authorities the remark of the learned Judge, that it was still open to the plaintiff to bring a fresh suit impleading the firm as defendant, is neither good law nor good sense.

However, having regard to the provisions of S. 43, Contract Act, it was not even necessary to implead the darri factory at all as a party defendant, and thus to invoke in aid the provisions of O. 30, Civil P. C.. S. 43 is perfectly clear on the point.

Where two or more persons make a joint promise the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

All that is necessary is to make a very slight amendment in para. 1 of the plaint by adding that the defendant, as a member of the firm known as "The Indian Darri Factory, Ambala," borrowed the amount claimed under the document dated the 22nd July 1920. This would not in any way alter the subject-matter of the suit, nor would it be open to objection that one distinct cause of action has been substituted for another. The amendment would only have the effect of defining the position of the defendant Said-ud-Din Khan. In *Lukmidas Khimji* v. *Purshotam Haridass* (3) it was held in a suit brought upon a contract made by a partnership firm that the plaintiff may select as defendants those partners of the firm against whom he wished to proceed. This decision was followed in *Motilal Bechardass* v. *Ghellabhai Hariram* (4), and subsequently by the Madras High Court in *Narayana Chetti* v. *Lakshmana Chetti* (5), and by the Allahabad High Court in *Muhammad Askari* v. *Radhe Ram Singh* (6). There is also a case reported as *Jag Lal* v. *Shib Lal* (7), which lays down that

in a suit upon a contract made by a partner on behalf of the partnership the promisee can compel all or any one of such partners to perform the whole of the promise, and that non-joinder of a co-promisor is no ground of defence to such a suit.

Having regard to these authorities, there cannot be any doubt that the plaintiff's claim is maintainable against defendant 1 as one of the partners of the Indian Darri Factory, Ambala. As the two Courts below dismissed the suit on a preliminary point, and the judgment of the lower appellate Court has been set aside on such point, I would allow the appeal, set aside the decree of the two Courts below and remand the case under O. 41, R. 23, Civil P. C., to the Court of the first instance through the lower appellate Court for disposal on the merits. It would be open to the plaintiff to make the necessary amendment in the light of the observations I have made in the course of this judgment. Costs here and hereafter will follow the event The Court-fee paid on the memorandum of appeal presented in this Court will be refunded to the plaintiff-appellant.

Tek Chand, J.—I agree.

R.K. *Case remanded.*

(1) A I. R. 1921 P. C. 50=48 Cal. 110=47 I. A. 255 (P. C.).
(2) A. I. R. 1924 Cal. 517=50 Cal. 878.
(3) [1882] 6 Bom. 700.
(4) [1893] 17 Bom. 6.
(5) [1898] 21 Mad. 256.
(6) [1900] 22 All. 307=(1900) A. W. N. 73.
(7) [1902] 37 P. R. 1902=25 P. L. R. 1902.

A. I. R. 1927 Lahore 821

ADDISON, J.

Gul Hassan—Plaintiff—Appellant.

v.

Mt. Resham Jan and *others*—Defendants—Respondents.

Second Appeal No. 1072 of 1927, Decided on 20th September 1927, from decree of Dist. Judge, Rawalpindi, D/- 19th January 1927.

Civil P. C., S. 11—Two suits by husband and wife against each other, tried together and disposed of by one judgment—Two decrees prepared—Appeal by husband against the decree in his own case—Unappealed decree does not operate as res judicata.

A brought a suit against *B*, his wife, for restitution of conjugal rights, in which she pleaded that she had a right to exercise the option of puberty. Afterwards she brought a counter

suit against *A* for a declaration that she was not his wife. Both suits were tried together, the principal issue being whether *B* had a right to exercise the option of puberty. This issue was decided in favour of *B*. The suit of *A* was accordingly dismissed. Both suits were decided by one judgment. *A* appealed against the decree in his own suit but preferred no appeal against the decree in *B*'s suit.

Held : that the hearing of the appeal was not res judicata either by the provisions of S. 11, Civil P. C., or by the general principles of res judicata or by the fact that the appellant had left outstanding against him a decree with which the decree sought by him to be obtained in the appeal would be in direct conflict. [P 822 C 2]

Held : further that the decree passed in appeal would override also the outstanding decree not appealed against : *A. I. R.* 1927 *Lah.* 289 (*F. B.*), *Foll.* [P 822 C 2]

Shamair Chand—for Appellant.

Aziz Ahmad—for Responden's.

Judgment.—Gul Hassan sued Mt. Resham Jan for restitution of conjugal rights and joined other defendants against whom he claimed an injunction that they should not prevent his wife returning to him. Mt. Resham Jan pleaded that she had a right to exercise the option of puberty. Gul Hassan's suit was instituted on 13th January 1926. On the 1st February 1926, Mt. Roshan Jan brought a counter-suit against Gul Hassan for a declaration that she was not his wife. Both suits were tried together, the principal issue being whether Mt. Resham Jan had a right to exercise the option of puberty. This issue was decided by the Subordinate Judge in favour of Mt. Resham Jan. The suit of Gul Hassan was accordingly dismissed, while Mt. Resham Jan obtained a decree, declaring that she was not Gul Hassan's wife. Both suits were decided by one judgment. Gul Hassan appealed to the District Judge against the decree in his own suit, but preferred no appeal against the decree in Mt. Resham Jan's suit.

Following the older rulings of this Court, the learned District Judge held that, as both decrees had not been appealed, the question as to whether there was a valid subsisting marriage was res judicata between the parties by virtue of the unappealed decree. He, therefore, dismissed Gul Hassan's appeal. Against this decision he has preferred this second appeal.

Since the date of the judgment of the learned District Judge there has been a Full Bench decision on this question. It was held by the Full Bench that the hearing of an appeal like the present was not res judicata either by the provisions of S. 11, Civil P. C., or by the general principles of res judicata or by the fact that the appellant had left outstanding against him a decree with which the decree sought by him to be obtained in the appeal would be in direct conflict: see *Mt. Lachhmi* v. *Mt. Bhulli* (1).

It appears to me that there is no distinction between the case now before me and the case before the Full Bench. It was, however, contended on behalf of the respondent that there was a distinction, in that the judgment and decree outstanding against the present appellant amounted to conclusive proof of what was contained in that judgment and decree by virtue of S. 41, Evidence Act. It must be pointed out that there was only one judgment in the two suits and Gul Hassan has appealed against the decision contained in that judgment. There were, however, two decrees. I can see no force in this contention as the finding of the Full Bench amounts to this: that the decree passed in appeal would override also the outstanding decree not appealed against. The judgment in the appeal would also be a judgment in rem and the decree following it would displace the other decree.

For these reasons I accept this appeal and, setting aside the order of the District Judge, direct him to proceed with the hearing of the appeal on the merits. The Court-fee in this Court will be refunded; other costs will abide the event.

N.K. *Appeal accepted.*

(1) A. I. R. 1927 Lah. 289=8 Lah. 384 (F. B.).

A. I. R. 1927 Lahore 822

CAMPBELL, J.

Amir Hassan — Complainant — Petitioner.

v.

Qadar Bakhsh—Opposite Party—Respondent.

Criminal Revn. Petn. No. 1590 of 1926, Decided on 21st January 1927, from order of Dist. Mag., Karnal, D/- 28th July 1926.

Criminal P. C., S. 145 — Magistrate going into question of ownership — How breach of peace was apprehended not shown—Order was set aside.

Where the Magistrate had gone at lengthin- to the question of ownership and his order was

further unsatisfactory, in that it did not explain how a breach of the peace was to be apprehended between the parties.

Held : that the order should be set aside. [P 823 C 2]

S. A. Nasir—for Petitioner.
Shamair Chand—for Respondent.

Judgment.—This case was commenced by the Magistrate, 1st Class, Karnal, being moved under S. 145, Criminal P. C., by one Amir Hassan in respect of a shrine or tomb in the town of Shahabad. The respondent was one Qadar Bakhsh. The Magistrate first made an order under S. 145 (1), and when the parties attended the Court took evidence. He then recorded a finding that the place in dispute was the property of the Muslim community and directed that it should remain so until the community was ousted by due course of law and any disturbance of their possession in the meantime was forbidden. The body of the order, however, is mainly occupied with the discussion as to the title in the place, & there is no clear finding whether any and which of the parties was at the date of the order under S. 145 (1) in possession. Qadar Bakhsh presented what he called a petition of appeal to the District Magistrate, and although the District Magistrate's order shows that the petition was registered as a revision petition, nevertheless he has decided it as if it was an appeal. The learned District Magistrate in his order took some exception to the Magistrate having gone so fully into the question of ownership and observed rightly that the Magistrate's function was merely to go into the question of possession. He then expressed doubt whether it was a case where there was likely to be a breach of the peace. But he continued that since the place had been attached and as there was scarcely any evidence to establish the possession of any particular party, he refused to interfere with the attachment and further directed that one Kazi Abdul Latif be appointed receiver and the place made over to him.

Amir Hassan has come to this Court on revision, contending that the District Magistrate had no jurisdiction to pass the order which he did and that he was only entitled to report the case to this Court recomending any alteration of the Magistrate's order which he considered should be made. Qadar Bakhsh has also presented a fresh revision petition to this Court attacking the Magistrate's action. His learned counsel admits that the District Magistrate's order must be set aside, but submits that, in the circumstances the Magistrate's order should also be cancelled since the police had reported that there was no apprehension of a breach of the peace and since neither the complainant nor the Muslim community had been proved to be in possession.

It is pretty clear that if the learned District Magistrate had realized (a) that no appeal lay to him and (b) that the Magistrate had not in fact attached the property under S. 146, he would have reported the case for cancellation of the Magistrate's order. That order is unsatisfactory, in that it does not explain how a breach of the peace is to be apprehended between these two parties and does not contain any decision about possession on the date of the first order.

In my opinion the Magistrate's order must be set aside and I order accordingly. If the authorities consider any breach of the peace to be likely to occur fresh proceedings can be taken. The result is that both revision applications 1590 and 1813 are accepted.

G.B. *Order set aside.*

A. I. R. 1927 Lahore 823

BROADWAY AND BHIDE, JJ.

Paras Das—Plaintiff—Appellant.

v.

Suraj Bhan and *others*—Defendants—Respondents.

Second Appeal No. 1426 of 1923, Decided on 22nd June 1927, from decree of Dist. Judge, Gurgaon, D/- 16th Feb. 1923.

Evidence Act, S. 103—Balance due on bahi account struck and executed by defendant—Plea of want of consideration—Onus lies on defendant to prove it.

Where it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rests on the person asserting want of consideration : *A. I. R.* 1925 *Lah.* 471 (*F.B.*) and *A.I.R.* 1927 *Lah.* 272, *Foll.* 17 *P. R.* 1888, *Diss. from.* [P 825 C 1]

Jagan Nath Aggarwal—for Appellant.
Shamair Chand—for Respondents.

Broadway, J.— This second appeal has arisen out of a suit brought by the plaintiff-appellant Paras Das against Suraj Bhan and Chandar Bhan, minor sons of Sultan, through their uncle Sheo

Dan, and Sheo Dan himself. The claim was for a sum of Rs. 2,300, being the principal and interest due on a bahi account. It was averred that the plaintiff had had dealings with the grandfather of the two minor defendants which had been continued by their father Sultan who executed certain balances, the last one having been executed on 12th June 1916 for a sum of Rs. 1,250. It was further stated that Sheo Dan had taken possession of Sultan's property and was therefore, liable for the claim.

The defendants pleaded that there had been no dealings with the plaintiff, that no balance had been struck by Sultan and that no consideration whatever had passed, while Sheo Dan pleaded that he was in no way personally liable.

The trial Court came to the conclusion that the plaintiff has had dealings with Kaushi Ram and later with Sultan, that Sultan, as a matter of fact, executed the three balances in question and that consideration had been proved. It accordingly granted the plaintiff a decree for the sum claimed, but relieved Sheo Dan from responsibility. Against this decree the two minor sons of Sultan preferred an appeal to the District Court which proved successful and the plaintiff's suit was dismissed. The plaintiff has now come up to this Court in second appeal.

After hearning Mr. Jagan Nath for the appellant and Mr. Shamair Chand for the respondents, in my judgment this appeal should succeed. It is perfectly clear that the points for determination by the learned District Judge were, firstly whether the balances had been struck, secondly, whether there was consideration for the balances and, thirdly, whether the suit was within time, the question of limitation depending almost entirely on the finding as to the execution of the balances.

After setting out the issues and the findings of the Court below the learned District Judge dealt with the points as to the competency of the appeal and then proceeded as follows :

> As to the merits I find myself unable to agree with the findings of the lower Court.

He then proceeded to discuss the evidence relating to the execution of the three balances. He pointed out that the said documents had been sent to Phillaur with the result that the thumb-mark on one alone was found to be that of Sultan, the thumb-marks on the other two merely being similar in certain points. Instead of proceeding to state definitely whether or not he found that the balances had been struck by Sultan he proceeded as follows :

> Even if we assume that these few marks of similarity also show that these thumb marks are of Sultan, the plaintiff has failed to prove an essential part of issue 1. He ought to have shown that the balances were for consideration but there is absolutely no evidence about a single transaction.

The learned District Judge then discussed the question as to whether consideration had or had not been proved. It is perfectly clear from what he has recorded that his mind was occupied with the discussion on the question of consideration. He found that it was possible that the balances which clearly bore the thumb-mark of Sultan might have been obtained by deceit, and then says :

> The bahi is a single one which can be written at any time. I do not feel satisfied of the consideration for the balances.

He then proceeded to deal with the question of limitation and says that so far as he could see there was no evidence on the record that the balance of Sambat 1961 (1904) was within time except plaintiff's own unsupported statement. After this he gave it as his opinion that the plaintiff had failed to prove that his suit was within time or that the balance drawn on 12th June 1915 was for consideration. It has been urged by the learned advocate for the appellant that there is no finding on the question as to whether the balances had or had not been struck. On the other hand, Mr. Shamair Chand says that although possibly the finding is not as clear as it ought to have been it is deducible from the judgment as a whole, more especially having regard to the statement at the commencement of the discussion where the learned District Judge says that he was unable to agree with the findings of the lower Court, and, later on, where he refers to the possibility of the plaintiff having deceived Sultan into affixing his thumb-mark on the balance struck in 1910 A. D. In my judgment, the learned District Judge refrained from coming to any clear and definite findings on this question because he was following the rule of law which was held to have been enunciated in *Wazir Singh* v *Jai Gopal* (1), Subsequently to that date, it has been held by a Full Bench of this

(1) [1933] 47 P. R. 185.

Court in *Ram Chand* v. *Chhunun Mal* (2) that when it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rests on the person asserting that want of consideration. *Muhammad Bakhsh* v. *Shadi Muhammad* (3) is another authority on this point. In this appeal it appears to me that the learned District Judge was clearly misled by what he considered to be the law and for that reason did not consider it necessary to do more than to record a finding on the question of consideration, leaving the question, as to whether the balances had been executed, undecided. I, therefore, think that this appeal must be accepted and the decree passed by the learned District Judge set aside. The case will be returned to the Court below for a re-hearing and re-decision in accordance with law. Costs in this Court will follow the event.

Bhide, J.—I concur.

J.V. *Appeal accepted.*

(2) A. I. R. 1925 Lah. 471=5 Lah. 470 (F. B.).
(3) A. I. R. 1927 Lah. 272=8 Lah. 123.

A. I. R. 1927 Lahore 825 (1)

ZAFAR ALI, J.

Tahiru and *another* — Accused—Petitioners.

v.

Jallu—Complainant—Respondent.

Criminal Revn. No. 847 of 1927, Decided on 24th June 1927, from order of Dist. Magistrate, Shahpur, D/- 3-5-1927.

Penal Code, S. 417—Cheating.

Petitioners were alleged to have gone to a person and asked him to send his daughter-in-law (petitioners' daughter) with them for paying a visit to a goddess. He sent the daughter-in-law with them, but they did not return her to him. He further stated that the daughter-in-law took away with her ornaments, and that the petitioners made a false representation to him in order to take away the girl with her ornaments. The petitioners were charged under S. 417. [P 825 C 2]

Held: that the facts alleged did not constitute an offence under S. 417.

M. L. Puri—for Petitioners.

Lachhman Singh—for Respondent.

Judgment. — The petitioners are Tahiru and his wife Mt. Taban. Jallu claimed to be the father-in-law of the petitioners' daughter Mt. Shani and his complaint was that they (petitioners) came to him and asked him to send Mt. Shani with them for paying a visit to the goddess at Kangra, that he sent Shani with them but they did not return her to him. He further stated that Mt. Shani took away with her her ornaments of the value of Rs. 700 and that the petitioners made a false representation to him in order to take away the girl with her ornaments. It is contended on behalf of the petitioners that the complaint discloses no offence and that the charge framed against them under S. 417, I. P. C., should, therefore, be quashed.

Now, assuming that the statement of facts made in the complaint is true (though the petitioners plead that it is entirely false), it does not conclusively follow therefrom that the petitioners made a false representation to the complainant, even if, as a matter of fact, they did not take the girl to Kangra for paying a visit to the temple of the goddess there. There is nothing in the evidence produced by the complainant to show that the petitioners had no intention of visiting Kangra when they represented to the complainant that they wanted to go there. It may be that they changed their mind subsequently and did not go. Thus no case under S. 417, I. P. C., appears to have been made out. I, therefore, quash the charge and dismiss the complaint.

N.K. *Complaint dismissed.*

A. I. R. 1927 Lahore 825 (2)

ZAFAR ALI, J.

Balbhadar Singh and *another*—Plaintiffs—Appellants.

v.

Shankar Das — Defendant — Respondent.

Second Appeal No. 2331 of 1926, Decided on 14th March 1927, from decree of Dist. Judge, Gurdaspur, D/- 24-4-1926.

Hindu Law—Presumption — Joint family living in commensality and possessing property —Property is joint.

Where it is proved or admitted as to a Hindu family that it lives in commensality and possesses joint property, the presumption of law is that all the property they are possessed of is joint. [P 826 C 1]

Mehr Chand Mahajan—for Appellants.

Faqir Chand—for Respondent.

Judgment.—In the execution of a money decree obtained by one Shankar Das against Raja Sant Singh a bungalow was attached as belonging to the latter.

His brothers Balbhadar Singh and Gur Kirpal Singh objected that they and the judgment-debtor were joint owners of the bungalow in equal shares and that their two-thirds share therein should be released from attachment. The decree-holder asserted that the judgment-debtor was the sole owner of the bungalow. The executing Court disallowed the objection. Then the objectors instituted a regular suit and the trial Court found that the site of the bungalow was joint property of the three brothers, but that the superstructure belonged to Raja Sant Singh exclusively. The plaintiffs-objectors appealed unsuccessfully to the District Judge and have now come up to this Court in second appeal.

It was proved that the two appellants were minors of tender ages and lived with their elder brother, the judgment-debtor, when the bungalow was built 18 years ago. The facts, coupled with the fact that the site belonged to all three raises a strong presumption that all three were joint and that the money spent in building the bungalow came from the joint family funds. But Balbhadar Singh was a co-defendant in the original money suit, and when examined before the settlement of issues in that case he stated:

> I live separately from defendant 1 (Raja Sant Singh). I have no property joint with defendant 1.

The learned District Judge held that this admission was conclusive as against Balbhadar Singh and dismissed the appeal so far as he was concerned on that ground. His reason for disallowing the claim of the other appellant was:

> considering that he was a half brother it is highly improbable that he was joint with Raja Sant Singh when Raja Sant Singh's own brother was separate from him.

Thus it was presumed that this brother of Raja Sant Singh was separate from him when the bungalow was built.

Both these conclusions are unsupportable. S. 31, Evidence Act, clearly lays down that admission is not conclusive proof of the matters admitted. In the present case the admission was found to be incorrect inasmuch as the site of the bungalow is still joint property of all the brothers,

> where it is proved or admitted as to a Hindu family that it lives in commensality and possesses joint property, the presumption of law is that all the property they are possessed of is joint: See Mulla's Hindu Law, S. 191, Cl. (4).

To the same effect is para. 1194 of Gour's Hindu Code, 2nd edn. p. 549, which is relied upon by the respondents' counsel.

The brothers are high caste Hindus, and though they are landholders and jagirdars, the presumption is that they are governed by Hindu law. Counsel for the decree-holder contends that this presumption does not arise because they are agriculturists. There is, however, nothing to show that they are governed by custom from the facts that have been established, viz.: (1) that the brothers are high caste Hindus; (2) that they lived jointly when the bungalow was built, (3) that the appellants were then minors of tender age and that the site belongs to them all, the conclusion that in the absence of all evidence to the contrary irresistibly follows is that the bungalow is joint of all three.

I, therefore, accept the appeal and, modifying the decree of the Courts below, decree the plaintiffs' claim in full with costs throughout.

R.D. *Decree modified.*

A. I. R. 1927 Lahore 826

ADDISON, J.

Firm Kirpa Ram Lachhman Dass—Defendant—Appellant.

v.

Firm Sawan Mal Gopi Chand—Plaintiff—Respondent.

Second Appeal No. 757 of 1927, Decided on 26th September 1927, from order of Dist. Judge, Rawalpindi, D/- 26th January 1927.

Limitation Act, Art. 83—Commission agent suing his principal for loss incurred on resale of goods—Art. 83 applies.

Where a commission agent buys goods for principal and they are resold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by Art. 83. Limitation in such a case operates from the date of payment made on behalf of the principal and not from the date of the sale : 23 *P. R.* 1915 ; 59 *P. L. R.* 1918; *A. I. R.* 1921 *Lah.* 167 and *A. I. R.* 1923 *Lah.* 473, *Foll.* [P 827 C 2]

Shamair Chand—for Appellant.

Mehr Chand Mahajan — for Respondent.

Judgment—The plaintiff-firm, which carries on a commission agency business, sued the defendant firm for the recovery of Rs. 1,000. According to the plaint the defendant-firm dealt with the

plaintiff firm, receiving goods worth Rs. 7,616-6-0, there being an agreement to pay interest at 12 per cent per annum, this interest being also chargeable according to custom. It was stated further that the defendant firm paid Rs. 6,290-10-9, so that the balance due was Rs. 725-11-3. Interest was added to this sum so as to bring the amount up to Rs. 1,000. This suit was dismissed by the trial Court on the ground that Art. 83, Lim. Act, applied and the suit was accordingly barred by limitation. On appeal the learned District Judge held that the plaint showed that there was an open current account between the parties, leaving a certain amount unpaid by the defendant firm. In his opinion Art. 85 applied and the suit was within time. The appeal was, therefore, accepted by him and the suit was remanded to the trial Court for disposal on the merits. Against this decision this second appeal has been preferred.

At the time of issues a member of the plaintiff firm stated that the defendant firm bought through his firm 200 tins of oil and that what remained due was for the loss in that transaction together with other incidental expenses of that transaction. This shows that all the transactions of the commission agency between the parties were settled except the one in question. The oil referred to was bought by the plaintiff firm as agent of the defendant firm on 9th December 1920 and the price was paid by the plaintiff firm on the same date. The oil was sold on account of loss was debited that day. The present suit was brought on 5th May 1925. Further, the issues framed show that all that the parties went to trial upon was the question of the loss incurred in this oil transaction and the other charges connected therewith. It might also be mentioned that a member of the plaintiff firm as a witness admitted that all dealings were with the plaintiff firm in their capacity as commission agents working on behalf of the defendant firm. It was held in *Munghi Ram* v. *Ram Saran Das* (1), *Sarb Dial* v. *Devi Ditta Mal* (2), *Kadri Pershad* v. *Harbhagwan* (3) *Munshi Ram* v *Bhagwan Dass* A. I. R. 1926 *Lah.* 152 and *Devi Sahai* v. *Tirath Ram* A. I. R. 1923 *Lah.* 473 that where a commission agent buys goods for a principal and they are resold by the agent at a loss a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by Art. 83, Sch. 1, Lim. Act. Limitation in such a case operates from the date of payment made on behalf of the principal and not from the date of the sale. In the present case, therefore, limitation commenced on 9th December 1920. Under Art. 83 the period of limitation is three years from the date when the plaintiff was actually damnified. The suit having been brought in 1925 is thus apparently long barred by limitation as the plaintiff was damnified in connexion with the transaction in question in 1920, when the plaintiff firm paid for the oil on behalf of the defendant firm.

It was argued, however, on behalf of the respondent firm that, as according to the plaint, the relief claimed was not for indemnity of loss, but for the balance in a running account, it was not permissible to go behind the plaint and discover what was the real matter in suit between the parties. This proposition, as stated is much too wide and it cannot be admitted that a plaintiff by wording of clever plaint can avoid the proper limitation for his suit. It was more or less admitted that if there had been only a single transaction of buying and selling by the plaintiff firm on behalf of the defendant firm Art. 83 would have applied, but that as there were several transactions, all embodied in one account which for this reason showed sometimes a credit in favour of one party and sometimes a credit in favour of the other, the account must be taken to have been a mutual, open and current one with reciprocal demands between the parties. I cannot accept this argument that the mere accident that there were other transactions makes the account different in any way. The account remains that of a commission agent and his principal, each transaction giving either loss or profit in favour of one party or the other.

I was referred to *Namber Mal* v. *Kottya* (4). In that case the plaintiff advanced moneys to the defendant and

(1) [1915] 23 P. R. 1915=35 P. W. R. 1915=26 I. C. 415=100 P. L. R. 1915.
(2) [1918] 59 P. L. R. 1918=46 I. C. 541=130 P. W. R. 1918.
(3) A. I. R. 1921 Lah. 167.
(4) [1913] 14 M. L. T. 498=21 I. C. 773.

the latter consigned goods to the former for sale on commission. It was held that there were independent obligations on each side and that the account between the parties was a mutual open and current one within the meaning of Art. 85. In the present case the defendant firm was buying through the plaintiff firm as their agents and selling through them. The plaintiff firm was not advancing money to the defendant firm, nor was the latter consigning goods to the former for sale on commission. There were thus no independent obligations on each side and the ruling does not apply.

The other two rulings referred to, namely *Bihari Lal* v. *Har Narain* (5), *Ratan Chand* v. *Asa Singh* (6), are distinguishable for the the same reason; Nor can it be said that there was an understanding that the plaintiff firm was to keep an open, mutal and current account because, by the nature of the dealings the balance of account went from one side to the other. That is the natural result which follows from commission agency transactions of the kind in question in this suit. For the reasons given I am of opinion that the suit is barred by Art. 83, and, accepting the appeal, I set aside the order of the learned District Judge and restore that of the trial Judge dismissing the suit, with costs throughout.

S.J. *Appeal accepted.*

(5) A. I. R. 1926 Lah. 283.
(6) A. I. R. 1921 Lah. 369.

A. I. R. 1927 Lahore 828

SHADI LAL, C. J., AND BROADWAY, J.

Dittu Mal—Plaintiff—Appellant.

v.

Ilahi Bakhsh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 176 of 1925, Decided on 17th January 1927, from decree of Harrison, J., D/- 23rd April 1925, in Civil Appeal No. 2691 of 1924.

(a) *Mortgage—Mortgage or adhlapi tenure—Lekhamukhi mortgage—Land tenure.*

One-half of a certain area of land was sold and the vendee was to sink a well but not at his own expense, it being specifically agreed that the vendor would pay half of the total expenditure incurred on the sinking of the well and the preparation of the ground for cultivation. The vendee was to be in possession of half of the land not sold, and, out of the produce thereof, recover half the expenditure which was payable by the vendor and the vendee was to keep strict accounts of the expenses and income.

Held: that the transaction was a lekhamukhi mortgage and an adhlapi tenure was not created. [P 829 C 2]

(b) *Limitation Act, Art.* 148—*Art.* 148 *applies to lekha-mukhi mortgages.*

Article 148 applies to mortgages of the lekhamukhi variety and time begins to run from the date of the mortgage : 1 *Lah.* 21, *Foll.* [P 830 C 1]

M. L. Puri—for Appellant.

Sayed Mohsin Shah—for Respondents.

Broadway, J.—The facts of the suit giving rise to this appeal are briefly these: Dittu Mal and others instituted a suit on the 6th July 1923 asking for a declaration that they had become owners of certain land of which they were shown in the revenue records as in occupation as mortgagees. They claimed that the right to redeem the said mortgage had become extinguished owing to the lapse of 60 years. The main defence set up was that no mortgage had ever been entered into, but that the plaintiffs were adhlapidars. The trial Court held that a lekha-mukhi mortgage had been created in 1859 and that as 60 years had expired the mortgagors had lost their right to redeem and accordingly decreed the plaintiffs' suit.

An appeal by the defendants Ilahi Bakhsh, etc., to the District Judge having proved unsuccessful, they came up to this Court in second appeal. The learned Judge in Chambers came to the conclusion that the transaction was not a mortgage but that an adhlapidari had been created in 1859. He accordingly accepted the appeal and dismissed the plaintiffs' suit with costs throughout. Against this order of dismissal the plaintiffs Dittu Mal, etc., have come up to this Court under S. 10, Letters Patent. Admittedly the transaction between the parties was entered into in the year 1859 and was evidenced by a document Ex. P.-5, which is dated 20th Shawal 1275 i. e., June 1859. The question for determination is whether by this document a mortgage of the lekha mukhi variety was created or an adhlapi grant was made. A reference to Ex. P.-5 shows that Murad and others, the predecessors-in-title of the present respondents, found it necessary for the proper irrigation of a certain area of land to sink a well. As they had not the necessary funds for that purpose they sold half of the land to Bala Mal, the predecessor-in-title of the present

appellants, for a sum of Rs. 70. It was duly paid and was duly acknowledged as having been received in this document. Bala Mal was further to sink a well which would irrigate the area in question and retain possession of the other half of the total area. He was to keep a strict account of all expenses incurred in sinking the well and in providing the necessary gear and persian wheel, etc. And also for the clearance of shrubs etc., which existed on the land. Murad, etc., undertook to pay half of the total expenditure incurred, which Bala Mal was to recover from the share of Murad, etc., of the produce of the well after deducting the tenant's share, miscellaneous expenses and the land revenue demand, The deed goes on to say :

When by the savings of income of our share, after deducting the above said items our whole debt will be wiped off, our five shares out of ten shares of the said well will be redeemed and every one of us will possess each share out of the said shares and shall take produce in future.

Murad, etc., were to remain in possession as tenants paying batai and certain agreements were entered into with regard to liability to pay interest. From 1859 up to the present moment Bala Mal and his successors-in title have been shown in the revenue records as mortgagees, the mortgage being a lekha-mukhi one. Ghose in his Law of Mortgage in India, 5th edn., Vol. I. p. 109, says as follows :

The lekha-mukhi is a kind of running mortgage, in which the proprietor's share of the produce is made over to the creditor, who pays the revenue and keeps a running account of the receipts and disbursements. Lekha-mukhi mortgages may be created in two ways: one where the propiretor has obtained a loan from the lekha-mukhidar, and makes over a well, or a share in a well to his management ; the other where an estate is made over to the lekha-mukhidar as an agent rather than as a creditor. The accounts are kept in the same manner in either case. The lekhi-mukhidar collects the crops and credits the proprietor with their value debiting the Government revenue, the cost of repairs, working expenses ; in fact, all charges usually defrayed by the proprietor. His fee consists of the Muhassali 2 topas per karwar, and he also charges interest, if the proprietor gets into his debt.

In Tupper's Customary Law, Vol. II, p. 279, it is stated that

adhlapi is the custom by which a man sinks a well in another's land, acquiring thereby share in the land and giving the other a share in the well.

The shares are what may be fixed by agreement, but they are generally half and half. The sinker bears all the original costs of sinking the well, erecting the wood-work, farm buildings, and preparing the ground for cultivation, but subsequent charges under these heads are borne by the parties according to their shares.

It will be seen that in the present case the transaction entered into between the predecessors-in-interest of the parties to this appeal does not comply with Tupper's custom of an adhlapi tenure. Here out of the total area which the well was to command, one-half was sold to Bala Mal for a definite amount of Rs. 70. He was to sink a well but not at his own expense, it being specifically agreed that Murad, etc., would pay half of the total expenditure incurred on the sinking of the well and the preparation of the ground for cultivation. Bala Mal was to be in possession of the half of the land not sold, and, out of the produce thereof, recover half the expenditure which was payable by Murad, etc,. In my judgment the transaction under consideration amounted to a mortgage of the land not sold to Bala Mal which land was charged with the payment of half of the expenses incurred by Bala Mal in sinking the well and preparing the land for cultivation. It seems to me that all the incidents requisite for a lekha-mukhi mortgage are present. Bala Mal was to collect the crops and credit the proprietors with their value debiting the Government revenue, costs of repairs, working expenses, etc. Under certain circumstances he was also entitled to charge interest. I think that Bala Mal was from the outset a mortgagee or lekha-mukhidar. That this was the situation from the start and continued so up to the present is evidenced by the fact that the revenue records consistently show Bala Mal and his successors as being mortgagees and Murad, etc., and their successors as mortgagors.

It was next contended by Mr. Mohsin Shah that the mortgage should be treated as a subsisting one and capable of redemption. Firstly, he contended that time should only be calculated from the date on which the well was sunk, and secondly that the existence of the mortgage had been acknowledged, time being extended by such acknowledgments. He was, however, unable to point out any such acknowledgment by the appellants or their predecessors-in-interest on the

record, and *Khandu Lal* v. *Fazal* (1) is an authority for the proposition that Art. 148, Limitation Act, applies to mortgages of the lekha-mukhi variety and that time begins to run from the date of the mortgage. In the present case the mortgage was effected in 1859, i. e., more than 60 years before suit. I would therefore, accept this appeal and decree the plaintiffs' suit with costs throughout.

Shadi Lal, C. J.—I concur.

R.D. *Appeal accepted.*

(1) [1920] 1 Lah. 21=51 I. C. 956.

A. I. R. 1927 Lahore 830

ABDUL RAOOF, J.

Mangiram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 340 of 1925, Decided on 22nd May 1925, reported by Sess. Judge, Karnal, on 7th February 1925

(a) *Criminal P. C., S. 522—Order restoring possession cannot be made where trespass is made in absence of complainant.*

An order to restore possession of immovable property under S. 522 can be made only where dispossession was by the use of criminal force as defined in S. 350, I. P. C. It cannot be made in a case where the trespass was committed in the absence of the complainant : 16 *P. R. Cr.* 1919, *Foll.* [P 830 C 2]

(b) *Penal Code, S. 350—Scope.*

Breaking open of a lock is not use of criminal force. [P 830 C 2]

Sagar Chand—for Petitioner.

Des Raj Sawhney, Public Prosecutor—for the Crown.

Shamair Chand—for Complainants.

Facts.—Raj Ram and Rati Ram prosecuted Manga, applicant, in the Naib-Tahsildar's Court at Panipat and the Magistrate convicted the latter under S. 138, I. P. C. The case of the prosecution was that one Mara, Brahmin, had died and complainants had taken possession of his house, and in their absence, about 19th July 1924, the applicant broke open the lock of the house and took possession of it. The Magistrate was satisfied with the evidence which was produced in the case that these allegations were right, so he convicted the applicant under S. 448, and also put the complainants in possession of the house by passing an order under S. 522, Criminal P. C. The accused appealed to the District Magistrate who reduced the sentence to one of fine only, but maintained the order under S. 522, Criminal P. C. The accused has now applied for revision to this Court.

Grounds.—So far as the conviction is concerned, I see no reason to differ from the concurrent finding of the two lower Courts. The evidence which was produced in the case can be best judged by the Magistrate who recorded it and he was satisfied from it that complainants were in possession at first and were subsequently dispossessed by the accused ; but the order of the Magistrate putting the complainants in possession of the house was not right, as the trespass was admittedly committed in the absence of the complainants and the complainants were not dispossessed by the use of any criminal force. The learned District Magistrate was of opinion that as the accused broke open the lock and subsequently prevented complainants from entering it under veiled threat of violence, it was a sufficient show of force to meet the requirements of S. 522, Criminal P. C. This opinion does not seem to be right. Breaking open of a lock was no use of criminal force, and, as to the threat of violence, there is no such allegation in the complainant's statement which was recorded on 26th August in presence of the accused. In *Hari Chand* v. *Emperor* (1) it was held that an order to restore possession of immovable property under S. 522, Criminal P. C., can be made only where dispossession was by the use of criminal force as defined in S. 350, I. P. C., and could not, therefore, be made in a case where the trespass was committed in the absence of the complainant. This ruling is exactly applicable to the present case. The case is, therefore, submitted to the High Court for revision of the order of the Magistrate directing the complainants to be put in possession of the house.

Order.—For the reasons recorded by the Sessions Judge in his referring order I set aside the order passed by the Magistrate under S. 522, Criminal P. C. Let the papers be returned.

R.D. *Order set aside.*

(1) [1919] 16 P. R. Cr. 1919=51 I. C. 472=20 Cr. L. J. 488.

A. I. R. 1927 Lahore 831

COLDSTREAM, J.

Lal and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 592 of 1926, Decided on 26th October 1926, from order of Sess. Judge, Montgomery, D/- 21st April 1926.

Penal Code, Ss. 34 and 326—Party of men acting with one purpose inflicting on the complainants severe injuries—No proof as to who caused injuries—All are guilty in the absence of proof as to their action being legitimate.

Where a party of man acting together with one purpose beat the complainants and inflicted on them many severe injuries, which appeared to be the result of blows with a cutting weapon, and it was not proved who used the cutting weapon,

Held: that the accused must be held constructively guilty of causing grievous hurt unless they can prove that their action was in the circumstances legitimate.

[P 831 C 2, P 832 C 1]

R. L. Saunders—for Appellants.

Govind Ram Khanna—for *the Govt. Advocate*—for the Crown.

Judgment.—The accused in the case from which this appeal arises were the collaterals of one Bhhawala who, being sonless had made a will in favour of one Rahmat. The collaterals prevailed on Bahawala to resolve to cancel this will and themselves took possession of and cultivated the land. This provoked the ill-will of Rahmat .and his relations. There was a fight between the two factions on 25th November 1925, in the course of which on Rahmat's side his cousin Ghula (or Ghilla) received a mortal injury, his skull being cut by a blow from a sharp weapon. Ghulla's body showed no other injuries but his brother Mokha received three cuts one of which cut the bone in his forearm and Shahamda received two cuts on his hand and arm, five blows with a blunt weapon on the head and another on the thigh, one of those on the head being a grievous hurt. Fattu, father of Ghulla received a comparatively trivial blow on his arm. On the other side Sadullah was hit on the head, back and arm and Lal showed four contused wounds on his hands and arm, one of which broke a finger.

The police sent up the whole body of Bahawala's collaterals for trial and led evidence to prove that following on an altercation between Rahmat's brother Shahamda on one side and Kanda and Pira on the other the accused in accordance with a pre-concerted plan came upon the spot armed with dangs and chhavis. Ghulla and Mokha and then Fattu intervened to protect Shahamda but these along with Shahamda were set upon and beaten by the accused who took away two camels that Shahamda had been leading.

The accused pleaded alibi, all except Sadullah and Lal whose story was that Sadli's brother had earlier in the day caught two camels belonging to Rahmat damaging Bahawala's field and taken them away to the pound. Later, when Sadli was carrying seeds to the field he was molested by Shahamda, Mokha, Fattu and Allah Ditta of the Rahmat's party. Lal came to Sadli's rescue but was injured, then other villagers came and rescued Lal and Sadli.

No evidence in support of the accused's version was produced. The Magistrate disbelieved the complainants' description of the origin and details of the fight as "palpably false." He thought that the fight was sudden and not intended by the accused who were not the aggressors though they had gathered in force, apprehending resistance to their cultivation of Bahawala's land from the complainants' party and were prepared to meet and oppose this resistance. He found no satisfactory proof as to who inflicted the various injuries on the wounded complainants but being satisfied that Lal and Sadli took part in the fight convicted these two only and sentenced them to four years rigorous imprisonment under S. 326 I. P. C. Against these sentences Lal and Sadli have filed this present appeal and Mr. Saunders who appears for them urges that the learned Sessions Judge was wrong to convict his clients after disbelieving the prosecution evidence and finding that the fight arose out of a fracas in which the complainants and not the accused had been the aggressors.

I have myself studied the evidence in the light of this criticizm. I agree with the Magistrate's view that the complainants' story is not to be believed in all its details and that it is not proved which of the accused inflicted the various injuries on the complainants. It is, however, certainly proved that a party including the appellant acting together with one purpose beat the complainants and

inflicted on them many severe injuries, the result of several blows with a cutting weapon. It is not proved who used the cutting weapon. There can be no doubt that the appellants must be held constructively guilty of causing grievous hurt unless they can prove that their action was in the circumstances legitimate. Such proof is entirely lacking here and I am not, therefore, able to interfere with the conviction But having regard to the circumstances of this particular case (which need not be detailed in this judgment) I think that the degree of constructive guilt of the appellants will be sufficiently punished by a much lighter sentence than has been inflicted. I accordingly accept the appeal of Lal and Sadullah to this extent only that their convictions being upheld their sentences are reduced to one year's rigorous imprisonment in each case including two months' solitary confinement.

R.D. *Appeal partly accepted.*

A. I. R. 1927 Lahore 832

TEK CHAND, J.

Firm Kirpa Ram-Kanshi Ram—Plaintiffs—Petitioners.

v.

Firm Devi Dial Mal-Dhan Raj—Defendants—Respondents.

Civil Revn. No. 757 of 1926, Decided on 4th February 1927, from decree of Small Cause Court Judge, Amritsar, D/- 3rd June 1926.

Limitation Act, S. 19—Letter asking copy of account showing amount due is acknowledgment.

Where, in a letter the writer definitely asked the plaintiff to send a copy of the account showing what amount was due by him to the plaintiff,

Held: that it was an acknowledgment within the meaning of S. 19: 33 *Cal.* 1047 and 1 *Lah.* 357, *Foll.* [P 832 C 2]

Shamair Chand—for Petitioners.

Balkishan for *B. Narain*—for Respondents.

Judgment. — On the 3rd February 1926 the plaintiff firm instituted a suit for recovery of Rs. 470 against the defendant in the Court of Small Causes at Amritsar. The amount was alleged to be due on the foot of certain dealings between the parties. In the plaint it was definitely pleaded that the suit was within limitation, inter alia by reason of an acknowledgment contained in a letter written by the defendant admitting liability, which letter was filed along with the plaint. Summonses were sent to the defendant to appear on the 8th April with his witnesses, when the case would be finally disposed of. On the 8th April the plaintiff appeared but the defendant was absent. The Judge was also on leave and the Reader made a note on the record adjourning the case to the 3rd June 1926. On that date the plaintiff appeared, but the defendant was absent and the learned Judge, after recording the statement of the plaintiff, dismissed the suit holding that it was barred by limitation, having been brought more than three years after the date of the debit entries in the account. With regard to the letter containing the alleged acknowledgment which was filed with the plaint. it was remarked that this letter was undated and contained no acknowledgment of liability. The learned Judge accordingly dismissed the suit.

The plaintiff has come up on revision to this Court and after hearing counsel for both parties I am of opinion that there has not been a proper trial of the case in the Court below. On the 8th April 1926, which was the date fixed for final disposal the Judge was on leave and when the Reader postponed the case to the 3rd June, he did not specifically ask the plaintiff to bring his evidence on that hearing, nor is there any note on the record to indicate that that date was fixed for final disposal of the case. Moreever, it seems to me that the learned Judge is not right in holding that the letter does not contain an acknowledgment of liability within the meaning of S. 19, Lim. Act. In the letter the writer definitely asks the plaintiff to send a copy of the account showing what amount was due by him to the plaintiff. This would clearly be an acknowledgment within the meaning of S. 19 as explained in the leading case on the subject reported in *Mani Ram* v. *Seth Rupchand* (1) and as explained in *Ganga Sahai* v. *Khazan Chand* (2) and other rulings.

Under the circumstances it seems to me necessary to allow the plaintiff to

(1) [1905] 33 Cal. 1047=33 I. A. 163=2 N. L. R. 130=10 C. W. N. 874=4 C. L. J. 94 (P. C.).

(2) [1920] 1 Lah. 357 = 56 I. C. 787=2 L. L. J. 107.

give formal proof of the execution of this letter and to allow the defendant an opportunity of rebutting any evidence that the plaintiff may produce in support of his claim. I accordingly set aside the decree of the lower Court, accept the revision and send the case back to the Judge, Small Cause Court, for disposal according to law.

As the plaintiff is not wholly free from blame he will pay the costs of the respondent in the lower Court. There will be no order as to costs in this Court.

R.D. *Decree set aside.*

A. I. R. 1927 Lahore 833 (1)

CAMPBELL, J.

Shera—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1528 of 1926, Decided on 21st January 1927, reported by Dist. Magistrate, Hoshiarpur.

Criminal P. C., S. 522—Where dispossession is not due to criminal force, order of restoration under S. 522 is illegal.

Where the act of trespass on immovable property was not attended by crlminal force, or by criminal intimidation,

Held: that possession of the property trespassed upon cannot be restored under S. 522: 16 *P. R. Cr.* 1919, *Foll.* [P 838 C 1]

Report.—One Bulaqi instituted a complaint on 13th July 1925, against one Shera in the Court of the Naib Tahsildar of Dasuya, exercising powers of a Magistrate, Third Class, under S. 447, I. P. C. The allegation was the complainant who is blind, obtained possession of a certain area of land under the decree of a civil Court, and that subsequently the accused cultivated this land without his permission It was not alleged that the act of trespass was attended by criminal force, or show of force or by criminal intimidation In convicting the accused and fining him Rs. 5 only, the Magistrate ordered that possession should be restored to the complainant under S. 522, Criminal P. C.

Grounds.—In view of the facts as explained above, it is quite evident that the Magistrate's order passed under S. 522, Criminal P. C., was without jurisdiction *Hari Chand* v. *Emperor* (1) is in point. It is accordingly recommended that the order in question may be set aside. The Magistrate admits that he made a mistake and a copy of his report in Urdu is appended.

Order.—There is no appearance. For the reasons stated by the learned District Magistrate the order under S. 522, Criminal P. C., is set aside.

J.V. *Order set aside.*

(1) [1919] 16 P. R. Cr. 1919=51 I. C. 472=20 Cr. L J. 488.

A. I. R. 1927 Lahore 833 (2)

TEK CHAND, J.

Kunj Behari Lal—Defendant—Appellant.

v.

Mt. Mubarik Begam and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 1428 of 1927, Decided on 23rd November 1927, from order of 1st Class Sub-Judge, Ludhiana, D/- 18th February 1927.

Civil P. C., S. 151—Inherent power of Court to grant injunction should be used only when irreparable injury or inconvenience would result if it were not used.

It is well settled that when the jurisdiction of the Court is invoked nnder S. 151, it is necessary for the plaintiff to establish a strong prima facie case, and show that if the injunction asked for is not granted, irreparable injury or inconvenience would result: 55 *I. C.* 403, *Rel. on.* [P 834 C 1]

Fakir Chand—for Appellant.

Muhammad Tufail—for Respondents.

Judgment.—In order to clearly understand the points involved in this appeal it is necessary to state a few preliminary facts. The relationship of the parties will appear from the following pedigree table: (see pedigree on next page).

On 10th October 1922, Muhammad Munir mortgaged a house with defendant 1. He having failed to make payment in accordance with the terms of the mortgage the mortgagee instituted a suit against him for recovery of the amount due to him, and a preliminary decree was passed in his favour on 12th November 1924 for Rs. 12,427-15-0 which was made final on 6th June 1925. In execution of this decree the mortgaged property was sold by public auction on 18th March 1926 to the decree-holder for Rs. 5,000. Only to this sale the judgment-debtor raised a number of objections which were after lengthy enquiry dismissed by the executing Court, and

the sale confirmed on 28th May 1926. Muhammad Munir, judgment-debtor, appealed to this Court against the order of confirmation but the appeal was rejected by Coldstraam, J., on 5th October 1926.

After the dismissal of this appeal the decree-holder applied for being put in possession of the property, which he had purchased at the auction sale, but before any proceedings could be taken on this application, the judgment-debtor's wife, Mt. Mubarik Begam, and his sister's daughter, Mt. Aisha Begam, a minor 14 years old, instituted the present suit for a declaration that the property sold to the decree-holder was owned by them under a will purporting to have been executed by Mt. Hamida Begam, mother of Muhammad Munir, judgment-debtor, on 10th June 1906. On the same day an application was presented in the Court praying that proceedings in execution of the decree passed in favour of the decree-holder against Muhammad Munir may be stayed. It was not stated under

Dr. AHMAD SHAH-HAMIDA BEGAM

Mahomed Munir-Mubarak Begam (Plaintiff 1).	Mahomed Amin	Mahomed Aslam	Ahmadi Begam	Zubena Begam 1. Aisha Begam (Plaintiff 2).	Zahur Begam.

what provision of law the application was made. On this application the Senior Sub-Judge has issued a temporary injunction staying delivery of possession to defendant 1, pending the disposal of the suit instituted by Mt. Mubarik Begam and Aisha Begam. Against this order granting the temporary injunction the decree-holder has preferred a miscellaneous appeal under O. 43, R. 1. Mr. Muhammad Tufail, for the respondents urges, that no appeal lies as the lower Court, in granting the injunction, has acted under S. 151, Civil P. C., Mr. Faqir Chand for the appellant replies that the lower Court has really issued the injunc- under O. 39, R. 1, and an appeal is competent. He further prays that in case it be held that the order in question is not appealable, the memo of appeal may be treated as one for revision.

In order to decide whether the appeal is competent, it is necessary to determine under what section the lower Court purported to act. It is unfortunate that the judgment of the learned Senior Sub-Judge granting the temporary injunction is a rambling document, and it is not easy to find out under what section the learned Judge purported to act. The judgment is written in such a way that it cannot be said where the recital of the arguments of counsel ends and where his own decision begins. The difficulty is enhanced by the fact that in the application filed by the plaintiffs on 29th November 1926, it was not stated under what section the applicants were moving the Court, nor did the Court insist upon a compliance by the parties with the instructions repeatedly issued by this Court that every application presented by a party must clearly give the provision of the law under which the party seeks to apply. The observations of the learned Judge in the penultimate paragraph of the judgment are not mutually consistent but I gather from the very last sentence of that paragraph where the Court has expressed the opinion that the injunction in this case was legally "issuable under S. 151, Civil P. C.," that he intended to act under that section. Orders passed under S. 151, Civil P. C. are admittedly not appealable and I must accordingly sustain the preliminary objection urged by Mr. Muhammad Tufail and hold that no appeal lies.

But while I hold that no appeal lies I am of opinion that the circumstances of this case are such as justify interference by this Court on the revision side. The lower Court has, as already held, issued the injunction under S. 151, Civil P. C., but, in doing so, it has entirely overlooked the principles which should be kept in view by a Court in taking action under that section. It is well settled that, when the jurisdiction of the Court is invoked under that section, and it is called upon to act *ex-debito justitiae*, it is necessary for the plaintiff to establish a strong prima facie case and show that if the injunction asked for is not granted, irreparable injury or inconvenience would result. The ruling of the Letters Patent Bench [*Manohar Lal Mahabir Pershad* v. *Jai Narain Babu Lal* (1)], which has been referred to by the

(1) [1920] 55 I. C. 403.

lower Court itself, lays down clearly these propositions. The lower Court has not applied its mind to this aspect of the case. The respondent's counsel has candidly expressed his inability to make out such a case from the materials on the record. On the other hand, he concedes that, when the mortgage suit against the husband of plaintiff 1 was pending and protracted proceedings in execution of the decree passed thereon were going on, the plaintiffs did not intervene and assert that they possessed any right in the honse, but that, as soon as the judgment-debtor had exhausted all his tactics in delaying the execution of the decree, and the sale had been confirmed, plaintiff 1, who is the judgment-debtor's wife, and plaintiff 2, who is a minor relation of his, at once instituted the suit and applied for grant of a temporary injunction to stay delivery of possession to the decree-holder. The plaintiff's suit was based mainly on a will purported to have been executed on 20th June 1906 by Mt. Hamida Begam, mother of the judgment-debtor, and in para. 5 of the plaint it was stated that in a decree obtained against Ahmad Shah (father of the judgment-debtor) this will had been set up, but had not been accepted by the Court. On these recitals in the plaint it was absolutely necessary for the plaintiffs to make out a strong case before the jurisdiction of the Courts under S. 151, Civil P. C. could be involved but as already stated it is admitted that such a case cannot be made out on the record as it stands at present.

I, therefore, accept the petition for revision, set aside the order of the lower Court, and discharge the injunction issued staying delivery of possession of the property in question to the decree-holder. Having regard to all the circumstances of the case the parties shall bear their own costs in both Courts. I wish to make it clear that nothing contained in this judgment is to be taken as in any way affecting the rights of the parties on the merits of the suit, which are yet to be enquired into and adjudicated upon by the lower Court.

S.J. *Petition accepted.*

A. I. R. 1927 Lahore 835

SHADI LAL, C. J., AND ZAFAR ALI, J.

Mai Dhan and *others*—Plaintiffs—Appellants.

v.

Mansa Ram — Defendant — Respondent.

Second Appeal No. 97 of 1923, Decided on 19th May 1927, from decree of Dist. Judge, Karnal, D/- 27th October 1922.

Hindu Law—Reversioners—Dismissal of a suit by—Other reversioners are bound unless male fides are proved.

A decree dismissing a suit by the next reversioner is, unless mala fides can be established, binding upon all other reversioners: *A. I. R.* 1925 *Lah.* 89, *Foll.* [P 835 C 2]

Shamair Chand—for Appellants.

Badri Das and *M. L. Puri*—for Respondent.

Zafar Ali, J.—The plaintiffs are Mai Dhan, brother of Singh Ram, and the two sons of the latter. Singh Ram claimed to be a reversionary heir of one Jot Ram and sued unsuccessfully in 1898 to avoid on the usual grounds a sale by Jot Ram of his landed estate. Jot Ram left no son and his widow died in 1918. The present suit was lodged on 12th August 1921 seeking virtually the same relief as was refused to Singh Ram. The third Court dismissed the suit, holding that it was time barred. On appeal the learned District Judge came to the conclusion that the suit was time barred so far as Mai Dhan was concerned, but that the sons of Singh Ram wers not barred. He, however, dismissed the appeal, holding that the sons of Singh Ram had no locus standi to sue. Counsel for the appellants admitted, after some argument, that Mai Dhan was barred, but he contended that the sons of Singh Ram were not bound by the former decree against their father, because they had an independent right of their own to contest the sale, which they derived, not from their father, but from the common ancestor of their father and Jot Ram. But it is a well-establshed principle that:

> a decree dismissing a suit by the next reversioner is, unless mala fides can be established, binding upon all other reversioners: see *Khair Muhammad* v. *Umar Din* (1).

Counsel for the appellants asks us to remand the case to enable the plaintiffs to prove mala fides, but the plaintiffs never pleaded that the decree dismissing

(1) A. I. R. 1925 Lah. 89=5 Lah. 421.

Singh Ram's suit was void by reason of fraud or otherwise, nor did they adduce any evidence on this point. Though the trial Court decided only the question of limitation, the record shows that the parties had produced evidence on all the issues that were framed. This second appeal must therefore fail and we dismiss it with costs.

G.B. *Appeal dismissed.*

A. I. R. 1927 Lahore 836

ADDISON, J.

Multani Ram and *others*—Accused—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 1175 of 1926, Decided on 26th Jan. 1927, from order of Addl. Dist. Mag., Multan, D/- 30-10-1926.

Penal Code, Ss. 376 *and* 377—*No evidence except statement of girl ravished—Enmity between parties proved—Delay in making report—Guilt was not established.*

Where in a case of rape and sodomy there was no evidence to implicate the accused except the statement of the girl ravished, and there was enmity between the parties and there was much delay in making the report to police even though the police post was very near,

Held : that guilt of the accused had not been established. [P 837 C 1]

Nand Lal—for Appellants.

Din Diyal Kapur for *Govt. Advocate*—for the Crown.

Judgment.—Multani, appellant, has been sentenced for the rape of Mt. Kanshia to five years rigorous imprisonment. Bhulai, appellant, has been sentenced for rape and sodomy committed upon the same girl under Ss. 376 and 377, I. P. C., to five years and three years rigorous imprisonment respectively, the sentences to run one after the other; while Mt. Lachhia has been sentenced under S. 366 to two years' rigorous imprisonment for kidnapping Mt. Kanshia with the knowledge that she would be forced to illicit intercourse.

The parties concerned are all Purbia syces residing in Multan. Debi, the father of Mt. Kanshia, is now out of employment. He used to live with Mt. Lachhia, appellant, but he left her house a short time ago on account of a quarrel and went to live near a police post. There is no doubt that there is enmity between Mt. Lachhia and Debi, father of the girl. Further, about a month before the alleged offence Debi, father of the girl, instituted a criminal complaint for theft and assault against Bhulai, appellant. This complaint was dismissed. There is thus enmity between the father of the girl and Bhulai, appellant as well.

One Lachhman was also tried for raping the girl, but acquitted as numerous defence witnesses appeared on his behalf and established that his wife died in hospital that day about 10 o'clock in the forenoon and that he was during the forenoon at the hospital and was busy the rest of the day making arrangements for her funeral. The same witness gave evidence that the appellant, Mt. Lachhia, was also engaged at the funeral the whole day. The only difference between the case of Mt. Lachhia, appellant, and Lachhman, who has been acquitted, was that the compounder of the hospital was able definitely to swear that Lachhman was present at the hospital that day, but as regards Mt. Lachhia all that he could say was that she used to come to visit the woman, but he could not say whether on the day in question she was with the other women who were there. The evidence, however, was that of independent witnesses and in my opinion was sufficient to prove the innocence of Mt. Lachhia, against whom the father of the girl bore ill-will.

The case for the prosecution was that Mt. Lachhia came about 10 or 11 on the forenoon of the 18th August and took Mt. Kanshia to her house. She left the girl in a room where were the two other appellants, Lachhman who was acquitted, and a fourth person who immediately left and was not tried. The girl's story was that she was raped by the two male appellants and Lachhman one after the other, while Bhulai also committed sodomy upon her. She was then taken home in a tonga by Mt. Lachhia. Her father was away fishing and did not return till the evening of the 19th. Nobody was present when she arrived back, but she told certain women what had happened. As her clothes were stained with blood she got her younger brother, aged 6 years or so, to wash them. Her father took her to the police station at about 2 a. m. on the 20th.

There is no evidence apart from the girl's own statement to show that she was taken there and taken back. The

women, whom she said she told, have denied this. Her clothes were not even blood stained and it is difficult to believe the explanation she has given that her younger brother washed them for her. The delay in making the first information report is also not satisfactorily explained. It is difficult to believe that her father was away all that time and that the neighbours refused to help her. The girl was living quite near a police post. One Mohan Singh, a constable, has stated that he came back on transfer to his house, which is quite near that of the girl on the evening of the 19th and that he was present when the girl told her father. There is no doubt, however, that there was enmity between this constable, Mohan Singh, and Lachhman who has been acquitted. The latter gave evidence against Mohan Singh in a complaint brought against him. The trial Magistrate has believed the young brother of the girl who stated that he saw Mt. Lachhia bringing her back, but the girl herself said that no one was present. This boy was not examined by the police and his testimony in my opinion is without value. Further, the medical witness has admitted that her hymen had been ruptured before. He did, however, find signs in her vagina and anus, which in his opinion made it quite possible that rape and sodomy had been committed. He also found certain germs (cocei, etc) in the girl's vagina and some of these germs corresponded with germs found in Bhulai's urethra. But this does not establish that Bhulai raped her as other persons might well have the same germs.

There is thus no evidence in the present case to implicate the appellants except the statement of the girl. Enmity has been established. The report was made after great delay. There is good evidence to establish the fact that Mt. Lachhia could not have taken the girl to and from the house on the day in question It is difficult to believe that no one saw her going or coming or heard her crying and that no one took any action for such a long time, especially as she was living near a police post in a town. In my judgment the guilt of the appellants has not been established and I accept their appeal and acquit them.

Appeal accepted.

R.D.

A. I. R. 1927 Lahore 837

TEK CHAND AND AGHA HAIDAR, JJ.

Najabat Khan — Defendant — Appellant.

v.

Maula Baksh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1625 of 1923, Decided on 28th June 1927, from decree of Dist. Judge, Jullundur, D/- 11th April 1923.

Soldiers (Litigation) Act (1918), *Ss.* 11 *and* 12—*Only that period for which a soldier served under war conditions is to be excluded in computing the period of limitation.*

A soldier is entitled to exclude only that period for which he was serving under war conditions in computing the period of limitation prescribed for a suit : *A. I. R.* 1923 *Lah.* 655, *Ref.* [P 838 C 2]

M. Tufail for *Noor-ud-Din*—for Appellant.

Fakir Chand and *Badri Das* — for Respondents

Tek Chand, J.—On 17th May 1918, Allah Ditta, father of the plaintiff, Maula Bakhsh, and Miran Bakhsh, his uncle, sold the land in dispute for a nominal consideration of Rs. 8,000 to Najabat Khan, defendant-appellant. On 12th May 1921, the plaintiff instituted the present suit claiming :

(a) A declaration that the sale of 17th May 1918, so far as the share of his uncle Miran Bakhsh was concerned, would not affect the plaintiff's reversionary rights after the alienor's death ; and

(b) possession of the other half of the land representing the share of his father Allah Ditta who had died in the meantime ; or

(c) in the alternative a decree for pre-emption, in case reliefs (a) and (b) are not granted.

The sale was held to be for consideration and necessity by the trial Court and the suit for reliefs (a) and (b) was accordingly dismissed. No appeal was preferred by the plaintiff to the District Judge so far as these reliefs were concerned, but he filed cross-objections in that Court. These cross-objections, however, were dismissed and no second appeal or cross-objections have been preferred to this Court on behalf of the plaintiff. This part of the claim, therefore, has been finally decided against the plaintiff and is not, therefore, before me. As to the alternative relief for pre-emption the first objection raised by the defendant-vendee was that the suit was time barred. The plaintiff, however, in his plaint alleged that he was a soldier

serving under war conditions and on that ground was entitled to the benefit of the Indian Soldiers (Litigation) Act, 1918. Both the Courts below have held that the plaintiff was an Indian soldier as defined in Act 9, 1918 and that under S. 11 of that Act the suit was within time.

In second appeal the first point urged on behalf of the defendant-appellant is that the plaintiff was not a soldier at the time of the institution of the suit and that following the ruling of this Court reported as *Piara Singh* v. *Mula Mal* (1) he is not entitled to the benefit of the provisions of the Soldiers Litigation Act. We find, however, that it was definitely stated in the plaint that the plaintiff was a soldier at the time when the suit was instituted and in the written statement the defendant not only did not deny this allegation, but, on the other hand, definitely admitted that the plaintiff was a soldier serving in the Indian Army. The plea, therefore, now put forward on behalf of the appellant has no force and must be overruled.

The next question to be decided is what period is to be excluded under S. 11 of the Act. As pointed out already the sale in question was effected on 17th May 1918, and the suit was instituted on 11th May 1921, i. e., six days less than three years after the sale. The statutory period for instituting suits for pre-emption is one year. The plaintiff's suit can, therefore, be considered to be within time if he is found entitled to exclude, under S. 11 of the Act, one year eleven months and 25 days. S. 11 lays down that

> in computing the period of limitation prescribed by ordinary law for any suit in which the plaintiff is an Indian soldier the time during which such soldier has been serving under war conditions since the 4th August 1914 shall be excluded.

The expression "war conditions" is defined in S. 3 as follows :

> An Indian soldier shall be deemed to be serving under war conditions :
>
> (a) during the continuance of the present war and for six months thereafter ;
>
> (i) when he is serving outside India ;
>
> (ii) when he is under orders to proceed on field service ;
>
> (iii) when the unit to which he belongs is mobilized ; or
>
> (iv) when in the opinion of the prescribed authority, such soldier by reason of the state of war now existing is precluded from obtaining leave of absence to enable him to attend a Court as a party to any proceeding therein ; and
>
> (b) after the expiration of that period when he is serving in any place, and such service has been declared by notification of the Governor-General in Council in the Gazette of India to be service under war conditions.

In S. 12 it is provided that.

> if any Court is in doubt whether any soldier is or was at any particular time serving under war conditions, it may refer the point for the decision of the prescribed authority, and the certificate of such authority shall be conclusive evidence on the point.

On the 18th October 1921, the Senior Sub-Judge, in whose Court the case was pending, made a reference to the Collector, Jullundur District, asking him to make an enquiry and state the period for which the plaintiff was employed under war conditions since May 1918. The Collector referred the matter to the Officer Commanding, 1/3rd Skinner's Horse, to which unit the plaintiff had been attached and that officer, on the 31st October 1921 replied that since the sale in question the plaintiff was employed under war conditions as under :

1. N. W. F. P. From 5th May 1918 to 30th September 1918.

2. Mesopotamia— December 1920 to 15th February 1921. According to this reply the plaintiff was serving under war conditions for seven months and eleven days in all. Later on the Officer Commanding was examined on interrogatories but in his replies he did not state any facts from which it can be said that the plaintiff was serving under war conditions within the meaning of S. 3, Act 9, 1918, for any period longer than that stated in his memo. which is to be treated as a certificate under S 12.

The plaintiff is, therefore, entitled to exclude a period of seven months and eleven days only, which is insufficient to bring his claim within limitation. I, therefore, hold that the suit is time barred.

I would accordingly accept the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit for pre-emption.

Having regard to all the circumstances of the case I would leave the parties to bear their own costs throughout.

Agha Haidar, J.—I agree.

N.K. *Appeal accepted.*

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(1) A. I. R. 1923 Lah. 655=4 Lah. 323.

A. I. R. 1927 Lahore 839

SHADI LAL, C. J., AND BROADWAY, J.

Sewa Ram—Plaintiff—Appellant.

v.

Massu and *others*—Defendants—Respondents.

Letters Patent Appeal No. 298 of 1925, Decided on 4th February 1927, from judgment of Abdul Raoof, J., D/- 13th Oct. 1925, in Civil Appeal No. 12 of 1925.

Limitation Act, Art. 152—*Judgment not pronounced according to law, but written and intimated to plaintiff's counsel—Limitation runs not from date of judgment but from date of receipt of intimation by party's pleader.*

Where a Court, after a case had been heard, did not pronounce the judgment at once, nor on the date of which notice was given, but wrote it some time after and only sent an intimation of it to plaintiff's pleader,

Held: that the judgment was never pronounced in accordance with law and that the limitation for appeal can begin only from the date on which the plaintiff's pleader received intimation of the decision of the case against him: 27 *P. R.* 1919 and *A. I. R.* 1923 *Pat.* 129, *Foll.* [P 839 C 2]

Amar Nath Chona—for Appellant.

Shadi Lal, C. J.—This is an appeal under Cl. 10, Letters Patent, from a judgment of Abdul Raoof, J., who held that the appeal before him was barred by time, as it was filed one day after the expiry of the period of limitation prescribed by law. In order to determine the question it is necessary to mention the dates which have a bearing upon it. The case was heard by the District Judge on 4th August 1924, but he did not pronounce judgment at once and fixed the 16th August for the delivery of judgment. On that day he postponed the pronouncing of judgment to 28th August. It appears that no order was recorded on the latter date, and that the parties were not informed of any future day on which the judgment was to be pronounced. On 29th August he appears to have written the judgment and signed it but, as the parties were not present on that day, he directed a notice to be sent to the pleader for the appellant informing him that his application had been dismissed. This notice was served upon the pleader on 3rd September 1924.

It is beyond dispute that if the period of limitation is to be counted from 3rd September 1924, the aqpeal preferred by the appellant was not barred by limitation, and the question for consideration is whether the 29th August or the 3rd September is to be regarded as the terminus a quo for the period of limitation prescribed for the appeal.

Now, O. 20, R. 1, Civil P. C., prescribes that the Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders. It is clear that the judgment in this case was not pronounced by the District Judge at once, and though due notice of the 16th August was given to the parties, no judgment was pronounced either on that date or on 28th August. As stated above, the judgment was written on 29th August and was dated the same day, but no notice of that date was given to the parties or their pleaders. It is true that at the end of the judgment the word "announced" is mentioned, but the record of the case makes it absolutely clear that it was not announced to the parties or their pleaders. Indeed, the learned Judge adopted the peculiar procedure of directing a notice to be sent to the appellant informing him that his application had been dismissed. We, must, therefore, take it that the judgment was never pronounced in accordance with law, and that the limitation can begin only from the date on which the appellant's pleader received intimation of the decision of the case against him. The rule laid down by the Punjab Chief Court in *Lalli* v. *Sain Dutta* (1), and by the High Court of Patna in *Sagarmal Marwari* v. *Lachmisaran Misir* (2) applies to the present case. Following these authorities I hold that the appeal preferred by the appellant was not barred by limitation.

I would accordingly accept the appeal and, setting aside the judgment of the Single Bench remit the case for decision on the merits. The Court-fee on the memorandum of appeal shall be refunded and the other costs shall be borne by the parties incurring them.

Broadway, J.—I concur.

J.V. *Appeal accepted.*

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(1) [1919] 27 P. R. 1919=51 I. C. 239.
(2) A. I. R. 1923 Pat. 129=1 Pat. 771.

A. I. R. 1927 Lahore 840

ADDISON, J.

Abdul Qadir—Plaintiff—Appellant.

v.

Imam Din—Defendant—Respondent.

Second Appeal No. 2626 of 1926, Decided on 3rd February 1927, from decree of Dist. J., Jhelum, D/- 31st August 1926.

Civil P. C., O. 2, R. 2—Burden of proving bar under R. 2 is on defendant—Evidence Act, S. 102.

The burden of proving that a suit is barred under O. 2, R. 2, Civil P. C., is upon the defendant : 20 *Cal.* 716, *Foll.* [P 839 C 2]

Jagan Nath Aggarwal—for Appellant.

Muhammad Amin and *Muhammad Azam*—for Respondent.

Judgment.—On 22nd June 1925 the plaintiff sued the defendant for Rs. 667 being a one-third share of Rs. 2,001, alleged to have been realized by the defendant from the Kashmir State regarding a particular contract entered into for the year 1922 by the parties as partners. In this suit the plaintiff relied on a memo dated 28th July 1924, executed by the defendant to the effect that Rs. 3,100 were due from the Jammu and Kashmir State on account of a contract for preparing rafts of timber and that the defendant would pay one-third of that amount to the plaintiff when he had collected it. It was further stated in the plaint that the defendant had collected Rs. 2,001 in March 1925, and accordingly the present suit was instituted for one-third of that amount.

Various pleas were taken to the effect that the above agreement was without consideration and that the plaintiff did not perform conditions of the contract between the parties, while it was added that another suit had been brought for rendition of accounts in which the plaintiff had obtained a decree for Rs. 201 and that all claims against the defendant should have been included in the suit. On these pleadings the trial Court struck three issues, but only decided one as to whether the suit was res judicata. It held that the suit was res judicata by virtue of the previous decision under S. 11, Civil P. C. On appeal the learned District Judge held that the suit was not barred by the doctrine of res judicata, but that it was barred under O. 2, R 2, Civil P. C. Against his decision the plaintiff has presented this second appeal.

The previous suit for rendition of accounts was instituted on 7th April 1925. It was to the effect that the plaintiff and the defendant entered into a contract for collecting wood thrown out from the river towards which the plaintiff paid to the defendant Rs. 1,350 as capital. This partnership existed during the years 1921 and 1922 and ended in January 1923. It was admitted that the defendants had paid back the capital sum of Rs. 1,350, but it was stated that he had not given an account of the profits. Accordingly, on 28th July 1924, the defendant wrote a memo promising to render accounts of this partnership, and as he did not do so, the plaintiff brought that suit against him. This suit was referred to arbitration and the plaintiff succeeded to the extent of obtaining a decree for Rs. 201. The memo relied upon in the first suit is a different memo from that relied upon in this suit, though both the memos bear the same date, namely, 28th July 1924. The memo in the first suit shows that the plaintiff had only a 6/16ths share in that partnership, whereas he had a third share in the alleged partnership about which the second suit has been brought. The two memos, therefore, are entirely different, one being for collecting stray timber washed up on the banks of the river in which the share of the plaintiff was 6/16ths and in which the parties dealt with private timber traders. The other was for preparing rafts and the plaintiffs' share was only one-third the dealings as regards it being with the Jammu and Kashmir State Prima facie, therefore, the two memos disclosed two different sets of transactions.

It is not necessary, however, finally to decide this point because admittedly there is no evidence on the record of the suit, the second appeal of which is now before me, to show that it is barred under O. 2, R. 2, Civil P. C. I have obtained the above facts from the record of the first suit but it was only called in the trial Court to see whether the first judgment acted as res judicata. The above facts, therefore, cannot be said to have been properly placed upon this record so far. As there was no evidence of any kind on the record upon which the District Judge could base a decision that the present suit was barred by O. 2, R. 2, and as the burden of proving that the present suit is barred under that section lies on the

defendant [*Upendra Lal* v *Secretary of State* (1).] I accept this appeal and, setting aside the decision of the Courts below, remand the suit to the trial Court for a fresh decision after framing proper issues. It is obvious that no question arose as to whether the previous suit acted as res judicata which was the issue framed. That issue should have been whether the present suit is barred under O. 2, R. 2, Civil P. C., the burden of proving which is upon the defendant. Owing to a wrong issue being framed it cannot be said that the defendant had a proper chance to prove what he had stated in his pleas and it is for this reason that I allow this question to be tried again, as well as the merits of the case. The remand is under O. 41, R. 23, Civil P. C. Court-fee on appeal will be refunded. Other costs here will abide the event and so will the costs hitherto incurred in the lower Court.

R.D. *Case remanded.*

(1) [1893] 20 Cal. 716.

A. I. R. 1927 Lahore 841

ZAFAR ALI, J.

Nizam Din—Plaintiff—Appellant.

v.

Naranjan Das—Defendant—Respondent.

Second Appeal No. 2952 of 1926, Decided on 5th May 1927, from decree of Sr. Sub-Judge, Gurdaspur, D/- 29th October 1926.

Evidence Act, S. 110—Plaintiff in possession as owner—Onus is on defendant to prove contrary.

Where plaintiff is in possession of property of which he says he is the owner, the onus of proving that he is not the owner lies on the defendant. [P 841 C 2]

Niaz Muhammad—for Appellant.

Hem Raj Mahajan for *Mehr Chand Mahajan*—for Respondent.

Judgment.—The plaintiff was in possession of the house in dispute and sued for a declaration that he was its owner. The defendant was the purchaser of the house from a widow called Bhago and his defence was that she was competent to sell it as it had descended to her late husband Wasau or Basia who was the owner. In the proceedings in connexion with this house that took place before this suit under S. 145, Criminal P. C., the widow denied having sold the house to the defendant. Copy of her statement recorded by the Magistrate was one of the documents produced and relied upon by the plaintiff. The widow herself is now dead.

As the plaintiff was in possession the onus of proving that he was not the owner lay on the defendant : see S. 110, Indian Evidence Act. The trial Court decreed the plaintiff's suit, but on appeal the Senior Subordinate Judge dismissed it finding that the documentary as well as oral evidence produced by the defendant established that the house originally belonged to Basia. The documents relied upon by the Senior Subordinate Judge were copies of two plans which were filed by third parties in two other suits respectively. The house in dispute is to the south of the house of one Kadir Bakhsh and to the east of the shop of Jagat Ram. In the suit *Kadar Bakhsh* v. *Nura*, Kadir Bakhsh filed a plan of a house in which the southern boundary of that house was shown as the house of Wasau. To prove this plan the defendant examined Nura and not Kadir Bakhsh who had filed it. The recital of the boundary in the plan was a statement of Kadir Bakhsh and consequently Kadir Bakhsh and not Nura could prove it. The other plan was filed by Dhari Bam in the suit *Dhari Ram* v. *Jagat Ram*, but the witness examined to prove it was Jagat Ram and not Dhari Ram. Thus the recital of the boundary in question in either plan was not proved and this being so the said recitals were inadmissible in evidence. There was no further documentary evidence to show that the house belonged to Basia or that he ever lived in it. As it cannot be said what weight the lower appellate Court would have attached to the oral evidence if the said documents had been excluded from consideration I accept the appeal, set aside the judgment and decree of the lower appellate Court and remand the case for redecision on the basis of oral evidence alone. For rulings as to admissibility in evidence of recitals of boundaries in documents between third parties, see *Lajpat Rai* v. *Faiz Ahmad* (1).

D.D. *Case remanded.*

(1) A. I. R. 1927 Lah. 448.

A. I. R. 1927 Lahore 842 (1)

ADDISON, J.

Hari Ram—Plaintiff—Appellant.

v.

Sheo Karn—Defendant—Respondent.

Second Appeal No. 2123 of 1926, Decided on 13th January 1927, from the judgment of the Dist. Judge, Karnal, D/- 19th June 1926.

Registration Act, S. 49—Unregistered partition deed, though inadmissible to prove its terms is still admissible to prove nature of possession of property comprised in the deed.

Although the details of a partition cannot be proved, being embodied in an inadmissible deed, still the fact that the plaintiff is in possession of the suit property or built any portion of it can be proved by oral evidence and the partition deed can then be relied upon to determine the nature of that possession : 28 *P. L. R* 88, *Foll.* [P 842 C 1]

Shamair Chand—for Appellant.

Behari Lal—for Respondent.

Judgment.—In execution of a money-decree against Kalu Mal and two of his sons, Richha Ram and Joti Parshad, the decree-holder attached a house and a shop alleged by him to belong to the judgment-debtors. Hari Ram, another son of Kalu Mal, objected to the attachment and sale of the shop and part of the house on the ground that he was the owner in possession thereof. His objection failed and he instituted a regular suit. It was dismissed and his appeal was dismissed by the District Judge. The second appeal is now before me.

It was held in the suit, the decree of which was under execution, that Hari Ram appellant was separate from his father and other brothers. The property in dispute was originally joint family property. Hari Ram's case is that he received it on partition. The partition has been established, but as the document embodying the partition was not admitted in evidence as being unstamped and unregistered, the District Judge held that oral evidence to prove the details of the partition could not be given as those terms were embodied in an inadmissible deed. This proposition is correct, but it has been held in *Sheo Karan* v *Chiranji Lal* (1), which is concerned with still another son of Kalu Mal, that the fact whether the plaintiff was in possession of the property in suit or built any part of it could be proved by oral evidence and that the partition deed could be relied upon to determine the nature of that possession.

Now the question of possession by Hari Ram appellant was considered by the trial Court, but rejected by the District Judge, as he was of opinion that no other evidence to prove the details of the partition could be admitted. I, therefore, accept the appeal, and setting aside the order of the District Judge, remand the appeal to him to decide as to whether the plaintiff was in possession of the property in dispute or any part thereof or constructed any portion of it as this could be proved by oral evidence. When he has come to a finding on this point the partition deed could be relied upon to determine the nature of that possession. The remand is under O. 41, R. 23, Civil P. C. Parties will bear their own costs here.

J.V. *Appeal accepted.*

(1) [1927] 28 P. L. R. 88.

A. I. R. 1927 Lahore 842 (2)

TEK CHAND, J.

Rahman—Defendant.

v.

Dillu and *others*—Plaintiffs—Respondents.

Second Appeal No. 2022 of 1926, Decided on 3rd February 1927, from decree of Dist. Judge, Montgomery, D/- 22nd May 1926.

Contribution — One co-heir cannot claim against another for expenses of litigation against third parties.

There is no provision of law which entitles a co-heir to claim contribution from his co-heirs for expenses incurred in litigation against third parties, even if such co-heirs have incidentally benefited by the result of that litigation : 21 *Cal.* 496 and 61 *P. R.* 1914, *Foll.* [P 844 C 1]

Noor Muhammad—for Appellant.

Anant Ram Khosla—for Respondents.

Judgment.—The relationship of the parties will appear from the following pedigree table. (Here pedigree was set out.) Rahman, son of Langar died in 1891 leaving him surviving two widows Mt. Suban and Mt. Zainab. On Rahmun's death his estate was mutated in favour of the two widows in equal moieties. Subsequently Mt. Suban made an oral gift of her half-share in Rahmun's land to her nephew Mubara who was a stranger to the family. Similarly, the other widow Mt. Zainab, gifted her half-share in her

husband's land to her nephew Dara. Rahmun's collaterals were entitled to his land in the following shares :

Lakhwira, son of Bahadur ...	¼th
Jowaya and Alam, sons of Nadir	¼th
Rahman , son of Himmat defendant	¼th
Alu, son of Ahmad ...	⅛th and
Mohammad, Dolu and Dulla, plaintiffs, sons of Bhanan ...	⅛th

On Mt. Suban's death a suit was instituted on 31st March 1913, by Rahman, son of Himmat and Lakhwira, son of Bahadur, and Alam and Jowaya, sons of Nadir, for possession of the whole of the land which had been gifted by her to Mubara. The present plaintiffs, Dolu, Dulla and Mohammad who were minors at that time, were impleaded as pro forma defendants. This suit was decreed with costs on 27th April 1914, and mutation of the land then in suit was effected in favour of all the collaterals of Mt. Suban's husband, including the plaintiffs, in proportion to their shares according to the pedigree-table.

Later on another suit was filed by the same four collaterals, namely, Rahman, Lakhwira, Jowaya and Alam, against Dara, with respect to the gift that had been made by Mt. Zainab in his favour. The present plaintiffs, Dolu, Dulla and Mohammad, who were still minors, were made pro forma defendants. This suit was decreed on 18th July 1917 with costs. But instead of mutation being effected in favour of all the collaterals of Mt. Zainab's husband, according to their ancestral shares the revenue authorities in the absence of any of the present plaintiffs, who were, as stated above, minors, mutated the land in favonr of Rahman one-half and Lakhwira, Jowaya and Alam one-half. Two of the plaintiffs, Dolu and Dulla, having attained majority and Mohammad their youngest brother being still a minor have now brought a suit against Rahman for possession of their share in the land which was gifted by Mt. Zainab to Dara. They contend that according to the pedigree-table Rahman defendant would be entitled to one-eighth share only and not to one-half as he got under the mutation. This suit was resisted by Rahman defendant on various pleas none of which is now pressed except one, namely, that one-half of the land decreed against Dara was given by him and his other co-plaintiffs in that suit to one Lal Khan, who had financed the litigation which resulted in that decree. The plaintiffs did not admit the existence of any such agreement and averred that in any case, they were not bound by it They further stated that whatever costs had been incurred by Rahman plaintiff in that litigation had been recovered by him from the then defendant Dara. The Subordinate Judge who tried the suit found that any agreement that might have been made with Lal Khan was made by Rahman and his co-plaintiffs in that case on their own behalf only and that the present plaintiffs (who were then minors), were not bound by it. On issue 2, the Subordinate Judge found that only Rs. 400 had been spent by the defendant Rahman in prosecuting the suit against Dara and that as against this Rahman had recovered Rs. 386-7-0 as costs from the latter in execution of that decree. The contention of Rahman that he had received only Rs. 200, from Dara and had given up the remaining costs was not accepted by the Subordinate Judge. In spite of these findings, however, the Subordinate Judge proceeded to hold that as one-half of the land had passed to Lal Khan the plaintiffs were equitably bound to surrender one-half of their share to the defendant. He accordingly passed a decree for one-sixteenth share and dismissed the suit *qua* the remaining one-sixteenth.

The defendant Rahman acquiesced in this decree and preferred no appeal to the District Judge. The plaintiffs, however, not being satisfied with the Subordinate Judge's decree in so far as it was against them appealed to the District Judge, who held that the minor plaintiffs were no parties to the agreement with Lal Khan, that Rahman and others did not enter into the agreement bona fide for the benefit of the minor plaintiffs but had been actuated by selfish motives. He accordingly accepted the plaintiffs' appeal and decreed the suit in full.

Against this judgment and decree of the District Judge Rahman defendant has preferred a second appeal to this Court and I have heard Mr. Noor Mohammad on his behalf. The learned counsel has contended that the agreement in favour of Lal Khan was entered into on behalf of the present minors also and that as the result of the litigation was beneficial to the minors they must be held to be bound by the agreement or,

in any case, they should be equitably made liable to pay one-half of the amount which had been spent by Lal Khan in the litigation with Dara.

After considering the arguments of the learned counsel I am of opinion that the judgment of the District Judge is correct and must stand. There is no written agreement between Rahman, Lakhwira, Alam and Jowaya on one side and Lal Khan on the other. The transaction is evidenced by a mutation which was sanctioned on 26th December 1918. In the mutation proceedings Rahman, etc., purported to act on their own account and there is no mention whatever of the plaintiffs having any share in the land which was being transferred or of the transferrers acting on behalf of the minors. The transaction, therefore, cannot be said to have been entered into on behalf of the minors. Even if Lal Khan actually financed the litigation against Dara, I fail to see how the minors can be said to have in any way benefited by it. The gift by Mt. Zainab to her nephew was obviously unauthorized and as the widow died in 1911 when the present plaintiffs were all minors they could bring a suit on attaining majority. They did not, therefore, derive any benefit from the suit which was instituted by Rahman, etc., against Dara. Moreover, it is quite clear that in the litigation against Dara, Rahman, etc., did not purport to act on behalf of the plaintiffs, Rahman etc., had impleaded the plaintiffs as merely pro forma parties, they had got a decree for plaintiffs' share passed in their own favour and subsequently entirely ignoring the minors in the mutation proceeding had got the whole land entered in their name. Under the circumstances the litigation cannot be said to have been conducted either on behalf of the minors or for their benefit. Moreover, as has been found by the trial Judge himself the amount of costs incured in the litigation against Dara was recovered from him by Rahman, etc., and thus they had been fully reimbursed. There was, therefore, no necessity to alienate any land to Lal Khan.

Further, there is no provision of law which entitles a co-heir to claim contribution from his co-heirs for expenses incurred in litigation against third parties, even if such co-heirs have incidentally benefited by the result of that litigation : see *Abdul Wahid Khan* v. *Shalukha Bibi* (1), *Dulla Singh* v. *Khazana* (2) and other rulings collected at p. 381 of the 5th edition of Pollock and Mulla's Indian Contract Act.

As a last resort Mr. Noor Mohammad contended that the case of his client is a very hard one as he has parted with the whole of his share to Lal Khan. But for this, he has only himself to thank, as it was he who entered into this arrangement with Lal Khan behind the back of the plaintiffs in proceedings which were obviously collusive and were intended to defeat the just rights of the plaintiffs.

For the foregoing reasons I maintain the judgment and decree of the District Judge and dismiss the appeal with costs.

D.D. *Appeal dismissed.*

(1) [1894] 21 Cal. 496=21 I. A. 26=6 Sar. 399 (P. C.).
(2) [1914] 61 P. R. 1914=25 I. C. 542=267 P. L. R. 1914.

A. I. R. 1927 Lahore 844

SHADI LAL, C. J., AND BROADWAY, J.

Neki Ram and *another*—Defendants—Appellants.

v.

Pirbhu Dayal—Plaintiff—Respondent.

Letters Patent Appeal No. 142 of 1925, Decided on 8th Jan. 1927, from decree of Jai Lal, J., D/- 9th April 1925, in Civil Appeal No. 3143 of 1924.

Damages—Suit for—Plaintiff taking on lease a shop from defendant for his business as Commission Agent—Defendant refusing to give possession—Measure of damages.

Plaintiff took on lease a shop from defendant at a monthly rental and paid him some advance. Subsequently defendant refused to give him possession. Plaintiff sued defendant for damages on the basis of what his earning as Commission Agent would have been for the period for which possession of the shop was not given to him,

Held : that plaintiff's income would depend on his own ability and business capacity as a Commission Agent. Further, as there were two or three similar shops available in the same mandi, and instead of occupying one of these he apparently chose to do no business, it cannot be said that he suffered a loss because of the failure on the part of his lessors to give him possession of the premises leased to him. Under the circumstances he was entitled only to a refund of advance paid by him. [P 845 C 1]

Shamair Chand—for Appellants.
Balwant Rai—for Respondent.

Broadway, J.—One Pirbhu Dial instituted a suit against Neki Ram and

Ramji Lal for the recovery of Rs. 993. He alleged that the defendants had leased him a certain shop in the Rui Mandi at Delhi at a monthly rental of Rs. 62-8-0, and that he had paid the sum of Rs. 193, in advance, further that they had refused to give him possession of the premises leased and that he was thus unable to carry on his business and claimed to recover the sum of Rs. 193, paid by him in advance and a sum of Rs. 800 as damages.

The trial Court found that the amount paid in advance was Rs. 49, and granted the plaintiff a decree for that amount plus Rs. 800 as damages, calculating damages at the rate of Rs. 100 a month for eight months, that being the amount which the plaintiff said he had been earning as a Commission Agent before he entered into this lease. The appeal by the defendants to the District Judge having proved unsuccessful they preferred a second appeal to this Court. This appeal was heard by Mr. Justice Jai Lal, and was dismissed on 9th April 1925.

Against this order of dismissal the defendants have preferred this appeal under S. 10, Letters Patent. On their behalf Mr. Shamair Chand urged that the Courts had erred in granting the plaintiff a decree for Rs. 800, and the question for determination is whether the view taken by the learned Judge in Chambers as to the principle on which the damages should be assessed is correct. The learned Judge in Chambers has based his conclusion on two cases decided by the Madras High Court. Those cases are, however, clearly distinguishable for they both deal with land that had been leased out for purposes of cultivation. In those cases it was held that in a suit by a lessee against his lessor for failure to give possession of the lands leased out to him, the measure of damages is the net profits which the lessee could have derived during the period he was out of possession, regard being had to the means which existed of mitigating the loss. The principle cannot be applied in the present case for the plaintiff clearly intended to occupy the premises leased to him for the purposes of carrying on his business there. His income would depend on his own ability and business capacity as a Commission Agent. It is also in evidence that there were two or three similar shops available in the same mandi and instead of occupying one of these he apparently chose to do no business for eight months, and it cannot therefore be said that he suffered a loss of Rs. 800 because of the failure on the part of his lessors to give him possession of the premises leased to him. I would, therefore, accept this appeal and dismiss the plaintiff's claim for damages leaving him the decree for Rs. 49. In the circumstances the parties will pay their own costs throughout.

Shadi Lal, C. J.—I concur.

G.B. *Appeal accepted.*

A. I. R. 1927 Lahore 845

ZAFAR ALI, J.

Ata Mohammad and *others*—Plaintiffs —Appellants.

v.

Harnam Singh and *others*—Defendants —Respondents.

Second Appeal No. 1688 of 1926, Decided on 9th December 1926, from decree of Sr. Sub-Judge, Hoshiarpur, D/- 23rd February 1926.

(a) *Practice—Parties must procure attendance of witnesses—If they fail, Court is not bound to do it for them.*

It is always the duty of litigants in a civil case to pay for the expenses of witnesses and procure their attendance. If they should fail to do so, the Court is not bound to do this for them. [P 846 C 1]

(b) *Civil P. C., S. 100—Finding of fact cannot be interfered with.*

A finding of fact arrived at on the evidence produced by parties cannot be interfered with in second appeal.... [P 846 C 1]

Faqir Chand—for Appellants.

G. S. Salariya—for Respondents.

Judgment.—The question for determination in this case was whether the house in dispute was situated within the limits of plaintiffs' village Moila or defendant's village Wahidpore. The trial Court issued a commission to the Tahsildar for fixing the position of the house by taking measurements and making an enquiry on the spot. That officer did so and reported that the house was within the area of village Wahidpore. (The two villages have a common boundary). The plaintiffs' suit was accordingly dismissed. On appeal the learned Senior Subordinate Judge expressed the opinion that the Tahsildar should have been summoned as a witness and examined to explain how he arrived at his conclusions, and he remanded the case for a de novo trial.

When the case was received in the Court of first instance the parties examined some witnesses. The defendants did apply for summons to him, but eventually declined to produce him. The Court again decided in favour of the defendants and the plaintiffs' appeal was also dismissed this time.

In second appeal it is contended that it was incumbent on the trial Court to examine the Tahsildar as ordered by the Senior Subordinate Judge. This contention is untenable. It is always the duty of litigants in a civil case to pay for the expenses of witnesses and procure their attendance. If they should fail to do so, the Court is not bound to do this for them.

The case has been decided on the evidence produced by the parties and the finding that has been arrived at on that evidence is one of fact which cannot be interfered with in second appeal. The learned counsel for the appellants has taken me through the judgment of the lower appellate Court, but has not been able to show where that Court has gone wrong.

I, therefore, dismiss the appeal with costs.

R.D. *Appeal dismised.*

A. I. R. 1927 Lahore 846

ZAFAR ALI, J.

Dialoo Mal—Judgment-debtor—Appellant.

v.

Firm Nandu Shah-Jai Lal and *others*—Decree-holders and judgment-debtors—Respondents.

Misc. First Appeal No. 2920 of 1926, Decided on 5th May 1927, from order of Sr. Sub-Judge, Kangra, D/- 12th November 1926.

Civil P. C., S. 145—Surety undertaking to pay if principal judgment-debtors failed—Decree should be first executed against the latter.

Where the surety bond provided that the decretal amount will be payable by the surety if it were not realized from the principal debtors, and a precept as against the principal debtors having proved infructuous, the decree-holder applied for a notice of arrest against the surety and the surety objected on the ground that decree be first executed against the properties of the principal debtor which he pointed out, but the Court ordered: "The execution cannot be stayed. The zaman can take out the warrant for the original judgment-debtor."

Held: that it is not the function of the zaman to take out a warrant. Moreover, before proceeding against the person or property of the party the executing Court should satisfy itself that the decretal debt cannot be realized from the principal debtors. [P 846 C 2]

Fakir Chand for Badri Das—for Appellant.

Nawal Kishore for Mehr Chand Mahajan—for Respondents.

Judgment.—According to the terms of the decree in this case the decretal amount will be payable by the surety defendant 4. if it were not realized from the principal debtors defendants 1 to 3. In their application for execution made by the decree-holder they asked in the first place for a precept under S. 46, Civil P. C., as against defendants 1 to 3, and then for a warrant of arrest against defendant 4, but the Court ordered that a precept and a warrant should both issue. The decree-holder, however, paid process-fee for a precept only and a precept was issued. This precept having proved infructuous the decree-holders applied for a notice of arrest to defendant 4. In response to the notice he put in an application to say that the decree should, in the first instance, be executed against defendants 1 to 3 and he mentioned some properties moveable and immovable which defendants 1 to 3 owned. The Court endorsed the following order on this application:

The execution cannot be stayed. The zaman can take out the warrant for the original judgment-debtor.

This order is improper and cannot be maintained. It is not the function of the zaman to take out a warrant. Moreover, before proceeding against the person or property of defendant 4, the executing Court should satisfy itself that the decretal debt cannot be realized from defendants 1 to 3 and should record a finding to that effect.

I, therefore, accept the appeal and set aside the above order. The decree-holder to pay the costs of the appellant, defendant 4, in this Court.

G.B. *Appeal accepted*

A. I. R. 1927 Lahore 847 (1)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Duncan Stratton & Co.—Defendants—Petitioners.

v.

Goenka Cotton Spinning and Weaving Mills, Ltd., Delhi—Plaintiffs—Respondents.

Civil Petition No. 250 of 1926, Decided on 10th May 1927, from order of 1st Cl. Dist. J., Delhi, D/- 14th Dec. 1925.

Civil P. C., S. 115—Court having jurisdiction but deciding the question of amendment wrongly—No revision lies—Civil P. C., O. 6, R. 17.

Order 6, Rule 17, confers ample powers upon the Court to amend the pleadings; and where the trial Judge has, after examining the arguments advanced on both sides, granted leave to amend the plaint, revision would not be allowed though his conclusion may be wrong in law: 11 *Cal.* 6 (*P. C.*), *Foll.* [P 847 C 1, 2]

Raj Narain and *Mehr Chand Mahajan*—for Petitioners.

Sardha Ram—for Respondents.

Shadi Lal, C. J.—The trial Judge has allowed the plaintiffs to amend their plaint by adding a prayer that the defendants be directed to render an account of the moneys received and disbursed by them in relation to a contract for the purchase of machinery, in respect of which the plaintiffs had brought the suit for damages. There can be no doubt that the new relief is claimed against the defendants on the ground that they were commission agents of the plaintiffs, but it is contended that the claim for damages, as contained in the original plaint, proceeded upon the assumption that the defendants had entered into the contract as principals and not as agents. Now, the plaint is not happily worded, and it is not clear that the defendants were sued as principals so far as the prayer for the recovery of damages was concerned.

The question for determination, however, is whether any ground justifying interference by a Court of revision has been established. It must be remembered that O. 6, R. 17, Civil P. C., confers ample powers upon the Court to amend the pleadings; and the trial Judge has, after examining the arguments advanced on both sides, granted leave to amend the plaint. His conclusion may be wrong in law; but, as laid down by their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (1), where a Court has jurisdiction to decide the question before it and in fact decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, merely because its decision is erroneous. The mere fact that the decision of the Court is wrong, affords no ground for the interference of the High Court as the Court of revision.

We accordingly see no valid ground for revision and dismiss the application with costs.

D.D. *Application dismissed.*

(1) [1885] 11 Cal. 6=11 I. A. 237 (P. C.).

A. I. R. 1927 Lahore 847 (2)

ADDISON, J.

Palo and *another*—Plaintiffs—Appellants.

v.

Bawa and *others*—Defendants—Respondents.

Second Appeal No. 2223 of 1926, Decided on 6th January 1927, from decree of Dist. J., Gurdaspur, D/- 7th May 1926.

Custom (Punjab) — Ancestral land — Land held by brothers must be presumed to be ancestral.

Where land is held by brothers, the presumption is, in the abence of any indication that the property was self acquired, that it was held by their father and that it was ancestral: 41 *P. R.* 1914 and A. *I. R.* 1924 *Lah.* 175, *Foll.* [P 848 C 1]

Shamair Chand—for Appellants.

S. R. Laul—for Respondents.

Judgment.—The plaintiffs who are the minor sons of one Tara (see the pedigree table attached to the judgment of the District Judge) sued for the usual declaration that the sale effected in 1920 by their father Tara and his cousins Indar Singh and Wadhawa should not affect their reversionary rights. Both the Courts below concurred in dismissing the suit on the ground that the land has not been proved to be ancestral. Against this decision the plaintifis have presented this second appeal.

As regards the area of 12 kanals 3 marlas, which the District Judge has pointed out can be traced back to 1852, it seems to me that the appeal must succeed. In that year this land was held by Khazana and Jodha and a deceased brother of theirs. The presumption

therefore is, in the absence of any indication that the property was self acquired, that it was held by Labha, their father. That being the case, this area of 12 kanals 3 marlas or rather 12 kanals 6 marlas, as shown in the Settlement of 1852, must be held to be ancestral The authorities are *Jiwan Singh* v. *Har Kaur* (1) and *Mt. Maryan Bibi* v. *Gholam Muhammad* (2).

As regards the area of 30 kanals 13 marlas which was only traced back to 1910-11, the appeal must be dismissed, for though it has been shown that in that year this area was held by Alu and Tara, sons of Khazana, and Dittu and Wadhawa, sons of Jodha, there is a clear indication that in 1882 it was acquired by these four persons by pre-emption. That being the case, it follows that this area is not ancestral. Owing to the fact that some of the records have been eaten by white ants and for other reasons the remaining area of about 16 kanals has not been traced at all. It follows that it was properly held not to be ancestral.

In the result I accept the appeal to the extent of holding that the area of 12 kanals 6 marlas, shown in the 1852 Settlement, is ancestral. I therefore set aside the order of the District Judge and remand the appeal to him for further orders in view of my finding that 12 kanals 6 marlas are ancestrial. Parties will bear their own costs here.

R.D. *Appeal partly accepted*

(1) [1914] 41 P. R. 1914=51 P. L. R. 1914=22 I. C. 415=34 P. W. R. 1914.
(2) A. I. R. 1924 Lah. 175.

A. I. R. 1927 Lahore 848 (1)

ZAFAR ALI, J.

Charat Singh and *others*—Plaintiffs—Petitioners.

v.

Sukhdev Singh and *others*—Defendants—Respondents.

Civil Revn. No. 213 of 1927, Decided on 15th November 1927, from order of Dist.J.,Ferozepur, D/-7th December 1926.

Punjab Tenancy Act (16 *of* 1887), *S.* 77 (3) (*d*) —*Suit by tenants for establishing their occupancy right is cognizable by revenue Court.*

A suit by tenants to establish their right as occupancy tenants falls under Cl. (d) sub-S. (3), S. 77, Punjab Tenancy Act, and is cognizable by a revenue Court. [P 848 C 2]

J. N. Bhandari—for Petitioners.

Nand Lal—for Respondents.

Judgment.—The plaintiffs petitioners claimed to be reversionary heirs of Jiwan Singh and on his death they entered into possession of his occupancy holding, and an Assistant Collector sanctioned mutation in their favour. This order having been set aside by the Collector on appeal, the petitioners instituted a suit for a declaration that they were the lawful heirs of Jiwan Singh and were entitled to succeed to his occupancy holding. The Courts below have concurred in holding that the suit is cognizable by a revenue Court and not a civil Court. This view appears to be correct. The plaintiffs according to their own showing are in possession as tenants, and what they want to establish, is that they are occupancy tenants. The suit, therefore, falls under Cl. (d), sub-S. 3, S. 77, Punjab Tenancy Act and the petition of plaint has been rightly returned to be presented to a revenue Court.

I, therefore, dismiss this application in revision with costs.

S.J. *Application dismissed.*

A. I. R. 1927 Lahore 848 (2)

ADDISON, J.

Firm Bhagwan Das-Kanhaya Lal—Defendant—Appellant.

v.

Firm Nand Singh-Hari Singh—Plaintiff—Respondent.

Second Appeal No. 2399-of 1926, Decided on 27th January 1927, from order of Addl. Dist. Judge, Lyallpur, D/- 26th June 1926.

Limitation Act, Art. 85—*If account is deliberately closed, merely adding at the end of new dealings old balance will not make it an open account.*

An open account is one which is continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. Where, therefore, an account has been deliberately interrupted and closed, the mere adding later on, in order to avoid limitation at the end of the new dealings the old balance with not make it an open account : *A.I.R.* 1923 *Lah.* 347, *Foll.* : 124 *P. L. R.* 1910, *Dist.* [P 849 C 1]

Jalal-ud-din—for Appellant.

Daulat Ram—for Respondent.

Judgment.—The plaintiff firm carries on a commission agency business at Lyallpur. The defendant firm, which carries on business in the Hazara District,

used to deal with the plaintiff firm from time to time. In Sambat 1975 there were certain dealings which ended in a balance in favour of the defendant firm. That account was closed and the balance at the credit of the defendant firm was brought forward at the beginning of the new account which started in Magh Sambat 1975. The account in connexion with the second dealings between the parties again closed with a balance due to the defendant and a third account was started shortly afterwards with the balance in favour of the defendant carried over into the new third accuont. This third account was closed on the 24th Phagan Sambat 1976, corresponding to the 7th March 1920, with a balance of Rs. 1,140, including interest against the defendant. Dealings did not again commence between the parties till the 21st August 1920, when a new account was opened in which the debit balance against the defendant was not put down. When the dealings in connexion with this fourth account ended a considerable time later, the plaintiff added at the end of this fourth account the debit balance of Rs. 1,140, from the last account. This was some two years after the third account had been closed.

The plaintiff firm then sued the defendant firm on the 27th February 1924 for Rs. 823-14-6 due to them on all the dealings. The trial Court dismissed the suit, holding that the item of Rs. 1,140, which was the balance at the closing of the account on the 7th March 1920, was barred by time under Art. 85, Sch. 1, Lim. Act. It therefore, dismised the suit as nothing certainly was due if that item was excluded. The other issues were not decided. On appeal the learned District Judge held that this item was within time under the same article and remanded the suit for decision on the remaining issues. Against his decision this second appeal has been preferred.

It is quite clear that the plaintiff firm treated the third account, ending with the balance due to it of Rs. 1,140, as finally closed. It did not carry forward that item to the next account, which started some months later, though at the end of the next account probably because this item was in danger of becoming time-barred, Rs. 1,140 were added. Further, Ex. D-3, dated the 27th October 1920, is a post card sent by the plaintiff firm to the defendant firm. This was after the last set of dealings had commenced. In this post card the plaintiff firm stated that they had formerly given the defendant firm a notice and had previously sent the account as well, and still the defendant firm was not paying. Therefore, the defendant firm would have to pay further interest on the former account at 12 per cent. per annum from the date of the closing of that account. All these facts conclusively prove that the plaintiff firm treated the account as finally closed on the 7th March 1920 and started a new account with the defendant firm on the 21st August 1920 and treated that new account as entirely separate from the previous dealings. That being the case, *Imrat Lal* v. *Lal Chand* (1) is not applicable. There the balance was ascertained and carried over. Here it was ascertained but deliberately not carried over and even after the new account was started, the plaintiff firm still insisted on payment of the old account as a separate account. In *Firm Rup Chand-Jiwan Singh* v. *Firm Poho Nathu Mal*: *A. I. R.* 1923 *Lah.* 347: it was said that an open account was one which was continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. In the present case the account was not continuous, but was interrupted and closed. The mere adding later on, in order to avoid limitation, at the end of the new dealings, the old balance would not make it an open account again as it was deliberately interrupted and closed. In my opinion, therefore, this item of Rs. 1,140 was barred by limitation under Art. 85, Sch. 1, Lim. Act, as the suit was not brought for more than three years after it became due. I, therefore, accept this appeal and, setting aside the order of the District Judge, dismiss the suit with costs, throughout.

J.V. *Appeal accepted.*

(1) [1910] 75 P. R. 1910=124 P. L. R. 1910=7 I. C. 715=99 P. W. R. 1910.

A. I. R. 1927 Lahore 850 (1)

JAI LAL, J.

Gurdit Singh—Defendant—Appellant.

v.

Mt. Bhago—Plaintiff—Respondent.

Second Appeal No. 1298 of 1925, Decided on 24th July 1925, from decree of Dist. Judge, Gurdaspur, D/- 19th February 1925.

Punjab Land Revenue Act (17 *of* 1887), *S.* 44 —*Revenue records only raise a presumption— They are not conclusive.*

Revenue records merely raise a presumption of correctness of entries therein and where they are challenged, a finding given without considering evidence in rebuttal is liable to be set aside. [P 850 C 1]

Shamair Chand—for Appellant.

Judgment.—In 1918 Santa Singh obtained tenant's rights in the land in suit and was entered in the revenue records as a tenant. On his death the mutation of his rights were made in favour of his widow Mt. Bhago, but the land remained in possession of his real brother Gurdit Singh. Mt. Bhago instiuted a suit for possession of the land and for recovery of mesne profits. The plea of Gurdit Singh was that he and Santa Singh were members of a joint family. Santa Singh, being the elder brother and manager, obtained the lease in his favour, but that in fact it was obtained for himself and Gurdit Singh jointly. He consequently denied that Santa Singh's widow was entitled to succeed to the tenant's rights in the land. The learned District Judge has come to the following conclusion :

It is quite possible that the facts are as alleged by Gurdit Singh, but I conceive that I am bound to rely upon the revenue records which admittedly follow the written instrument rather than upon oral evidence, and I, therefore, reject the appeal with costs.

The appeal was by Gurdit Singh against whom the suit had been decreed by the trial Court. Now this finding of the learned District Judgeis inconclusive. The revenue records and the written instrument merely raise a presumption against the defendant, but this presumption is capable of being rebutted, inter alia, by proof that Santa Singh and Gurdit Singh were joint in family or by proof that the lease was obtained by Santa Singh for the joint benefit of himself and Gurdit Singh, and the defendant was entitled to a clear finding by the learned District Judge on the pleas raised by him.

I remand this case to the learned District Judge with the directions to rehear the appeal and to give definite findings on the points involved. The Courtfee will be refunded to the appellant and the other costs will abide the result.

N.K. *Case remanded.*

A. I. R. 1927 Lahore 850 (2)

SHADI LAL, C. J., AND JAI LAL, J.

Sheo Ram—Defendant—Appellant.

v.

Mem Raj and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 325 of 1923, Decided on 27th April 1927, from decree of Dist. Judge, Karnal, D/- 13th December 1922.

Mortgage—Interest is charge unless otherwise stipulated.

In the absence of contract to the contrary, a mortgagee is entitled to treat interest due under a mortgage as a charge on the property : *A. I. R.* 1924 *P. C.* 183 and *A. I. R.* 1926 *Lah.* 624, *Foll.* [P 850 C 2]

Rama Nand and *Bal Krishan Mehra*—for Appellant.

Shamair Chand—for Respondent.

Shadi Lal, C. J.—This appeal arises out of a suit for redemption and the sole question for determination is whether the plaintiff can redeem the property without paying the interest stipulated in the mortgage deed of 1893. Now, it is common ground that the mortgagee was entitled to interest on the principal sum, but it is contended that the interest was not made a charge on the mortgaged property. Their Lordships of the Privy Council have, however, laid down the principle in *Ganga Ram* v. *Natha Singh* (1) that, in the absence of contract to the contrary, a mortgagee is entitled to treat interest due under a mortgage as a charge on the property. The same principle was followed by a Division Bench of this Court in *Manghi* v. *Dial Chand* (2). The learned counsel for the plaintiff does not seriously suggest that the deed contains any stipulation which would displace the general rule enunciated above.

(1) A. I. R. 1924 P. C. 183=5 Lah. 425=51 I. A. 377 (P. C.).

(2) A. I. R. 1926 Lah. 624=7 Lah. 559.

We accordingly accept the appeal, and, setting aside the decree of the District Judge, restore that of the Court of first instance with costs throughout. A preliminary decree for redemption shall be framed in terms of the judgment of the Court of first instance.

G.B. *Appeal accepted.*

A. I. R 1927 Lahore 851 (1)

SHADI LAL, J. C.

Thaba Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 171 of 1925, Decided on 1st May 1925, from an order of the Sessions Judge, Ferozepore, D/- 2nd January 1925.

Penal Code, Ss. 323 and 99—Beating public servant executing warrant of attachment—Even though warrant is illegal, accused is not justified under S. 99.

A person beating a public servant entrusted with the duty of executing a warrant of attachment is guilty under S. 323 and is not justified in beating under S. 99. [P 851 C 1]

Sagar Chand—for Respondent.

Judgment. — The learned Sessions Judge holds that the warrant of attachment, which the jamadar Ram Lal was asked to execute, was not illegal; and no argument has been addressed to me impeaching the correctness of that finding. Further even if it is assumed that the warrant was defective, the petitioners had no justification for beating Ram Lal. S. 99, I. P. C., provides that there is no right of private defence against an act, which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. It is, therefore, clear that the petitioners are, at any rate, guilty of an offence under S. 323, I. P. C.

For the aforesaid reasons I cannot interfere with the conviction, but considering that the accused have been released on bail by a learned Judge of this Court, I reduce the sentence in the case of each of them to the period of imprisonment already undergone by him. The application for revision is accepted to this extent only.

R.D. *Revision accepted.*

A. I. R. 1927 Lahore 851 (2)

ADDISON, J.

Karam Khan and *another*—Plaintiffs—Appellants.

v.

Mast Ali Khan and *others*—Defendants—Respondents.

Second Appeal No. 741 of 1926, Decided on 19th January 1927, from decree of Dist. Judge, Dera Ghazi Khan, D/- 20th November 1925.

Civil P. C., O. 22, Rr. 4 and 11—Where interests of co-respondents are separable, death of one respondent will not cause an appeal to abate wholly but only as against the deceased.

The question whether an appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable, the appeal will abate only as regards the interest of the deceased respondent. If they are joint, the appeal will abate as regards the whole of the joint interests. [P 852 C 1]

A further test in this connexion is that if a separate suit is maintainable against the co-defendants severally, the mere fact of their being impleaded in the same suit will not cause an appeal to abate as a whole: *A. I. R.* 1926 *All.* 128; *A. I. R.* 1925 *Lah.* 381 and 23 *P. R.* 1917, *Foll.* [P 852 C 1]

Niaz Muhammad—for Appellants.

Hargopal—for Respondents.

Judgment.—The plaintiffs are co-sharers of certain land along with defendants 1 to 3, and certain other pro forma defendants. The plaintiffs instituted a suit for a declaration that defendants 1 to 3 were in reality owners of only a 24/576th share and not a share of 60/576ths as recorded in the revenue records, that is, the plaintiffs claimed a declaration that 36/576ths of the shares recorded in the name of defendants 1 to 3 was theirs. The trial Court dismissed the suit. On appeal the learned District Judge found that defendant 2, named Bahadur Khan, had died on 9th May 1925 during the pendency of the suit, and that his representatives were never brought upon the record. He held that a suit or appeal filed against a dead person was a nullity, and that the appeal could not proceed as regards defendants 1 and 3, that is, Mast Ali Khan and Jamal Khan as no specification of their shares was possible. He purported to follow *Hadu* v. *Lala* (1). Against this decision the plaintiffs have preferred this second appeal.

(1) [1915] 41 P. R. 1915=15 P. L. R. 1914=21 I. C. 951=16 P. W. R. 1914.

It seems to me that the question whether the appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable. the appeal will abate only as regards the interest of the deceased respondent. If they are joint the appeal will abate as regards the whole of the joint interests. This was, what was laid down in *Darshan Das* v. *Bikramajit Rai* (2). A similar view was taken by a Division Bench of this Court in *Ragbir Saran* v. *Mt. Sohan Devi* (3). In it there was a sale to various vendees the interest conveyed to each of them being specified in the sale-deed. One of the vendees died, and no application was made for the substitution of his heirs within time. Accordingly the whole suit was dismissed on the ground that it had abated. It was held on appeal that the suit had abated as against the interests of the deceased vendee only. In this ruling *Khuda Bakhsh* v. *Mathra Das* (4) was distinguished while *Mt. Zainab Bibi* v. *Rohila* (5) was followed. In the last named case the plaintiff, who was the daughter of a Dogar, sued the nine defendants, collaterals of her father, for possession of her father's landed property on the ground that it was self acquired, and that she as a daughter had a preferential right to the collaterals. The lower Court dismissed the suit holding that the property was ancestral. During the pendency of the appeal in the Chief Court one of the defendants-respondents died and application for the substitution of the names of his legal representatives was not made within time. It was held that the appeal abated *qua* the deceased collateral's share of the land, but not as regards the shares of the other collaterals as each had a separate right to his ancestral share. In my opinion the principles laid down in *Raghbir Saran* v. *Mt. Sohan Devi* (3) and *Mt. Zainab Bibi* v. *Rohila* (5), apply in the present case for the interests and shares of the first three defendants are separately given namely Mast Ali Khan 36/576ths, Bahadur Khan 20/576ths, and Jamal Khan 4/576ths. The claim of the plaintiffs was that the total of the shares of these three should be declared to be 24/576 and not 60/576ths i. e., that Mast Khan's share should be declared to be 14-2/5-576ths, the share of Bahadur Khan deceased 8/576ths and that of Jamal Khan 1-3/5-576ths, The fact therefore that the appeal is no longer competent as against Bahadur Khan's share of 20/576ths does not mean that it is not competent as regards Mast Ali Khan's share of 36/576ths and Jamal Khan's share of 4/576ths which can be reduced if the plaintiff's suit is correct, to

$$\frac{4\text{-}2/5+1\text{-}3/5)=16.}{576.}$$

Besides, it is obvious that in the present suit the plaintiffs need not have included Bahadur Khan in the beginning had they not wished to dispute his right to hold the share recorded in his name. The shares of all three defendants are separate, and the suit could have been brought against one of them or two of them or all three. In these circumstances I hold that the appeal was still competent as regards Mast Ali Khan and Jamal Khan, defendants 1 and 3. This was the only point argued in appeal. It was admitted that so far as Bahadur Khan's share was concerned the plaintiffs had lost all right to constest it.

I accordingly accept the appeal and setting aside the order of the District Judge hold that the appeal was competent so far as the shares of defendants 1 and 3 were concerned. I return the appeal to the District Judge to be decided in accordance with law as regards the shares of those two persons. Court-fee on appeal will be refunded. Parties will themselves bear the other costs incurred in this Court.

J.V. ... *Case remanded.*

(2) A. I. R. 1926 All. 128=48 All. 81.
(3) A. I. R. 1925 Lah. 381=6 Lah. 233.
(4) [1913] 62 P. R. 1913=85 P. L. R. 1913=18 I. C. 182=89 P. W. R 1913.
(5) [1917] 23 P. R. 1917=39 I. C. 277.

A. I. R. 1927 Lahore 852

ZAFAR ALI, J.

Parma Nand—Decree-holder—Appellant.

v.

Mt. Raj Devi—Judgment-debtor—Respondent.

Misc. First Appeal No. 1748 of 1926, Decided on 14th December 1926, from order of Sr. Sub-Judge, Rawalpindi, D/- 21st May 1926.

(a) *Civil P. C., O. 41, R. 5—Stay order.*

Order staying execution is not appealable.

[P 853 C 1]

(b) *Civil P. C., S. 11—Execution proceedings.*

Where an order releasing property from attachment is not appealed against, the order becomes final and so fresh application for the attachment of the same property does not lie : *A. I. R.* 1921 *Bom.* 208; *A. I. R.* 1924 *All.* 808; 25 *C. W. N.* 555 and *A. I. R.* 1922 *P. C.* 341, *Foll.* [P 853 C 1]

Nand Lal—for Appellant.

Shambhu Lal Puri—for Respondent.

Judgment.—This is a miscellaneous appeal against an order in execution proceedings relating to a money-decree In execution of that decree a house was attached, but sale thereof was stayed by the executing Court (Senior Subordinate Jude of Rawalpindi) by order, dated 20th March 1922. In 1925 the decree-holder applied for cancellation of that order, but the application was rejected on 23rd April 1925, and the decree-holder's appeal to the High Court against that order was dismissed on 13th July 1925. On 18th July 1925, the decree-holder made a fresh application for execution by attachment of certain moneys payable to the judgment-debtor by the Punjab National Bank, Limited, Rawalpindi, and certain persons named by him, and his money lying in the Bank was attached, but on 21st October 1925, it was released from attachment on the objection of the judgment-debtor on the ground that the execution had already been stayed by the order of 20th March 1922.

No appeal was preferred against the order of 21st October 1925, releasing the money from attachment. On 2nd January 1926 the decree-holder again applied for attachment of that money, but the application was rejected on 21st May 1926. It is against this last order that the decree-holder appeals. It is clear that the order of 21st October 1925, which was not appealed against became final and no fresh application for attachment of the money was competent.

It may be observed that it has been held by the Bombay, Allahabad and Calcutta High Courts that no appeal lies from an order staying execution : see *Janardan Trimbak* v. *Martand Trimbak* (1), *Husain Bhai* v. *Beltie Shah Gilani* (2) and *Rajendra Kishore* v. *Mothura Mohan* (3).

I, therefore, dismiss the appeal with costs.

J.V. *Appeal dismissed.*

(1) A. I. R. 1921 Bom. 208=45 Bom. 241.
(2) A. I. R. 1924 All. 808=46 All. 733.
(3) [1920] 25 C. W. N. 555=55 I. C. 228.

A. I. R. 1927 Lahore 853

BHIDE, J.

Muhammad Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 475 of 1927, Decided on 2nd July 1927, from order of Sub-Divl. Magistrate, Chakwal, D/- 17th March 1927.

Penal Code, S. 307 — Shot not aimed at anyone in particular—Doubt whether accused fired it—Benefit should be given to the accused.

Where it was proved that a shot was fired from the house in which the accused was residing, but it was not proved that the shot was aimed at any one in particular, and it was also doubtful whether the accused himself fired the shot :

Held : that the accused cannot be convicted under S. 307 as benefit of doubt should be given to him. [P 854 C 2]

Nand Lal—for Appellant.

Edmunds—for the Crown.

Judgment.—The appellant Muhammad Khan has been convicted in this case under S. 307, I. P. C., and sentenced to rigorous imprisonment for seven years.

The prosecution story briefly was that Muhammad Khan, who was wanted by the police for two murders, was absconding since the year 1924. On the night between the 1st and 2nd January 1927, Sub-Inspector Malik Muhammad Khan of thana Nila received information that Muhammad Khan was in his house in the village Nila. He thereupon organized a raiding party, including two policemen and some villagers. He posted his men on the roofs of the houses adjoining that of Muhammad Khan and proceeded, to his courtyard accompanied by Ahmad Khan and Ghulam Rasul. He then asked Ahmad Khan to chain the outer door of Muhammad Khan's house. The night was dark. Ahmad Khan first felt at the top of the door, but did not find any chain. He then quickly sat down and finding the clain near the threshold closed the door with it. Almost immediately afterwards a shot was fired though a hole in the door. The Sub-Inspector thereupon fired three shots in reply. Nothing more happened during the night. The house remained under guard. In the morning Muhammad Khan was told that there was a strong party armed with guns and re-

volvers and that resistance was useless. He was then induced to surrender himself. His house was searched and a revolver and some cartridges were found concealed behind a gahi (corn bin). Muhammad Khan was thereupon challaned separately under S. 307, I. P. C.. and under S. 20, Indian Arms Act.

With regard to the conviction under S. 307, I. P. C., to which this appeal relates, the main points urged by the learned counsel for Muhammad Khan were :

(1) That there is no reliable evidence to show that any revolver shot was fired through the door ; and

(2) even if any shot was fired, the evidence on the record does not establish any offence under S. 307, I. P. C.

As to the first point my attention was drawn to the fact that there was no evidence to show that any bullet was found in the courtyard or even in the immediate vicinity and that no mark of firing was left near the hole through which the shot is alleged to have been fired. As to these points the evidence on the record shows that the hole was large enough to allow the revolver muzzle to protrude through it. Consequently the fact that there was no sign of any shot having been fired through the hole does not go against the prosecution. It appears further from the evidence that the hole through which the shot was fired was a slanting one and the shot probably went upwards and the bullet may have been lost somewhere amidst the neighbouring houses. The witnesses for the prosecution are perfectly clear that a shot was fired at the time when Ahmad Khan chained the door or immediately afterwards and it was then that the Sub-Inspector fired three shots. It seems to me that there was no possibility of any mistake as to the shot having been fired from the inside. The fact that at the time when Muhammad Khan surrendered the next morning he was immediately questioned as regards the revolver is also significant in this connexion. I, therefore, hold that it has been satisfactorily established that a shot was fired by about the time when Ahmad Khan was chaining the door.

The second point for consideration is whether in the circumstances an offence under S. 307, I. P. C., can be said to be established, The allegation on behalf of the prosecution is that the shot was actually aimed at Ahmad Khan who had been sent to chain the door, but the evidence on this point does not appear to my mind to be at all convincing. Ahmad Khan first felt at the top of the door for the chain. It is not alleged that there was any noise at that time and it was when he was chaining the door or immediately afterwards that a shot was fired through the hole. It seems to me that it must have been on hearing the noise of the chain that the shot was fired. The night was dark and it does not seem likely that the persons outside could have been seen by Muhammad Khan. In fact they were taking precautions to place guards in the neighbourhood and this must have been done with as little warning as possible of the movement of the party to Muhammad Khan. The hole was a slanting one and pointed upwards as noted above The shot apparently went upwards and the bullet could not be found. It does not appear likely in the circumstances that the shot was aimed at anyone in particular. It seems to my mind more probable that the shot was simply fired to frighten anybody who tried to force open the door. It must also be remembered that the accused was not the only person inside. His wife was also inside and it was not impossible for her to fire the shot.

The evidence is certainly consistent with the innocence of the appellant, and hence the benefit of doubt must, I think, be given to the appellant. I accordingly accept the appeal and setting aside the conviction and sentence acquit the appellant of the charge under S. 307, I. P. C.

N.K. *Appeal accepted.*

A. I. R. 1927 Lahore 854

TEK CHAND AND AGHA HAIDAR, JJ.

E. I. Ry. Co.—Defendant—Appellant.

v.

Mohammad Shah—Plaintiff—Respondent.

Appeal No. 2925 of 1924, Decided on 12th May 1927, from decree of 1st Cl. Sub-Judge, Lahore, D/- 1st October 1924.

Railways Act, S. 72—Risk-note B— Goods rotten and destroyed by railway—"Loss" is caused to the owner.

When goods, in the custody of the railway, become rotten and are destroyed under the

orders of the railway authorities, it must be held that the owners had suffered "loss of a whole consignment," within the meaning of that phrase as used in risk-note : 43 *Mad.* 617 and *A. I. R.* 1926 *Lah.* 614, *Foll.* [P. 855 C 2]

C. H. Carden Noad and *Mehr Chand Mahajan*—for Appellant.

Jagan Nath Aggarwal and *Parduman Das*—for Respondent.

Tek Chand, J.—On the 30th July 1921 a large quantity of potatoes was booked in two wagons Nos. 13907 and 2237 at Patna City railway station on the E. I. Ry., by one Modan Mian, consigned to Lahore, the consignees being Choudhri Nizam Din and Mohammad Shah respectively. It has been found and the finding has not now been controverted by Mr. Jagan Nath for the respondent—that the goods were consigned under Risk-note B. Nizam Din sold the contents of wagon No. 13907 to Mohammad Shah, who was the consignee of the other wagon, and endorsed the relative railway receipt in his favour. Thus Mohamed Shah, plaintiff, became entitled to receive both the wagons. Wagon No. 2237 arrived at Lahore on the 18th August 1921, with its contents in a partly rotten condition and the consignee (plaintiff) took delivery of it. The other consignment, which was in wagon No. 13907, reached the Ambala railway station on the 20th August 1921 and arrived at Lahore on the 25th August. On opening this wagon it was discovered that the potatoes had entirely got rotten and were unfit for human consumption. The railway authorities instead of making delivery of the contents in that condition to the consignee, handed them over to their Sanitary Inspector for destruction.

After serving the required notice on the Agent of the E. I. Ry., and the Secy. of State for India, through the Agent of the North-Western Railway, Lahore, the plaintiff Mohammad Shah on the 15th July 1922, instituted the suit out of which this appeal has arisen, for recovery of Rs. 7,750 as compensation for "loss and injury to the goods" consigned in both wagons. In his plaint he did not admit that the goods were booked under Risk-note B.

The main defence put forward was that the goods had been booked at reduced rates under Risk-note B, and as the alleged loss or damage had not been caused by the wilful neglect of the respondents or their employees, they were not in any way liable to pay compensation to the plaintiff.

The learned Subordinate Judge upheld the defendant's plea with regard to the goods that had been dispatched in wagon No. 2237 and disallowed the plaintiff's claim to that extent. He, however, found that the defendants were guilty of wilful neglect with regard to the consignment dispatched in wagon No. 13907 and passed a decree for Rs. 2,909-6-0.

The defendants have appealed, and the first point urged on their behalf by the learned Government Advocate is that the "loss" of a "complete consignment" has not been proved and, therefore, the plaintiff has got no cause of action. He argues that all that is established is "deterioration" and not "loss" of the goods. After carefully considering his arguments on the point, I am of opinion that they are devoid of all force. The point is covered by the judgment of Campbell, J., in *Jagan Nath Baij Nath* v. *Secy. of State* (1), where it was held that when goods in the custody of the railway become rotten and are destroyed under the orders of the railway authorities, it must be held that the owners had suffered "loss of a whole consignment," within the meaning of that phrase as used in Risk-note B or H. To the same effect is the decision of the Madras High Court reported as *M. & S. M. Ry.* v. *Mattai Subba Rao* (2). These authorities completely meet the learned Government Advocate's contention, and, following them, I would overrule it.

The main point for decision, however, is whether the defendants have been rightly held by the lower Court to be guilty of wilful neglect. The proposition of law is now firmly established that the onus of proving wilful neglect lies upon the plaintiff, and Mr. Jagan Nath, for the respondent, has not sought to controvert it. The question, however, is whether the facts on the record are sufficient to prove wilful neglect on the defendants' part. After carefully going through the record and giving due weight to the arguments of both counsel, I have reached the conclusion that before a definite finding can be given on this question it is necessary to determine what is the time

(1) A. I. R. 1926 Lah. 614.
(2) [1920] 43 Mad. 617=38 M. L. J. 360=11 M.L.W. 358=55 I. C. 754=(1920) M.W.N 198.

normally taken for a consignment dispatched by goods train from Patna to arrive at Lahore. The evidence on this point is very unsatisfactory and neither party seems to have realized its importance during the trial. Both counsel are agreed that the materials on the record are very scanty and it is not possible to come to a satisfactory decision. In these circumstances the only proper course is to remit an issue under O. 41, R. 25, Civil P. C., for the determination of this question. I would, therefore, if my learned brother agrees, send back the case to the lower Court for trial of the following issue :

What was the usual time taken in 1921 by the railway to carry a wagon of potatoes from Patna to Lahore by goods train ?

Both parties will be allowed to produce fresh evidence on this point. It will be desirable if the books of the E.I. Ry., and the N. W. Ry. are examined with a view to ascertain the time actually taken by similar consignments to come from Patna or other places in its neighbourhood to Lahore in 1921. Return will be made within three months.

Agha Haidar, J.—I agree.

D.D. *Case remanded.*

A. I. R. 1927 Lahore 856

TEK CHAND, J.

Firm Ganpat Rai-Gopal Chand—Defendants—Appellants.

v.

Firm Dhanna Mal-Harbans Lal—Plaintiffs—Respondents.

Civil Rev. Petn. No. 752 of 1926, Decided on 3rd February 1927, from decree of Sr. Sub-Judge, Lahore, D/- 10th July 1926.

Punjab Courts Act (1918), *S.* 44 — *Senior Sub-Judges' jurisdiction to entertain appeal in unclassed suits is limited to Rs.* 100—*His power to pass decree in such suits is unlimited.*

Though the jurisdiction of a Senior Sub-Judge to entertain an appeal in unclassed suits is limited to Rs 100, his powers to pass a decree in such suits are unlimited and he cannot be said to have exercised a jurisdiction not vested in him by law in passing a decree for sum over Rs. 100 in an appeal of which he was properly seised : 54 *P. R.* 1912, *Foll* ; 94 *P. L. R.* 1903 ; 21 *P. R.* 1918 and 78 *P. L. R.* 1915, *Dist.* [P 857 C 2]

Prakash Chandra for *Parduman Das*—for Petitioners.

Badri Nath—for Respondents.

Judgment. — The firm of Dhanna Mal-Harbans Lal instituted a suit against the firm Ganpat Rai-Gokal Chand for rendition of accounts and recovery of Rs. 100, or such other amount as may be found due after going through the accounts of dealings between the parties. Before filing the written statement in this suit, the defendant instituted a counter-suit against Dhanna Mal-Harbans Lal for recovery of Rs. 133-8-0 alleged to be due on the strength of certain bahi accounts. On a joint application by both the parties, the two suits were referred by the Sub-Judge to the sole arbitration of one L. Gobind Ram. The arbitrator submitted an award on 23rd December 1925, whereby he found that in the first suit which had been instituted by Dhanna Mal-Harbans Lala aginst Ganpat Rai-Gokal Chand a sum of Rs. 434-13-0 was due to the plaintiff and that in addition to this sum the plaintiff was entitled to realize certain other items which third parties owed to the defendant firm. In the counter-suit which had been instituted by Ganpat Rai-Gokal Chand against Dhanna Mal-Harbans Lal the arbitrator found that nothing was due to the plaintiff and that this suit should be dismissed.

Against this award objections were filed by the firm Ganpat Rai-Gokal Chand in both suits. The trial Court after a lengthy and detailed enquiry into these objections came to the conclusion that the arbitrator had acted with material irregularity in mixing up the dealings of the firm Dhanna Mal-Sundar Singh with those of Dhanna Mal-Harbans Lal which was an entirely distinct firm and the dealings of which had nothing to do with the transactions in suit. The Sub-Judge, therefore, excluded out of consideration the items due on account of dealings with the firm Dhanna Mal-Sundar Singh and as a result dismissed the suit of Dhanna Mal-Harbans Lal, but passed a decree for Rs. 113-15-9 in the second suit instituted by Ganpat Rai-Gokal Chand.

Against these decrees two appeals were preferred to the Court of the Senior Sub-Judge, Lahore, by the firm Dhanna Mal-Harbans Lal. The appellate Court in the appeal arising out of the suit instituted by Dhanna Mal-Harbans Lal reversed the decree of the trial Court and instead decreed the plaintiff's suit for

Rs. 434- 13-0 in favour of Dhanna Mal-Harbans Lal against Ganpat Rai-Gopal Chand. The appeal arising out of the counter-suit filed by Ganpat Rai-Gokal Chand was also accepted and the suit of Ganpat Rai-Gokal Chand was dismissed.

Against the decrees of the appellate Court in both cases, petitions for revision have been preferred to this Court by the firm Ganpat Rai-Gokal Chand. In Civil Revision No. 752 of 1926 which relates to the suit for rendition of accounts filed by Dhanna Mal-Harbans Lal the only point taken by Mr. Parkash Chandra for the petititioner is that the Senior Sub-Judge has acted without jurisdiction in passing a decree for Rs. 434-13-0 in the appeal arising out of a suit for rendition of accounts in which the tentative value had been fixed at Rs. 100. He contends that the pecuniary jurisdiction of the Senior Sub-Judge to entertain appeals in unclassed suits is limited to Rs. 100 and that when he found that a decree for a sum larger than Rs. 100 was to be passed in favour of the plaintiff, he should have returned the memorandum of appeal for presentation to the District Judge. In support of this contention Mr Parkash Chandra has cited *Manna Lal* v. *Samandu* (1), *Cheloo* v. *Kali Dass* (2) and *Kalabalu* v. *Prabh Dial* (3). In my opinion none of these rulings has any bearing on the point that arises for decision in the present case. All these cases relate to decrees passed by Courts of the first instance for sums beyond their pecuniary jurisdiction.

In *Manna Lal* v. *Samandu* (1) a suit for rendition of accounts in regard to an alleged partnership was valued at Rs. 130 and was entertained and tried by a Munsif the pecuniary limit of whose jurisdiction was Rs. 1,000. The Munsif, however, passed a decree for Rs. 1,676 which was obviously beyond his jurisdiction and it was held that he was not competent to pass such a decree.

Kalabalu v. *Prabh Dial* (3) arose out of execution proceedings relating to a decree for Rs. 384 which had been passed by a Munsif and which had been upheld by the Divisional Judge. An appeal against the order of the Munsif in execution proceedings was preferred to the District Judge who could entertain appeals only to Rs. 100. It is obvious that in such a case the forum of appeal would be determined by the value of the decree which was beyond the pecuniary jurisdiction of the District Judge. In *Cheloo* v. *Kali Das* (2) a suit for injunction was improperly valued at Rs. 20 against the rules framed by the Chief Court and printed in Vol. III, at p. 92. The sole question decided in that case was that it was not competent for the plaintiff to value that suit at a figure below the minimum fixed by the rules and that the course of appeal should be determined by the real value of the suit.

In the present case it is to be noted that the plaintiff brought the suit for rendition of accounts fixing the tentative value thereof at Rs. 100. This suit was dismissed by the trial Court. The value of the suit, therefore, at the date of passing of the decree was Rs. 100 and the value for purposes of jurisdiction would be either the value as fixed in the plaint or as fixed by the decree. The only Court, therefore, that could entertain the appeal was the Court of the Senior Sub-Judge who is authorized to entertain appeals in unclassed suits up to Rs. 120.

The question, however, arises as to whether after having entertained the appeal which ex facie was within the jurisdiction of the Senior Sub-Judge he was bound to return the memorandum of appeal for presentation to the District Court when he after going into the facts of the case was of opinion that a decree for a sum larger than Rs. 100 shall have to be passed. Now, though the jurisdiction of the Senior Sub-Judge to entertain an appeal in unclassed suits is limited to Rs. 100 his powers to pass a decree in such suits are unlimited and he cannot be said to have exercised a jurisdiction not vasted in him by law in passing a decree for a sum over Rs. 100 in an appeal of which he was properly seized. This point was raised and decided in *Dayal Singh* v. *Ram Rakha* (4) where Robertson and Shah Din, JJ., after distinguishing the cases relating to the incapacity of a trial Court to pass a decree beyond its pecuniary jurisdiction made the following remarks :

(1) [1906] 46 P. R. 1906=94 P. L. R. 1906.
(2) [1918] 21 P. R. 1918=44 I. C. 816.
(3) [1915] 78 P. L. R. 1915=45 I. C. 163=80 P. W. R. 1918.
(4) [1912] 54 P. R. 1912=14 I. C. 78=122 P. W. R. 1912.

Here we have the case of an appellate Court properly seised of the appeal in the first instance from a decree which was passed by a Court competent to pass it, passing a decree which cannot be said to be clearly beyond its powers to pass. It is true that for the purpose of entertaining an appeal the jurisdiction of the Divisional Court is limited to suits which do not exceed Rs 5,000 in value. This is a provision simply to provide in the first instance whether the Divisional Court or the Chief Court shall entertain particular appeals. But when an appeal has once been been brought and entertained, it does not appear that there is any limit upon the powers of the Divisional Court any more than there is any limit on the powers of the Chief Court.

These remarks apply fully to the present case and furnish a complete answer to the arguments advanced by Mr. Parkash Chandra. I, therefore, hold that the Senior Sub-Judge was fully competent to pass the decree under appeal.

The other points mentioned in the grounds for revision were given up by the learned counsel for the petitioner. The result is that this petition is dismissed with costs.

R.D. *Petition dismissed.*

A. I. R. 1927 Lahore 858 (1)

ZAFAR ALI, J.

Beli Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 333 of 1927, Decided on 16th May 1927, from order of 1st Cl. Mag., Ferozepore, D/- 11th March 1927.

Penal Code, S. 376 — Copulating with a woman with her consent does not amount to rape.

Where the accused was convicted of committing rape on a woman aged 20, but there were circumstances to show that the accused was copulating with her with her consent and when she was caught in the act of copulation, she naturally concocted a story to save her face that the accused had carried her into the room by force. [P 858 C 2]

Held : that the offence of rape was not made out.

Nand Lal—for Appellant.

Carden Noad—for the Crown.

Judgment.—Balli Singh, appellant, has been convicted of having committed rape on a girl called Mt. Dhan Kaur and sentenced under S. 376, I. P. C., to rigorous imprisonment for five years. Mt. Dhan Kaur is a married girl aged about 20 and the appellant is 30 years of age. She has already borne two children and the appellant also has wife and children. According to her own testimony she used to go to appellant's well to wash clothes and he never molested her before. On the day of occurrence her husband was absent from the village and she with her son aged two years went to the well to wash clothes. Anokha Singh, P. W. 2, happened to pass that way and hearing the cries of the child he went up to him. As the child was all alone and was looking towards the kothi or room at the well of appellant Anokha Singh peeped into the room through a hole and saw the appellant having sexual intercourse with Mt. Dhan Kaur.

Mt. Kartaro, P. W. 3, sister of Mt. Dhan Kaur, deposed that the (Mt. Dhan Kaur) did not use to go to the well of the appellant to wash clothes if her husband were at home. Having regard to all these circumstances it would appear that the appellant was copulating with Mt. Dhan Kaur with her consent. When she was caught in the act of copulation she naturally concocted a story to save her face and stated that the appellant had carried her into the room by force. She bore a mark of contusion on her right cheek, but it cannot be said that this contusion was the result of a fist blow given by the appellant as stated by her. It is more probable that she was beaten by her husband when he came home and heard of what had happened. The conviction, therefore, cannot be maintained, and, accepting the appeal, I set aside the conviction and sentence and order that the appellant be released forthwith.

N.K. *Appeal accepted.*

A. I. R. 1927 Lahore 858 (2)

BROADWAY, AG. C. J., AND BHIDE, J.

Nafis-ud-Din and *others*—Objectors—Appellants.

v.

Secy. of State & another—Respondents.

First Appeal No. 545 of 1924, Decided on 27th June 1927, from order of Dist., Judge, Hissar, D/- 20th November 1923.

(a) Land Acquisition Act, S. 54—Reference under S. 18 rejected as time-barred—No appeal lies.

No appeal is competent under S. 54, Land Acquisition Act, from an order of the Divisional Court rejecting a reference under S. 18, on the ground that the application to the Collector was time barred under sub-S. (2), Cl. (1), of that.

section : 48 *P. R.* 1914 and 64 *P. R.* 1914, *Foll.* : *A. I. R.* 1926 *Rang.* 135, *not Foll.* : 39 *Cal.* 393, *Ref.* [P 859 C 2]

(*b*) *Limitation Act*, S. 12—*Application under Land Acquisition Act*, S. 18—*S.* 12 *does not apply.*

Section 12 does not apply in computing the periods of limitation prescribed for an application under S. 18 (1), Land Acquisition Act, 1894 : 79 *P. R.* 1904, *Foll.* [P 859 C 2]

Nanwa Mal—for Appellants.

C. H. Carden Noad and *J. N. Bhandari*—for Respondents.

Broadway, Ag. C. J.—The Government acquired certain land for the purpose of building a grain mandi. The land belonged to R. B. Makhan Lal, but was in the occupancy tenancy of certain other individuals. The Collector made an award on 29th November 1922. Makhan Lal and certain of his occupancy tenants filed objections to that award on 9th January 1923 and an order of reference to the District Court was accordingly made. On 2nd February 1923 the remaining occupancy tenants applied to the Collector asking that the question of what should be awarded to them should also be referred to the District Court. The Collector made a reference. At the hearing before the District Court an objection was taken to the competency of this last reference on the ground that the application tc the Collector was made after the prescribed period of limitation and that, therefore, the District Court had no power to vary the award of the Collector. It was discovered that of these latter objectors the application so far as it related to one Yakub Ali was within time while *qua* the remainder it was barred. Yakub Ali was accordingly given a slightly enhanced amount while the reference *qua* others was dismissed as barred by time.

Against this order dismissing their application Wahid-ud-Din and others have come up to this Court through Mr. Nanwa Mal in appeal and the first point for decision is whether or not the reference was barred by time. That it was made after the prescribed six weeks cannot be denied. It has been urged by Mr. Nanwa Mal that the provisions of S. 12 (4), Limitation Act, apply to such awards and that therefore the application made was within time. It appears that there is a copy of the award on the record which was applied for on the 21st December 1922 and was completed on 11th January 1923 and delivered on 16th January 1923. The copy, however, does not show who was the applicant or to whom the copy was delivered. It does not, therefore, afford any real assistance. Having regard to the decision in *Ghulam Mohy-ud-Din* v. *Secy. of State* (1), it seems to me that the view taken by the learned District Judge was correct. It was there held that no appeal was competent under S. 54, Land Acquisition Act, from an order of the Divisional Court rejecting a reference under S. 18, on the ground that the application to the Collector was time-barred under sub-S. (2), Cl. (a) of that section. A similar view was taken in *Secy. of State* v. *Hakim* (2), in which it was clearly held that the period of limitation laid down in S 18, Land Acquisition Act, could not be extended on the ground of minority. Further, in *Bhagwan Das* v. *Collector of Lahore* (3), it was specifically held by a Division Bench of the Chief Court that

S. 12, Limitation Act, 1877, does not apply in computing the periods of limitation prescribed for an application under S. 18 (1), Land Acquisition Act, 1894, and therefore the time requisite for obtaining a copy of the award cannot be deducted in computing the periods laid down by sub-S. 2 of S. 18 of that Act.

Mr. Nanwa Mal for the appellants, however, drew attention to a non-reported case *H. N. Burjorjee* v. *Special Collector of Rangoon* to be found in *A. I. R.* 1926 *Rang.* 135. This to some extent supports the learned advocate. But, after a careful consideration and with all respect to the learned Judge who was responsible for that decision I am unable to accept it as an authority against the Division Bench decisions of the Chief Court that have already been cited. In my view the conclusion arrived at by the learned District Judge was correct and I also consider that no appeal lay to this Court from the order of the learned District Judge : see *Hasun Molla* v. *Tasir-ud-Din* (4).

I would, therefore, dismiss this appeal with costs.

Bhide, J.—I concur.

D.D. *Appeal dismissed.*

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(1) [1914] 48 P. R. 1914=203 P. L. R. 1914=24 I. C. 379=149 P. W. R. 1914.
(2) [1914] 64 P. R. 1914=244 P. L. R. 1914=25 I. C. 448=158 P. W. R. 1914.
(3) [1904] 79 P. R. 1904=133 P. L. R. 1904.
(4) [1912] 39 Cal. 393=15 I. C. 925.

A. I. R. 1927 Lahore 860 (1)

ADDISON, J.

Kalu and *others*—Defendants—Appellants.

v.

Sadha Singh—Plaintiff—Respondent.

Second Appeal No. 2161 of 1926, Decided on 5th Jan. 1927, from decree of Sr. Sub-Judge, Ferozepore, D/-6th July 1926.

Suits Valuation Act (7 of 1887), S. 11—Objection to valuation not taken in lower Courts—Party is not entitled to object in second appeal.

Where a defendant omitted to object to the under-valuation of the plaint in the Court of first instance, nor did he object to the under-valuation of the appeal in the lower appellate Court,

Held: that S. 11 governs all cases of erroneous valuation, and as the defendant did not object to the jnrisdiction in the lower Courts, he could not be allowed to raise it in second appeal: *A. I. R.* 1925 *Lah.* 290 (*F. B.*), *Foll.* [P 860 C 1]

L. C. Mehra—for Appellants.

Vasdeo Kumaria for *Fakir Chand*—for Respondent.

Judgment.—The plaintiff sued the defendants for an injunction restraining them from interfering with his building of a wall. The plaintiff valued his suit at Rs. 100 for purposes of jurisdiction. His suit was dismissed and the plaintiff then presented an appeal in the Court of the Senior Sub-Judge; the appeal was also valued at Rs. 100. The Senior Sub-Judge heard the appeal without objection and accepted it, granting the plaintiff a decree in certain terms. Against this decision this second appeal has been admitted.

The first ground of appeal is that according to the rules suits for injunctions should be valued at over Rs. 100 and, therefore, the appeal lay not in the Court of the Senior Sub-Judge, but in the Court of the District Judge. There is no force, however, in this contention because, as held in the case of *Sardar Khan* v. *Aisha Bibi* (1), S. 11, Suits Valuation Act, governs all cases of erroneous valuation. This means that, as the appellant before me did not object to the jurisdiction of the Senior Sub-Judge, he cannot now be allowed to raise it.

The rest of this second appeal is barred by clear finding of fact arrived at on evidence by the lower appellate Court. Nothing has been said before me which would show that the lower appellate Court erred in any way which would give rise to a second appeal.

The appeal is, therefore, dismissed with costs.

J.V. *Appeal dismissed.*

(1) A. I. R. 1925 Lah. 290=6 Lah. 105 (F.B.).

A. I. R. 1927 Lahore 860 (2)

AGHA HAIDAR, J.

Mahomed Hassan and *others*—Defendants—Appellants.

v.

Haji and *others*—Pltffs.—Respondents.

Second Appeal No. 602 of 1926, Decided on 8th December 1926, from decree of Dist Judge, Multan, D/- 6th December 1926.

Civil P. C., O. 22, R. 4—Decree by lower appellate Court for possession in favour of all plaintiffs—No shares specified—During pendency of appeal by defendants some plaintiffs dying—No application for bringing legal representatives on record—Appeal abates in toto.

Where the decree of the first appellate Court was one in favour of all the plaintiffs for possession of the land in suit and no shares were specified; and during pendency of the appeal some of the plaintiffs-respondents died,

Held: that in the absence of application for substituting their legal representatives within time the whole appeal must be dismissed as abated: *A.I.R.* 1925 *Lah.* 124, *Foll.* [P 860 C 2]

M. Obedulla—for Appellants.

Niaz Muhammad and *Muhammad Amin*—for Respondents.

Judgment.—In this suit the plaintiffs claimed to be inferior proprietors of certain land and alleged that the land had been under the Chenab river for a long time, that it had re-appeared three years before suit and that when it became fit for cultivation one year before suit the defendants took unlawful possession of it. The trial Court dismissed the suit, but on appeal it was decreed by the learned District Judge. The decree of the District Judge was one in favour of all the plaintiffs for possession of the land in suit. No shares were specified and no question of shares was in controversy in the suit.

The defendants have preferred a second appeal and admittedly the appeal has abated against two of the plaintiffs-respondents, Hayat Muhammad and Rahim Bakhsh because these men are dead and no application for substituting their legal representatives was made within time. In these circumstances the whole appeal must be dismissed with costs because there cannot be two contradictory decrees

in the same litigation and the representatives of Hayat Muhammad and Rahim Bakhsh could effectively prevent the execution of any decree passed by us in favour of the defendants-appellants against the remaining respondents. The situation is similar to those dealt with in *Wali Mohd.* v. *Mahlu* (1) and in *Muhammada* v. *Abdulla* (2).

R.D. *Appeal dismissed.*

(1) A. I. R. 1925 Lah. 124=5 Lah. 429.
(2) Civil App. No. 893 of 1922.

A. I. R. 1927 Lahore 861

DALIP SINGH, J.

Sardara—Plaintiff—Appellant.

v.

Hayat Bibi—Defendant—Respondent.

Second Appeal No. 2126 .of 1926, Decided on 8th January .1927, from decree of Dist. Judge, Gujranwala, D/- 1-6-1926.

Civil P. C., O. 32, *Rr.* 3, 4 — *Treating a person as guardian ad litem is sufficient.*

The omission to cancel a previous order rejecting the application for being appointed a guardian ad litem of a minor or to pass a formal order appointing such guardian does not vitiate the proceedings : 61 *P. R.* 1915, *Foll.*

[P 861 C 2]

Muhammad Alam—for Appellant.

Ishwar Das—for Respondent.

Judgment.—The plaintiff in this case sued for restitution of conjugal rights against a minor alleging that she was his wife formally married to him through her guardian and that she had been living with him as his wife. One Allah Ditta was appointed guardian ad litem for the minor in the plaint. Allah Ditta was a maternal uncle of the defendant and as he is alleged to have a hand in the marriage, he was hardly a proper person to be a guardian ad litem. One Mt. Fazal Bibi, a widow of Mt. Hayat Bibi's brother, made an application on 17th March 1925, to be appointed guardian ad litem for the minor Mt Hayat Bibi.

On 18th March 1925, the first date of hearing, Allah Ditta confessed judgment and prayed to be released from carrying on the suit. He was evidently unwilling to act as guardian. Mt. Fazal Bibi also filed a jawab-i-dawa on behalf of Mt. Hayat Bibi alleging that no marriage had taken place at all. On 19th March the Court passed an order on the application of Mt. Fazal Bibi to be appointed guardian an litem rejecting the application.

On 19th March it, however, also ordered that the written statement put in by Mt. Fazal Bibi should be placed on the record. It then proceeded to frame issues on the written statement put in by Mt. Fazal Bibi and decreed the suit.

Mt. Fazal Bibi appealed to the learned District Judge and an objection was taken that as she was not the guardian ad litem of the minor, she was not entitled to appeal on her behalf. The learned District Judge held that Mt. Fazal Bibi had been treated as a guardian ad litem and the Court had merely omitted to record a formal order to that effect. He dismissed the suit holding that Mt. Hayat Bibi had not attained the age of puberty at the time of her marriage and that she had not willingly cohabited with her husband at any time after attaining the age of puberty, and that the marriage, if any, was repudiated by her on attaining the age of puberty.

In second appeal it is contended that the appeal to the District Judge was not competent. It is pointed out that Mt. Fazal Bibi's application had been definitely rejected by the Court. This is correct. I can only suppose that the Court on finding that Allah Ditta was not acting as a guardian and was confessing judgment proceeded to treat Mt. Fazal Ribi as the guardian ad litem. It forgot to cancel its order rejecting the application of Mt. Fazal Bibi or to pass a formal order appointing her as guardian ad litem. Following *Narain Das* v. *Ralli Brothers* (1), I hold that the omission to cancel the previous order and to pass a formal order appointing Mt. Fazal Bibi as a guardian does not vitiate the proceedings.

On the merits I hold that the learned District Judge was right in holding that Mt. Hayat Bibi had repudiated the marriage after attaining puberty and that there is no evidence on the record to show that she cohabited with her husband after attaining the age of puberty. I also hold that the factum of marriage is not satisfactorily proved. No doubt, certain witnesses have stated that a formal marriage took place, but it is pointed out by counsel for the respondent that these witnesses stated that the amount of dower was fixed at Rs. 100 whereas in the plaint it is stated that the dower was fixed at

(1) [1915] 61 P.R. 1915=31 I.C. 45=136 P.W. R. 1915.

Rs. 200. Had the witnesses been present, they could hardly make a mistake on this point. I, therefore, dismiss the appeal with costs.

J V. *Appeal dismissed.*

A. I. R. 1927 Lahore 862 (1)

DALIP SINGH, J.

Ram Bilas—Plaintiff—Petitioner.

v.

Sheo Nath and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 588 of 1926, Decided on 14th January 1927, from decree of Sr. Sub-Judge, Rohtak, D/- 30th April 1926.

Civil P. C., S. 115—*Error of law.*

An error of law in the judgment of a lower Court is not a ground of revision. [P 862 C 2]

Parkash Chandra for *Shamair Chand* —for Petitioner.

Bishan Nath for *Anant Ram*—for Respondent.

Judgment. — In this revision the plaintiff sued some of the legal representatives of one Molar, deceased, on a bahi account. It was objected by the defendants impleaded that there were other legal representatives of Molar who were necessary parties to a suit of this description. On this objection the plaintiff first of all applied for time to implead the remaining legal representatives. On 23rd July 1925, the pleader for the plaintiff stated he would not implead the other legal representatives of Molar, deceased, because the suit was time barred as against them. It was ordered that the other heirs of Molar, deceased, could not be made parties to the case. The trial Court then held that the suit could proceed against the present defendants alone and gave a decree for the sum claimed against the property of Molar, deceased, in the hands of the defendants.

On appeal, the learned Senior Sub-Judge held no single legal representative of Molar could be called upon to pay the whole of the debt due from Molar. He also held that as the estate of Molar deceased, was not fully represented by the present defendants, the suit was not properly constituted. He held, in other words, that the other legal representatives were necessary parties and dismissed the suit leaving the parties to bear their own costs throughout.

In revision it is urged that the lower appellate Court's order dismissing the suit was wrong as all the legal representatives were not necessary parties. Counsel argues that on the analogy of S. 43, Contract Act, the same principle should be applied to the case of several legal representatives. S. 43, Contract Act, has no bearing on this point. No other law or authority has been cited before me by counsel for the petitioner. He contends, however, that the estate of Molar to the extent to which it has come into the hands of the present defendants is fully represented by them, and that, therefore, the argument of the lower Court is not valid. On the other hand the counsel for the respondents contends that the argument of the lower Court is correct. He has also cited no law or authority on the point. The point is not free from difficulty, but the revision falls on the short ground that an error of law, assuming that there is such an error in the judgment of the lower appellate Court, is not a ground for revision. I, accordingly, dismiss it and I make no order as to costs.

J.V. *Petition dismissed.*

A. I R. 1927 Lahore 862 (2)

BROADWAY, J.

Lila Ram—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revn. No. 1259 of 1927, Decided on 14th October 1927, from order of Dist. Magistrate, Muzaffargarh, D/-11th February 1927.

Criminal Trial — Grounds for conviction— Suspicion is no ground.

Suspicion is not sufficient to base a conviction upon, nor mere suspicion would warrant harassment of the suspected person by criminal proceedings. [P 864 C 1]

Nand Lal—for Petitioner.

Anant Ram Khosla for *Govt. Advocate* —for the Crown.

Judgment. — A bullock was stolen some time in September 1925. On the 4th September 1926 it was found in the possession of one Hassan. This Hassan is a tenant of a man named Lila Ram, and on being asked about this bullock stated that it was the property of his master. The head constable tried for about a fortnight to get hold of Lila Ram in order to examine him but apparently

failed. The Sub-Inspector then proceeded to the spot and, apparently, without any difficulty, secured the presence of Lila Ram who at once stated that the animal had been obtained by him, on an exchange from a man named Habib. When Habib was questioned he admitted this fact and stated that he himself had obtained this animal from one Kamala. Kamala, when questioned, claimed that the animal was his own, being what be called a ghar jam. As a result of the investigation Kamala was sent up for trial under S. 411, I. P. C. When he was examined, he adhered to the statement made by him originally and claimed the animal as his property. Subsequently it appears that he put in a written statement and also stated in Court that the whole of his story was false and had been made by him at the instance of Lila Ram who promised that he would have him defended and that the result of the case would not be in any way serious. As a matter of fact a relative of Lila Ram appeared for Kamala as his counsel.

When Kamala made this statement attacking Lila Ram he engaged another counsel and led evidence in support of his story. This story was believed by the Revenue Assistant, Sayad Muhammad Shah, who acquitted Kamala and, holding that Lila Ram had committed an offence under S. 411, directed that proceedings should be started against him under that section. At the same time he sent the case to the District Magistrate in order that that officer should make over the case to some other Magistrate for trial. This was on the 13th December 1926. On the 11th February 1927 the District Magistrate, Sardar Nihal Singh, recorded an order on what appears to be an application filed by Lila Ram asking that the proceedings should be quashed or the case transferred to the District Magistrate's Court. Sardar Nihal Singh declined to forward the case to this Court with the recommendation that the proceedings should be quashed, but expressed his opinion that Habib having stated on oath that he had given the bullock to Lila Ram in exchange, the burden of proof should in the first instance have been laid on him, Habib. The Magistrate, Sayad Muhammad Shah, was therefore asked to state on what grounds he had not first proceeded against Habib. The Magistrate replied, I think very properly, that the reasons would be found in his judgment. A reference to the judgment shows that whether the reasons were right or wrong they were certainly detailed. Nothing appears to have been done till 27th May 1927, when Sardar Nihal Singh recorded an order in which he says that he did not think the Magistrate had good grounds for making a case against Lila Ram, but that he thought it better to take the advice of the prosecuting inspector, and the case was fixed for the 30th May 1927. On the 21st June 1927 Sardar Nihal Singh passed another order saying that he had intended to try this case himself, but that as he was about to make over charge of the district he was unable to do so and transferred the case for trial to the Court of Sardar Harbans Singh.

Lila Ram has moved this Court under S. 439, Criminal P. C., against the order of the District Magistrate. It is clear that the District Magistrate, Sardar Nihal Singh, was of opinion that there was no case against Lila Ram and in those circumstances it seems to me that he should have proceeded to record an order to that effect discharging Lila Ram. Instead of doing that, the charge has been held pending over Lila Ram's head for about ten months without anything having been done. Dr. Nand Lal, who appears for Lila Ram, thought it necessary to read a good deal of the evidence which had been recorded in the case against Kamala in the hope that that evidence would exonerate his client. On the other hand counsel for the Crown has urged that there would be evidence forthcoming especially if a certain amount of investigation were to be made, which might result in the conviction of Lila Ram. When questioned what that evidence would be, he mentionod the witnesses produced by Kamala in his defence, and Hassan, the tenant or servant of Lila Ram. Now, the evidence recorded in the case against Kamala to my mind raises considerable suspicion as to the probity of Lila Ram. The fact that for about a fortnight he was not accessible to the head constable is certainly suspicious. The fact that Kamala was represented by a member of the Bar related to Lila Ram is also not without significance; nor is there any real reason given why he should have taken this particular animal in exchange for another

from Habib. Habib himself, as a witness, stated that he effected the exchange, but stated that he did so foolishly. As I have said, taking all these facts into consideration, there is certainly suspicion against Lila Ram. At the same time suspicion is not sufficient to base a conviction upon, nor do I think that mere suspicion would warrant harassment of the suspected person by criminal proceedings which even the District Magistrate thought were unsound. Kamala must, of course, adhere to his statement, but if Habib does the same, then it seems to me that Lila Ram's guilt could scarcely be proved.

In these circumstances I consider that further proceedings against Lila Ram in connexion with this matter should be quashed and I order accordingly. In this view of the case I do not think it necessary to discuss certain points of law raised by Dr. Nand Lal, but will merely state that I have no doubt whatever in my own mind that the Magistrate had, in law, the power to take the action he did.

N.K. *Order accordingly.*

A. I. R. 1927 Lahore 864

TEK CHAND, J.

Sundar Singh—Plaintiff—Petitioner.

v.

Khushi Ram and *another*—Defendants—Respondents.

Civil Revn. No. 770 of 1926, Decided on 4th February 1927, from decree of Small Cause Court Judge, Amritsar, D/- 30th July 1926.

(a) *Evidence Act, S.* 101—*Pro-note—Suit on—Different stories set up by plaintiff—Burden of proving consideration shifts on him.*

Where, in a suit on promissory note, plaintiff set up different stories as to consideration at different stages, the burden of proving consideration shifts on him : 48 *P. R.* 1915, *Foll.*

[P 865 C 1]

(b) *Negotiable Instruments Act, S.* 118—*Consideration.*

There is a legal presumption under S. 118 that an endorsement on a promissory note is to be presumed to be for valuable consideration.

[P 865 C 1]

Jagan Nath Aggarwal—for Petitioner.

Mukand Lal Puri—for Respondents.

Judgment.—On 11th February 1924, Khushi Ram, defendant 1, executed a promissory note for Rs. 450 in favour of Jawahar Singh, defendant 2. In the promissory note it was merely stated that the promisor owed this money to the promisee, and in lieu thereof he had executed this promissory note which was to bear interest at 6 per cent. per annum. On 6th August 1924, Jawahar Singh promissee, assigned this promissory note in favour of Sundar Singh, plaintiff. On 23rd January 1926, Sundar Singh brought a suit on the foot of this promissory note against both Khushi Ram, the original promisor, and Jawahar Singh, the assignor. The execution of the promissory note was admitted by defendant 1. The Judge of the Court of Small Causes at Amritsar noted that the only point for determination was whether the promissory note was executed without consideration. After a detailed enquiry the learned Judge in a carefully written judgment held that under the circumstances of the case, the onus shifted on to the plaintiff to prove that consideration passed, and on the facts he held that the plaintiff had failed to discharge this onus. He accordingly dismissed the suit with costs.

Against this judgment and decree the plaintiff has come up to this Court on the revision side, and the first point taken by Mr. Jagan Nath on his behalf is that, under the circumstances of the case, the learned Judge of the Court below was wrong in holding that the onus shifted back to the plaintiff and that, as the question of onus is of vital importance in this suit, this Court should scrutinize the facts again, and laying the onus upon the defendant, should pass a decree in favour of the plaintiff. I have given due weigtt to the arguments of the learned counsel and have gone through the relevant portions of the record with him. In my opinion the conclusion arrived at by the learned Judge was fully justified on the record. Jawahar Singh, defendant 2, when examined as P. W. 1, on 31st May 1926, definitely stated that Khushi Ram had received Rs. 450 in cash from him and executed the promissory note in his favour. Later on, the ground was shifted and a story was put forward that a stamped ruqqa had been obtained from Khushi Ram on the morning of the 11th February 1924, when the amount was paid in cash and that in lieu of this ruqqa the promissory note in suit was executed the same day in the evening. This story

has not been believed by the lower Court, and in my opinion rightly. In face of this finding Mr. Jagan Nath sought to argue that the consideration for the promissory note was not the sum of Rs. 450 paid in cash, but that it was the release of certain rights by Hari Singh against Khushi Ram, the details of which are given in the judgment of the lower Court. In my opinion the plaintiff and defendant 2 cannot be allowed to shift their ground in this manner so often. In any case under the circumstances the Court was justified in holding that the onus had shifted on to the plaintiff. This view of the lower Court is in consonance with *Mt. Zohra Jan* v. *Mt. Rajan Bibi* (1). I, therefore, hold that there is no valid ground for interference so far as defendant 1 is concerned. I accordingly uphold the finding of the lower Court dismissing the suit *qua* defendant 1.

But I fail to see how the Court could have dismissed the suit against defendant 2. There is a legal presumption under S. 118, Negotiable Instruments Act, that an endorsement on a promissory note is to be presumed to be for valuable consideration. Jawahar Singh has not alleged that the assignment was without consideration. Under the circumstances the suit should have been decreed against Jawahar Singh, defendant 2.

I accordingly accept this revision to this extent : that a decree for the sum claimed will be passed with costs against Jawahar Singh, defendant 2, but the suit will be dismissed against Khushi Ram, defendant 1, who will recover his costs in both Courts from the plaintiff.

D.D. *Revision partly accepted.*

(1) [1915] 48 P. R. 1915=62 P. W. R. 1915=28 I. C. 402=146 P. L. R. 1915.

A. I. R. 1927 Lahore 865 (1)

SHADI LAL, C. J.

Nand Ram—Plaintiff—Petitioner.

v.

Mt. Ralli and *others* — Defendants—Respondents.

Civil Revn. No. 345 of 1925, Decided on 16th July 1925, from order of Dist. Judge, Hoshiarpur and Kangra, D/- 3rd March 1925.

Civil P. C., O. 22, R. 9—Abatement—Order though amounting to a decree, can be set aside.

An order declaring that the suit abated as against the deceased person for failure to implead his legal representatives within the prescribed period of limitation can be set aside on an application under O. 22, R. 9, though the order deciding that the suit had abated in toto amounted to a decree. [P 865 C 2]

Fakir Chand—for Petitioner.

Sain Das—for Respondents.

Judgment.—It is common ground that Lalji, one of the defendants who were in unlawful possession of the house in dispute died in October 1923, and that his legal representatives were not impleaded within the prescribed period of limitation. When the matter was brought to the notice of the Sub-Judge, he passed an order on 13th May 1924 declaring that the suit had abated as against the deceased Lalji. The learned Judge also decided at the same time that, as the house was in the joint possession of Lalji and other persons the partial abatement caused by the failure to implead Lalji's legal representatives resulted in the total abatement of the suit. Now that portion of the order which decided that the suit had abated in toto may be a decree, but, in so far as the order declaring the partial abatement as against the deceased Lalji is concerned, I am of opinion that it is an order which could be set aside on an application under O. 22, R. 9, Civil P. C. The Courts below were wrong in holding that an application under R. 9 was not competent. I accordingly set aside the orders of the lower Courts and remand the case to the Court of first instance with the direction that it should determine the application made by the plaintiff under O. 22, R. 9, Civil P. C., on the merits. I leave the parties to bear their own costs in this case.

N.K. *Case remanded.*

A. I. R. 1927 Lahore 865 (2)

ADDISON, J.

Labh Singh—Defendant—Appellant.

v.

Gurbakhsh Singh—Plaintiff—Respondent.

Second Appeal No. 1421 of 1926, Decided on 27th January 1927, from decree of Dist. J., Jullundur, D/- 12th Feb. 1926.

Registration Act, S. 17, sub-S. (2) (vi)—Suit dismissed in accordance with compromise—Compromise not recorded in decree under O. 23, R. 3—Subsequent suit based on same compromise—It is inadmissible in evidence if it deals with property over Rs. 100.

Where a suit is dismissed in accordance with

a compromise arrived at between the parties, but the compromise is not recorded under the provisions of O. 23, R. 3, such compromise is not admissible in evidence in a subsequent suit to enforce the same, if it purports to deal with property worth more than Rs 100, and is not registered : *A. I. R.* 1919 *P. C.* 79 and *A. I. R.* 1923 *Lah.* 581, *Foll.* [P 866 C 2]

Behari Lal—for Appellant.

Judgment.—Gurbakhsh Singh, the son of Lal Singh, and Mt. Indi, his mother, sued Lal Singh on 19th November 1923, for half of 75 kanals of land on the allegation that the mother wanted to live separately from her husband along with her son and that they required that amount of land as their maintenance. They also started a criminal case against Lal Singh. On 7th February 1924 Gurbakhsh Singh, the son of Lal Singh, appeared before the Court with his pleader and put in a compromise signed by himself and his father and dated 4th February 1924 to the effect that the father had given one-third of the land, and also fixed maintenance for his wife, and therefore, the plaintiff withdrew from the suit. The father, Lal Singh, was summoned for 19th February 1924. He denied that he had executed any such compromise, but admitted that he had compromised the criminal case. It had been promised that the civil suit will be withdrawn, but he had not effected any compromise giving up any part of his land. He had come to know that the plaintiffs had put in such a compromise, upon which his signature must have been obtained by fraud. The Court enquired into the matter and came to the conclusion that there had been a compromise, but as the effective terms of the compromise were that the plaintiffs withdrew from the suit, he dismissed the suit in accordance therewith.

The plaintiff Gurbakhsh Singh then instituted the present suit against his father Lal Singh on the strength of the above-mentioned compromise for possession of one-third of his father's land. It was admitted in the plaint that though it was stated that the land had actually been given—in fact this had not been done—and he, therefore, sued for possession. The father again denied entering into the compromise and stated that it was fraudulent. The trial Court decreed the suit and the appeal was dismissed by the learned District Judge. Against his decision this second appeal has been preferred.

The case is not very different from that reported in *Ghulam Mustafa* v. *Ghulam Nabi* (1). There a compromise was made in writing and tendered to the Court which held that as the suit was in respect of one village only, and the compromise dealt with the land of the parties in five villages, a decree could not be passed in accordance with the terms of the compromise, and ordered that the record of the case be consigned to the record room in accordance with the compromise. The agreement itself was not recorded, nor was a decree passed in accordance therewith. It was held in a subsequent suit that the Court should have recorded the whole of the compromise under O. 23, R. 3, Civil P. C., and then passed a decree in accordance with so much of the compromise as related to the subject-matter of the suit. It was further held that as the compromise had not been recorded by the Court the exception provided in sub-S. 2 (vi), S 17, Registration Act, in respect of any decree or order "of a Court" was not applicable and the deed of compromise being unregistered was consequently inadmissible in evidence. This ruling, followed the Privy Council ruling *Hemanta Kumari Bebi* v. *Midnapur Zamindari Co.* (2), and certain other rulings. In the PrivyCouncil ruling their Lordships observed as follows:

> A perfectly proper and effectual method of carrying out the terms of this rule would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit. It could introduce the agreement in a schedule to the decree but in either case although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.

In the present case, though the suit was dismissed in accordance with the compromise that compromise was never recorded under the provisions of O. 23, R. 3, Civil P. C. If there was an agreement as held, to give the son one-third of the father's property, that was an agreement regarding property valued at more than Rs. 100, and the document was not admissible in evidence for want of regis-

(1) A. I. R. 1923 Lah. 581=4 Lah. 263.
(2) A. I. R. 1919 P. C. 79=47 Cal. 485=46 I. A. 240 (P. C.).

tration. The suit should have been dismissed on these grounds.

I accept the appeal ex parte and, setting aside the order of both the Courts, dismiss the plaintiff's suit with costs in the trial Court to the defendant-appellant.

J.V. *Appeal accepted.*

A. I. R. 1927 Lahore 867

TEK CHAND, J.

Indar Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 558 of 1927, Decided on 18th July 1927, from order of 1st Cl. Magistrate, Kasur, D/- 30th April 1927.

Penal Code, S. 376—Rape—When the offence is not proved to have been committed, accused cannot be convicted.

Where in a case of rape the only evidence was the circumstance that semen was detected on a piece of cloth which was recovered from the house of the accused, and that it was also discovered on the silwar which was alleged to have been worn by the woman at the time, and the accused was a young man who was married and the woman was a grown-up woman who admittedly passed the night before making the first information report at her husband's house.

Held, that that was a wholly neutral circumstance which did not help the case of either side. [P 870 C 1]

Nand Lal and *Saunders*—for Appellants.

Des Raj Sawhney—for the Crown.

Judgment.—The appellants Dalip Singh and Indar Singh, Jats of mauza Thing in Chunian tehsil of the Lahore District, aged respectively 22 and 32 years have been convicted by a Magistrate of the 1st Class (with enhanced powers) under S. 376, I. P. C. for having, committed rape on P. W. 1 Mt. Gago on the 23rd February 1927 and sentenced each to undergo rigorous imprisonment for seven years and pay a fine of Rs. 500. The convicts have appealed and I have heard Dr. Nand Lal and Mr. Saunders on their behalf while Mr. Sawhney has addressed me on behalf of the Crown.

The story for the prosecution which has been believed by the Magistrate is as follows: Mt. Gago, P. W. 1, is a young Jat woman about 20 years of age, who was married to Natha Singh of mauza Thing about two years before the occurrence. Her father Ram Singh, P. W. 2, belongs to mauza Sultanke which is situate in thana Kahna Kachha. Sometime in December 1926, she went to her parents' house and stayed there for about a month. She states that on this visit she was as usual accompanied by her husband who stayed with her at her parents' house for about 20 days after which he came back to his own village. At the time of his going away from mauza Sultanke it was arranged between her father Ram Singh and Natha Singh that on the 12th Phagan Mt. Gago should be sent to mauza Thing. The arrangement was that she would take the train at Raiwind and alight at Pattoki railway station where her husband Natha Singh would come to receive her. It is alleged that in accordance with this arrangement she took the train at Raiwind and alighted at Pattoki at about 1 p.m. on 23rd February 1927.

She states that when she left her father's house she had only eight annas with her with which she bought the railway ticket. During her journey from Raiwind to Pattoki she, somehow or other, lost her ticket and when on getting down at Pattoki railway station she was asked to produce her ticket by the ticket collector she failed to do so. She, however, remained standing there in the crowd for some time and then managed quietly to slip away from the platform. She went to the shivala where her husband generally used to stay and not finding him there she started alone for her village Thing which is at a distance of about 1½ miles from Pattoki. When she had gone half a mile she was met by P. W. 3, Ahmad Din, contractor, who enquired from her who she was and why she was going alone. On her replying that she was on her way to mauza Thing and that she was going alone because her husband who was expected to receive her at the railway station had not arrived, Ahmad Din suggested that it is not safe for her to go without a companion and that she should be accompanied by somebody to her village. While this conversation was going on between Ahmad Din and Mt. Gago, Dalip Singh and Indar Singh, appellants, arrrived on a mare (which both of them were riding together) from Pattoki mandi where it is stated a cattle fair was being held that day. Ahmad Din asked the appellants where

they were going and they replied that they belonged to Thing and were returning home. On this Ahmad Din suggested that Mt. Gago might go with them. Mt. Gago states that she at first refused to go because the accused were not known to her before. The accused, however, stated that they knew her very well and that they would be glad to take her to the village. On this Ahmad Din went in another direction and Mt. Gago started towards the village in company with the two appellants. She states that both the appellants got down from the mare and made her ride it. They at first followed on foot for a short distance but later on Dalip Singh, appellant, jumped over the mare and seated himself in front of Mt. Gago. Later on it is stated Mt. Gago wanted to get down from the mare but she was not allowed to do so. They were met near the canal bridge by Surain Singh, P. W. 4, and Pir Bakhsh, P. W. 5 who happened to pass by, and on seeing whom Mt. Gago began to cry.

These two persons asked the appellants why the woman was crying and they replied that she was their brother's wife and had run away from her home on account of a family quarrel and they were taking her back. She was then taken to a kotha in a haveli belonging to Dalip Singh appellant which is situate at a distance of 40 karams from the abadi of mauza Thing. It is alleged that in this kotha rape was forcibly committed on her several times by the two appellants turn by turn. Her mouth had been gagged and she could not raise a hue-and-cry and seek outside assistance. She, however, alleges that she was crying slowly and hearing her sobs P W. 6, Jindar Singh and P. W. 8, Hazara Singh came in and rescued her from the clutches of the two appellants. She was then taken to the village that very afternoon where she remained during the night. The first information was lodged by her at Thana Pattoki which as already stated is at a distance of $1\frac{1}{2}$ miles from the scene of the occurrence.

It will be seen from the summary of the case for the prosecution as given above that the case against the appellants rests on the evidence of P. W. 1 Mt Gago the woman who is alleged to have been raped and of P. Ws. 6 and 8, Jindar Singh and Hazara Singh who are alleged to have caught the appellant red-handed while committing the offence. If the evidence of these three witnesses is believed, as has been done by the learned trial Magistrate, there can be no manner of doubt that the appellants are guilty and having regard to the serious nature of the offence and the manner in which the woman was outraged I would not be inclined to interfere with the sentence. If on the other hand, the evidence of these witnesses does not carry conviction, then the appellants are entitled to be acquitted. It is conceded by the learned counsel on both sides that the evidence of P. Ws. 4 and 5 Surain Singh and Pir Bakhsh is not by itself sufficient to bring home the charge of rape against the appellants. Their statements, even if true, are consistent with the versions as given by the prosecution as well as by the defence. I would, therefore, examine the evidence of Mt. Gago and the two eyewitnesses Jindar Singh and Hazara Singh a little more closely.

Mt. Gago in her statement as P W. 1, stated that her husband had lived for 20 days at her father's house at mauza Sultanke in December 1926 and that when he left for mauza Thing he had arranged with her father Ram Singh that she should be sent on the 23rd February 1927 by the noon train from Raiwind and that he would receive her at the Pattoki railway station. P.W. 2 Ram Singh however, states that Natha Singh stayed with him for three days only and not for 20 days as stated by Mt. Gago. He does not say that it had been arranged between him and Natha Singh that the woman should be sent on the 23rd February in the manner stated by her. On the other hand he states that one day before 23rd February a messenger, Karam Din Mochi, arrived from mauza Thing bringing information that Natha Singh's younger brother had broken his arm and that Mt. Gago should be sent the next day by train and that he, Natha Singh, would meet her at the Pattoki railway station with a horse. This discrepancy by itself would not be very important, but we have to take these two varying statements along with the admitted fact that Natha Singh did not meet Mt. Gago at the Pattoki railway station as already arranged. It is also significant that Natha Singh has not been produced as a witness by either party.

The next point to be noticed is that in her statement Mt. Gago has said that she did not know Jindar Singh and Hazara Singh before and that they were total strangers to her. We, however, find from the first information report, which was put to her in the witness-box and which she admitted as having been correctly recorded, that she stated to the police that she knew both Jindar Singh and Hazara Singh before. Jindar Singh as P. W. 6 has stated that he is married in this village to the sister of P. W. 8 Hazara Singh and that he had known Mt. Gago before. P. W. 8 Hazara Singh states that he is a collateral of Natha Singh in the 4th or 5th degree and that he knew Mt. Gago very well. In fact he states that when he arrived on the scene and rescued the woman from the clutches of the appellants, she on seeing him began to cover herself as is the custom among Indian ladies when they see their elder relations. It is quite clear, therefore, that Mt. Gago is not telling the truth in the witness-box, when she states that these two persons Jindar Singh and Hazara Singh were utter strangers to her.

As to the details of the actual occurrence Mt. Gago has made inconsistent statements on several occasions and what she has deposed to is not corroborated by the alleged two eyewitnesses, P Ws. 6 and 8. In her examination-in-chief she stated that, while the accused were still committing rape with her Jindar Singh and Hazara Singh arrived. In cross-examination, however, she stated that it was after the appellants had ceased ravishing her and she had tied her suthan that these witnesses arrived in the kotha.

It appears from the first information report that there she indicated that it was after the appellants had ceased committing intercourse with her in fact and both they and she had cleaned their genitals with pieces of cloth that the witnesses arrived on the scene. As against this both Jindar Singh and Hazara Singh are positive that when they arrived at the scene Indar Singh appellant was actually having intercourse with the woman and Dalip Singh was holding her by the hands. Indeed the witnesses state that it was they who pulled up Indar Singh from above the body of the woman. It is thus quite clear that the statements made by Mt. Gago on various occasions are mutually inconsistent and are not in accord with what the witnesses state they actually said. Again Mt. Gago stated in the first information report that the appellants had a bottle of wine with them which they drank before committing rape and that they asked her to drink, but she refused. In her statement in Court, however she stated that the appellants drank wine after the rape had been committed. If the story as given by P. Ws. 6 and 8, is correct that they arrived on the scene when the appellant Indar Singh was actually having intercourse with the woman, it is not clear when wine could have been drunk by the appellants.

Next Mt. Gago in her evidence at the trial stated that the appellants had dangs with them and after the witnesses Jindar Singh and Hazara Singh arrived on the scene they beat the appellants and the appellants in turn beat the witnesses. P. W. 6, Jindar Singh, however, does not mention that there was any beating by either side. On the other hand he stated that they did not even abuse each other. As against this P. W. 8 Hazara Singh stated that after they had pulled aside Indar Singh from the woman he wanted to assault the witnesses with a dang, but they pushed him behind on which the accused ran towards the garden. It will thus be seen that almost on every material point the statements made by the woman are not consistent either with each other or with what the two alleged eyewitnesses have stated. P. W. 6 Jindar Singh deposed that the kotha in which the rape was committed had shutters on its door. But we have it from the evidence of the woman herself as well as from the evidence of P. W. 10, Head Constable Muhsan Ali and the patwari, P. W. 13 Murad Ali, who prepared the plan, that there were no shutters to this kotha.

In addition to the above facts it is significant that though the offence is alleged to have been committed on the afternoon of 23rd February and the thana is at a distance of 1½ miles only, the first information report was not made till 9-30 a.m., the next day. According to the prosecution, the woman was at once brought to the village by Jindar Singh and Hazara Singh and in the village they met her husband Natha Singh to whom they related the whole story. P. W. 9 Karta Singh, lambardar, who is a collateral of

Natha Singh was also present at the time and was informed of the incident.

A number of other relations of Natha Singh were in the village and the information of the alleged crime was conveyed to them. It is a matter for explanation by the prosecution as to why no attempt was made to report the matter to the police at once.

Another fact which requires to be noticed here is that according to the allegations of Mt. Gago, rape was committed with her by Dalip Singh and Indar Singh by turn and that each raped her several times. If this were so, it is very likely that some marks of violence or injuries on her knees, buttocks and other parts of the body would be left, but we have it from the evidence of P. W. 7 Dr. Bawa Harsaran Singh that no such marks or injuries were discovered on her body. In fact the woman herself has admitted that she was not injured at all.

The learned Magistrate has laid considerable stress upon the circumstances that semen was detected on a piece of cloth (Ex. P. 1), which was recovered from the house of Dalip Singh and that it was also discovered on the silwar which was alleged to have been worn by Mt. Gago at the time. In my opinion this is a wholly neutral circumstance which does not help the case of either side. Dalip Singh is a young man who has got a married wife living with him. Similarly Mt. Gago is a grown-up woman who admittedly passed the night before making the first information report at her husband's house. The presence of semen on these clothes, therefore, does not in any way raise a presumption that rape was committed on the woman by Dalip Singh alone or by both Dalip Singh and Indar Singh.

Having regard to the foregoing remarks and to all the circumstances of the case I am unable to accept the statements of Mt. Gago and P.Ws. 6 and 8, Jindar Singh and Hazara Singh, as correct. I would, therefore, accept the appeal, set aside the conviction and direct that the appellants be set at liberty forthwith.

A petition has been presented by Mr. Tara Singh on behalf of Mt. Gago for retrial of the appellants under S. 366 and for enhancement of the sentence of fine, but in view of my findings above this petition fails and is dismissed.

N.K. *Appeal accepted.*

A. I. R. 1927 Lahore 870

SHADI LAL, C. J.

Abdullah and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 341 of 1925, Decided on 27th March 1925. reported by the Sess. Judge, Gujranwala.

Criminal P.C., S. 512—Conviction of accused in his absence is illegal.

Convicting and sentencing an accused in his absence is wholly illegal and the conviction is liable to be set aside. [P 870 C 2]

Facts.—Abdullah alias Dullah was challaned by the police under S. 414, I. P. C., and was committed to the Court of Sessions by Mr. Chandu Lal, Magistrate, 1st Class. Before the case could be heard by the Assistant Sessions Judge, who was specially deputed to try this case, Abdullah escaped from police custody at Hafizabad on the night between 7th and 8th August 1924. Some other accused had also been committed along with Abdullah and their case came up for hearing before the Assistant Sessions Judge on 8th October 1924, and the record shows that the fact of Abdullah having absconded was brought to the notice of the Assistant Sessions Judge.

Grounds.—The learned Assistant Sessions Judge convicted Abdullah under S. 414, I. P. C., by an order dated 15th November 1924, and sentenced him to undergo three years' rigorous imprisonment. It is clear that the conviction of Abdullah in his absence is entirely illegal and that the learned Assistant Sessions Judge has entirely ignored the provisions of law in convicting Abdullah and passing a sentence on him in his absence.

Under these circumstances, I forward the records of the case to the High Court with the request that the conviction and sentence on Abdullah may be set aside.

Order.—The order of the learned Assistant Sessions Judge convicting and sentencing Abdullah in his absence is wholly illegal and must be set aside. Accordingly I accept the recommendation made by the Sessions Judge and quash the conviction of Abdullah and set aside the sentence imposed upon him.

R.D. *Conviction set aside.*

A. I. R. 1927 Lahore 871

ADDISON, J.

Sham Singh— Defendant— Appellant.

v.

Hardit Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2303 of 1926, Decided on 31st January 1927, from decree of Dist. Judge, Jullundur, D/- 1st June 1926.

Punjab Tenancy Act, S. 60—Declaration by landlord obtained under S. 60 that transfer by tenant is void—Transfer is void as between vendor tenant and vendee also.

Where the landlords have obtained a declaration that a transfer is void under S. 60 such transfer must be held to be void completely even as between the tenant-vendor and, his vendee : 17 *P.R.* 1892 (*F.B.*), *Foll* : 30 *P R.* 1881, *Dist.* [P 872 C 1]

Jagan Nath Bhandari for *Badri Das*—for Appellant.

Fakir Chand—for Respondents.

Judgment.—Akku sold his occupancy rights in 1 kanal 8 marlas of land by a registered deed to Sham Singh and Sundar Singh on 19th March 1921.

Possession was given to the vendees. The occupancy tenancy was under S. 6, Punjab Tenancy Act, and the landlords brought a suit under S. 60 of that Act for a declaration that the sale was void, having taken place without their consent. The suit was decreed and a declaration given that the sale was void. The vendees, however, continued in possession. Formerly, landlords used to sue for a declaration under S. 60 and also for possession, but the tenant was always allowed re-entry if the landlords took possession. For this reason landlords usually now content themselves with a suit for a declaration without claiming possession.

One Hardit Singh then sued the vendees for possession of the occupancy tenancy on the ground that Akku had mortgaged it to him by two unregistered deeds, prior in date to the registered deed in favour of Sham Singh and Sundar Singh. The trial Court dismissed the suit holding that the sale-deed had priority. On appeal the learned District Judge held that, though under normal circumstances the sale-deed would have had priority, yet in the present case as the sale had been declared void by a competent Court, the vendees were in possession merely as trespassers and without any right, and for this reason the mortgagee could sue for possession as he still had a subsisting right seeing that the landlords had so far not sued for a declaration against him though they might do so if the mortgagee obtained possession. Accordingly, the plaintiff's suit was decreed by the learned District Judge and against his decision this second appeal has been preferred.

It was argued that the decree of the revenue Court was in favour only of the landlords and that they only could dispossess the vendee. That is, it was claimed that the decision of the revenue Court did not effect the position of the vendees *qua* the vendor and the mortgagee whose rights are derived from the vendor. *Gohar Singh* v. *Fattu* (1) was referred to. It was held in this ruling that the tenant-vendor cannot dispute the validity of his own sale in a suit by his vendee for possession on the ground that he had no right to sell the occupancy tenancy, the proprietors not being parties to the suit. This decision undoubtedly lays down the correct law, but the position is different in this appeal. The landlords have obtained a declaration that the sale to the present vendees is void.

It seems to me that I am bound by the Full Bench decision in *Khuda Bahsh* v. *Fazl Din* (2). In that case an occupancy tenant made an unauthorized alienation of his holding and gave possession to the alienee. The landlords sued successfully to have the alienation declared void and to recover possession from the alienee. When the landlords obtained possession the tenant sued them for re-entry on his holding. The landlords pleaded that the plaintiff must be able to show that he was no longer bound by the contract either because the alienee had taken back his money or because the contract had been put an end to in some other way. It was held that plea was not a good answer to the suit and the tenant was entitled to re-entry as against the landlord. In order to come to this decision the Full Bench had to hold as follows:

Section 60, Punjab Tenancy Act, declares a transfer not in accordance with the provisions of the Act to be a transaction voidable at the option of the landlord. When, therefore, the

(1) [881] 30 P. R. 1881.
(2) [1892] 17 P.R. 1892 (F. B.).

landlord exercises his option .successfully the transaction becomes altogether void, and we do not think it can be said that there is a valid contract existing anywhere. The voiding of the contract may..... entail certain obligations or confer certain rights on the original parties to it, but the contract itself has been declared void, and it appears to us immaterial at whose instance this was done. The plea in bar to the suit, that the plaintiff cannot sue because he has transferred his rights to another person, necessarily implies that the transfer was a valid one, and it is sufficiently met by proof that the transfer had been declared void.

This clearly means that the Full Bench held that in a suit where the landlords have obtained a declaration that a transfer is void under S. 60 of the Act such transfer must be held to be void completely even as between the tenant-vendor and his vendee. This being the case the vendees in the present appeal are mere trespassers, while the mortgagee has still a subsisting right. His suit was, therefore, properly decreed and I dismiss the appeal with costs.

R.D. *Appeal dismissed.*

A. I. R 1927 Lahore 872 (1)

MARTINEAU, J.

Kishen Parshad —Judgment-debtor—Appellant.

v.

Punjab National Bank Ltd., Amritsar —Decree-holders—Respondents.

Misc. First Appeal No. 1842 of 1924, Decided on 30th January 1925, from order of Senior Sub-Judge, Amritsar, D/- 30th May 1994.

Civil P. C., O. 21, R. 63—Dismissal of a former objection to attachment—It is a bar to fresh objection—Civil P. C., S. 11.

Rule 63 renders the dismissal of the former objection to attachment, in default or on merits, a bar to the entertainment of a fresh objection: 41 *All.* 623; *A. I. R.* 1921 *Oudh* 54, 45 *Cal.* 785; *A. I. R.* 1922 *Cal.* 166, *Foll.* [P 872 C 2]

Des Raj Sawhney—for Appellant.

Hargopal—for Respondents.

Judgment.—An objection filed by the appellant Kishen Parshad to the attachment of certain property effected in execution of a decree against his father Devi Parshad was dismissed for default. Afterwards Devi Parshad died and Kishen Parshad again filed an objection to the attachment on the same grounds as before. The Senior Subordinate Judge disallowed it, holding that the order passed on the first objection was conclusive. Kishen Parshad has appealed to this Court, and it is contended on his behalf that as the first objection was dismissed for default and not on the merits a fresh objection can be entertained. This was, no doubt, the law while the old Civil Procedure Code was in force as it was only an order passed under Ss. 280, 281 and 282 of the Code, that is an order passed after investigation of the claim which was conclusive under S. 283. But the law was changed by the enactment of the present Code, as the order mentioned in O. 21, R. 63, which corresponds to S. 283 of the old Code, relates to any order made on a claim or objection and is not confined to an order under one of the three preceding rules. Consequently under O 21. R. 63, an order dismissing a claim for default is, subject to the result of a suit instituted by the person against whom the order is made, conclusive no less than an order dismissing a claim on the merits. This has been so held in *Kedar Nath* v. *Sukh Nath Singh* (1), *Gulab* v. *Mutsaddi Lal* (2), *Nagendra Lal* v, *Fani Bhusan* (3) and *Satindra Nath* v. *Siva Prasad* (4).

It is argued for the appellant that the provision in O. 21, R. 63, that the order shall be conclusive subject to the result of a suit means only that the order cannot be challenged in appeal or revision, but I see no reason for placing this restricted interpretation on the word "conclusive" and I hold that O. 21, R. 63 renders the dismissal of the former objection, even though it was a dismissal for default, a bar to the entertainment of a fresh objection.

I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) A. I. R. 1921 Oudh 54=24 O. C. 213.
(2) [1919] 41 All, 623=50 I. C. 748=17 A. L. J. 674.
(3) [1918] 45 Cal. 785=44 I. C. 265=23 C. W. N. 375.
(4) A. I. R. 1922 Cal. 166.

A. I. R. 1927 Lahore 872 (2)

HARRISON AND TEK CHAND, JJ.

Ashaq Ali Khan—Plaintiff—Appellant.

v.

Shaffi Ali Khan and *others*—Defendants—Respondents.

Second Appeal No. 1979 of 1923, Decided on 22nd September 1927, from decree of Dist. Judge, Karnal, D/- 14th August 1923.

Pre-emption—Waiver and collusion—Proof necessary—Mere desire to defeat or annoy a rival pre-emptor is not sufficient.

It is necessary, before a pre-emption suit can be defeated on grounds of waiver and collusion, to establish by the strictest evidence that the object of the plaintiff was really to secure the land for the vendee, and a desire to annoy and defeat a rival pre-emptor is not sufficient: 58 *P. R.* (1912) and 103 *P. R.* (1914), *Foll.* [P 873 C 1]

Balwant Rai for *Abdul Ghani*—for Appellant.

Shamair Chand—for Respondents.

Harrison, J.—In this second appeal only two points are involved: first, whether the suit was barred by limitation, and secondly whether there has been waiver on the part of the plaintiff, Khurshaid Ali Khan.

The point of limitation was not raised in either of the lower Courts and merely amounts to this that two rival pre-emptors instituted suits on the same day, that being the last day of limitation; and when this fact was brought to light the respective plaintiffs were impleaded by order of the trial Court as defendants in the rival suits. It is urged that the plaint was not properly presented on account of the subsequent action taken, and rightly taken, by the trial Court. We can see no force in this contention.

The second point of waiver and collusion is dealt with at p. 8 of the paper-book of Appeal No. 1980 of 1923. As put by the learned District Judge there are three admitted facts, and, although they all point to the likelihood of Khurshaid Ali Khan having been put forward and financed by Shafi Ali Khan, they prove nothing. It is not even established that Khurshaid Ali Khan is acting on behalf of Shafi Ali Khan, much less that there has been any waiver on the part of Khurshaid Ali Khan. As pointed out in *Sheru* v. *Jawahir Singh* (1) which was followed in *Amar Singh* v. *Kishen Singh* (2), it is necessary before a pre-emption suit can be defeated on such grounds to establish by the strictest evidence that the object of the plaintiff was really to secure the land for the vendee and a desire to annoy and default a rival pre-emptor is not sufficient. In that case (*Sheru* v. *Jawahar Singh* (1), it was proved that the party presumably interested had actually financed the litigation and taken a mortgage from the plaintiff to secure the money so advanced, and even this was not held to be sufficient. The facts here are very much weaker, and it is impossible to come, as we have been asked to do, to a definite finding that the plaintiff is merely acting on behalf of Shafi Ali Khan and that the suit is collusive. We dismiss this appeal with costs.

S.J. *Appeal dismissed.*

(1) [1912] 58 P. R. 1912=13 I. C. 662=240 P. W. R. 1912.

(2) [1914] 103 P. R. 1914=27 I. C. 93=202 P. L. R. 1915.

A. I. R. 1927 Lahore 873

FFORDE AND ADDISON, JJ.

Mian and *another* — Plaintiffs — Appellants.

v.

Mahtab Singh and *others*— Defendants —Respondents.

Second Appeal No. 1077 of 1923, Decided on 16th May 1927, from decree of Dist. Judge, Mianwali, D/- 16th February 1923.

Punjab Courts Act (6 *of* 1918), *S.* 41 (3)—*Findings on custom as to power of mother guardian to alienate son's property cannot be challenged without certificate.*

Findings of the lower Courts that by the custom the mother was the guardian of her son and competent as such to alienate his property cannot be challenged in second appeal in absence of a certificate. [P 873 C 2]

Nanak Chand—for Appellants.

M. L. Puri—for Respondents.

Fforde, J.—This is a second appeal from the judgment and the decree of the District Judge dismissing the plaintiff's suit with costs. The suit was brought for possession of certain lands which had been alienated by one Mt. Bakhat Bhari, purporting to act on behalf of Sher Bahadur, a minor, as his guardian. The only three questions in the case were (1) whether Mt. Bakhat Bhari was the legal guardian of her son Sher Bahadur; (2) whether she could make the alienation for consideration and necessity; and (3) whether in fact the alienation was made for consideration and necessity.

It has been held by the lower Court that by the custom governing the parties Mt. Bakhat Bhari was the guardian of her son and competent as such to alienate his property for necessity and consideration. These findings on custom cannot now be challenged as the appellant has not obtained a certificate.

The question of necessity and consideration has been decided upon appropriate evidence. This is a finding of fact which again cannot be challenged on second appeal. Upon these findings it is unnecessary to consider the question of limitation. Upon the findings of the Courts below no second appeal lies, and it must, therefore, be dismissed with costs.

Addison, J.—I agree.

Appeal dismissed.

N.K.

A. I. R. 1927 Lahore 874 (1)

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Dalip Singh and *others* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 680 of 1926, Decided on 26th October 1926, from order of Addl. Sess. Judge, Lahore, D/- 3rd June 1926.

Criminal Trial— Conviction should not be based on evidence of witnesses who are accused's enemies—Evidence Act, S. 114.

Conviction should not be based on the evidence of witnesses who are bitter enemies of the accused unless it is supported by the evidence of reliable and disinterested witnesses.

[P 874 C 2]

L. Saunders—for Appellants.

Ram Lal—for the Crown.

Judgment.—On the morning of 7th September 1925, one Narain Singh, a Jat of the village Bughiana Kalan in the district of Lahore, was subjected to a brutal assault; in the course of which he sustained no less than 18 wounds, one-half of which were incised injuries. The unfortunate man succumbed to his wounds shortly after the assault. Two other persons, namely, Bahali Ram and his brother Ram Lal, who were partners in cultivation with Narain Singh, were also wounded; Bahali Ram had four contused wounds, one of which had broken his jaw bone, and Ram Lal sustained a bruise on one arm and an abrasion on the other.

Four persons, namely, Dalip Singh, Shingara Singh, Hira Singh and Bahal Singh have been convicted of the murder of Narain Singh, and have been sentenced each to suffer the penalty of death. (The judgment then stated further facts and discussed the evidence against Dalip Singh, and holding that his guilt had been proved beyond doubt proceeded.)

The case of the remaining three appellants stands, however, on different footing Their conviction rests upon the evidence of the two brothers, Ram Lal and Bahali, and a witness called Jaggi. The first two witnesses were undoubtedly present at the time of the tragedy, but they have bitter enmity with the convicts. It would, therefore, be unsafe to base the conviction upon their testimony unless it is supported by the evidence of reliable and disinterested witnesses. Jaggi is the only corroborating witness relied upon by the learned Sessions Judge, but we find that his name was not mentioned in the first information report lodged by Ram Lal at the police station on the 7th September, and that his statement was not recorded by the police until after the expiry of six days. In these circumstances we are not prepared to attach any importance to the evidence of Jaggi, who being a *sepi* in the village could easily be induced to repeat the story which had found favour with the police.

We have bestowed our careful consideration upon the evidence relied upon by the prosecution, and, while we are of opinion that Narain Singh was assaulted by more than one person, we are not prepared to hold that the guilt of Singara Singh, Hira Singh and Bahal Singh has been established beyond reasonable doubt. Giving them the benefit of the doubt we accept their appeals, and setting aside their conviction we direct that they be released forthwith.

The appeal preferred by Dalip Singh is dismissed.

G.B.

A. I. R. 1927 Lahore 874 (2)

BROADWAY, J.

Natha Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1083 of 1927, Decided on 8th September 1927, from order of Sess. J. Ferozepore, D/- 24th April 1927.

Penal Code, S. 193—*False evidence—Conviction is illegal in the absence of conclusive proof of the charge,*

During the proceedings of a certain case, a witness stated that he had no knowledge of the fact that his son was proceeded against and avoided conviction by apologizing. Proceedings were then taken against him under S. 193, I. P. C., for false evidence. During the trial it was not conclusively proved that he was present in the village at the time of arrest of his son.

Held: that the conviction was illegal. The mere fact that the accused heard of the arrest of his son between certain periods was not sufficient to warrant his conviction on the charge laid against him. [P 875 C 2]

Nand Lal—for Petitioner.

Sunder Das—for the Crown.

Judgment.—In 1925 a case was instituted by one Bahadur against Prem Singh, Head Constable, and three others under S. 161, I. P. C. One of the prosecution witnesses in that case was Natha Singh, son of Sahib Singh, an old man between 75 and 80 years of age. In the course of his cross-examination he was asked whether the said Prem Singh, head constable, had his sons arrested in 1921 for taking part in the Akali movement, and that his son had been proceeded against, and only avoided conviction by apologizing. Natha Singh replied that he had no knowledge of this. The case against the head constable and his companions failed and subsequently proceedings under S. 193, I. P. C. were instituted against Natha Singh under the order of the District Magistrate.

Now, it appears that in January 1924, Gulab Singh, the son of Natha Singh, was as a matter of fact arrested by or under the directions of Prem Singh, head constable for taking part in the Akali movement and after proceedings had gone on for two months was released on his tendering an apology. It appears also that at the same time the nephew of Natha Singh was similarly arrested and released. The learned Magistrate who tried Natha Singh held, on the prosecution evidence, that Natha Singh was present in his village, when Gulab Singh, his son, was arrested and that, therefore, his statement made in 1926. was false to his knowledge and that the falsehood had been intentionally spoken. He accordingly convicted Natha Singh under S. 193, I. P. C. and sentenced him to simple imprisonment for six months and to pay a fine of Rs. 500 or in default to undergo further rigorous imprisonment for six months. Natha Singh appealed to the learned Sessions Judge who maintained the conviction but reduced the sentence to imprisonment till the rising of the Court upholding the fine.

Natha Singh has come up to this Court under S. 439, Criminal P. C. and it has been urg d before me by Dr. Nand Lal that on the findings of the learned Sessions Judge the conviction cannot stand. A reference to the judgment of the learned Sessions Judge, shows that the defence set up by Natha Singh was that he had two places of residence in two separate villages from 16 to 20 *kos* apart and that at the time when his son is said to have been arrested he himself was in another village where he had been staying for three months collecting his share of the produce from his tenants. He also said that although there has been no formal separation and partition of land between him and his son they as a matter of fact lived apart and were not on visiting terms. While the prosecution witnesses were produced to prove that Natha Singh was in the village where his son was arrested defence witnesses were produced who have sworn that Natha Singh was in his other village and had been there for about three months. The learned Magistrate accepted the evidence given by the prosecution witnesses but the learned Sessions Judge has apparently been unable to agree, for he says as follows :

> I agree with the Magistrate that it is extremely unlikely that appellant (Natha Singh) by the time he gave evidence on 12th February 1926, had not learnt of his son's affair. He describes himself on that date as a lambardar. It is possible that what he meant to convey was that he had no direct knowledge of his son's arrest and prosecution. His presence at the time is not conclusively proved.

He then goes on to say :

> There is, however, suppressio veri; three questions appear to have been addressed to him on the point and the opportunity of saying that he had heard of his son's arrest and prosecution was not apparently denied him.

Now, what Natha Singh was asked was whether he knew that his sons had been arrested. The learned Sessions Judge has found that it has not been proved conclusively that he was present in the village at the time of the arrest. Natha Singh, therefore, obviously could not have had any personal knowledge of the arrest and the most he could have said was that he had heard of it. Again, in order to make the statement relevant to the case in which it was made the important point was whether the arrest had been made by the head constable Prem Singh a fact that seems to have been somehow lost sight of by the learned Sessions Judge.

It not having been proved that Natha Singh had any personal knowledge of the arrest of his son by Prem Singh in 1924 the mere fact that he probably heard of it between 1924 and 1926, is not, in my

opinion, sufficient to warrant his conviction on the charge laid against him. I therefore, accept this petition and setting aside the conviction and sentence direct that the fine, if paid, be refunded.

Petition accepted.

N.K.

A. I. R. 1927 Lahore 876 (1)

JAI LAL, J.

Attar Singh-Sunder Singh — Plaintiffs —Petitioners.

v.

Mool Chand—Defendant—Respondent.

Civil Revn. No. 897 of 1926, Decided on 7th April 1927, from decree of Small Cause Court Judge, Amritsar, D/- 20th November 1926.

Stamp Act, S. 36—Improperly stamped document admitted by trial Court—No objection to its admissibility can be raised in revision.

Where an improperly stamped document has been admitted by the trial Court, no objection can be raised in revision that it was admitted on a misreading of its contents. [P 876 C 2]

Shamair Chand—for Petitioners.

Anant Ram—for Respondent.

Judgment.—The petitioner instituted a suit against the respondent for the recovery of principal and interest alleged to be due on a document produced by him in Court. An objection that the document was not properly stamped was disallowed. The defendant's plea on the merits was that he executed the document under undue influence and that it was without consideration. He alleged that he executed the document because the plaintiff told him that the defendant's son owed him money and unless he executed a document in the plaintiff's favour the son would be sent to prison. The learned Judge, Small Cause Court, has held that undue influence has not been established, but he has dismissed the suit on the ground that the plaintiff has failed to prove consideration. The burden of proving want of consideration lay on the defendant. He produced no evidence at the trial. On the other hand he definitely stated that he had no witnesses. Under these circumstances it seems to me that the plaintiff's suit should have been decreed. Counsel for the respondent contends that the learned Judge below held the document admissible in evidence on a misreading of its contents, but this objection cannot now be raised considering that the lower Court has admitted the document in evidence: vide S. 36, Stamp Act. The execution of the document having been admitted by the defendant, and there being no proof in support of his defence that it was without consideration, I accept this revision, set aside the decree of the learned Judge, Small Cause Court, and decree the suit with costs throughout.

G.B. *Revision accepted.*

A. I. R. 1927 Lahore 876 (2)

TEK CHAND, J.

Mt. Kishno—Appellant.

v.

Mt. Partabo—Respondent.

Misc. First Appeal No. 2050 of 1926, Decided on 2nd February 1927, from order of Dist. Judge, Lyallpur, D/- 20th May 1926.

Guardians and Wards Act (7 of 1890), Ss. 7 and 39 — Testamentary guardian neglecting performance of his duties and allowing minor's property to deteriorate—Court is competent to remove him under S. 39 and appoint another.

Where a testamentary guardian has taken no interest in the minor and has neglected the performance of his duties as such and has allowed the estate to deteriorate, it would be the duty of the Court to remove him under S. 39 and to appoint a new guardian instead. The paramount consideration for the decision of the Court in such cases is the welfare of the minor. [P 877 C 2]

Charan Singh—for Appellant.

Ram Chand Manchanda—for Respondent.

Judgment. — One Chanan Singh, a Jat proprietor in the Lyallpur District, who originally came from a village called Mansuran in the Ludhiana District, died about the end of 1921, leaving behind him surviving a widow, Mt. Partabo and a son, Puran, by his former wife, Mt. Ram Kaur. This boy was a little over five years of age at the time of Chanan Singh's death. Chanan Singh had, on 21st June 1921, executed a will in which he recited that Mt. Ram Kaur, his first wife, had become unchaste and had been turned out of his house by him, that the sole heir of his property would be his son Puran, minor, and that his "muntazim and guardian would be Mt. Partabo, his step-mother, so long as the boy does not attain majority." It seems that Mt. Ram Kaur died either in the lifetime of Chanan Singh or soon after his death. On 22nd May 1925 an

application under S. 7, Guardians and Wards Act, was presented in the Court of the District Judge, Lyallpur, by Mt. Kishno, the maternal grandmother of the minor, for appointment as guardian of the person and property of the minor. She alleged that the minor had been living with her and that the step-mother, Mt. Partabo, was wasting his property. Along with this application was filed a schedule of moveable and immovable property of the minor, valued at Rs. 23,880. On 23rd June 1925 the step-mother, Mt. Partabo, also filed an application propounding the will of her husband, dated 21st June 1921, already referred to, and claiming to be the testamentary guardian of the person and property of the minor. She gave the total value of the property of the minor as Rs. 11,400 only and prayed for her formal appointment as such. The genuineness of this will was not admitted by Mt. Kishno.

The learned District Judge held the will duly proved and, holding that there was no reason to interfere with the discretion exercised by the deceased, he dismissed Mt. Kishno's application and appointed Mt Partabo as guardian of the person and property of the minor. It is noteworthy that the minor was not willing to go to Mt Partabo, but the learned District Judge thought "that probably by and by he shall get used to live with her."

In appeal Mr. Charan Singh, who appeared for Mt. Kishno, has attacked the finding with regard to the execution of the will. I have carefully examined the evidence led by the parties and have reached the conclusion that the learned District Judge was right in holding the will proved Mr. Charan Singh has further contended that, according to the terms of the will, Mt. Partabo was appointed guardian only of the property of the minor and not of his person. The terms of the will are, however, clear and leave no doubt in my mind that the testator intended to appoint her guardian both of the person and property of the minor. These findings, however, are in my opinion insufficient to warrant a decision in favour of Mt. Partabo. It is to be noted that Chanan Singh died in 1921 and the present application was not filed till 1925. How did Mt. Partabo discharge her duties as a testamentary guardian during these 4½ years? Mr. Charan Singh for the appellant contends that the boy has all along lived with his maternal grandmother Mt. Kishno and that Mt Partabo has taken no interest whatever in his welfare. He also alleges that Mt. Partabo has not only neglected her duties as a testamentary guardian, but has appropriated the bulk of the income of the minor's estate to her own use and that she has taken no steps whatever to realize or to keep alive the debts that were due to the minor's estate and most of which have now probably become barred by limitation. It is most unfortunate that there are no materials on the record on which it is possible to come to a decision on these important points. It seems to me that this aspect of the case was entirely lost sight of in the lower Court. Mt. Partabo is no doubt the testamentary guardian of the minor, and, under S. 7 the Court cannot appoint another person to be guardian in her place until her powers as such have ceased under the provisions of the Act.

But under S. 39 it is as much the duty of the Court to remove a testamentary guardian as it is to remove a guardian appointed by itself, if any, of the grounds mentioned in that section exist. If there are reasons to suspect that a testamentary guardian is guilty of continued failure to perform the duties of his or her trust and has ill treated or neglected to take proper care of the ward, the Court should, acting either on the application of any person interested or *suo moto* remove her. It is to be noted that the paramount consideration for the decision of the Court is the welfare of the minor. In the present case, in view of the fact that the question of the appointment of a guardian did not come into Court till four years after the death of Chanan Singh, it seems to me to be absolutely necessary to make an enquiry into the conduct of Mt. Partabo towards the minor during this period. If, as is contended on behalf of the appellant, it is a fact that Mt. Partabo has taken no interest in the minor, and has neglected the performance of her duties as a testamentary guardian and has allowed the estate to deteriorate, it would be the duty of the Court to remove her under S. 39 and to appoint a new guardian instead. If on the other hand, Mt. Partabo has not neglected her duties, but has been looking after the boy and taking

such steps as she was capable of to protect his property then in that case, the wishes of the father must be given effect to and the Court must declare her to be the properly appointed guardian both of the person and property of the minor. In order to determine this matter it is necessary to remand the case to the lower Court for proper enquiry. I accordingly remit the following issues to the lower Court:

(*a*) With whom has the minor been living since the death of Chanan Singh ?

(*b*) What was the property inherited by the minor from his father, and what income has been received therefrom since Chanan Singh's death ?

(*c*) How has Mt. Partabo managed the estate since Chanan Singh's death and has she been looking after the ward properly ?

The parties will be allowed to produce fresh evidence on these points and a return will be submitted to this Court within three months.

J.V. *Case remanded.*

A. I. R. 1927 Lahore 878

ADDISON AND JOHNSTONE, JJ.

Rati Ram—Defendant—Appellant.

v.

Har Kishan Mitru and *others*—Plaintiffs—Respondents.

Second Appeal No. 1741 of 1923, Decided on 15th June 1927, from decree of Dist. Judge, Karnal, D/- 2nd July 1923.

Punjab Pre-emption Act (1 *of* 1913), *S.* 25—*Question of market value should not be taken up if price, though fancy, is paid.*

Under S. 25 the Court has to determine whether the price has been fixed in good faith, or paid. It is only if it is found that the price was not fixed in good faith or paid that the market value is to be fixed as the price.

[P 878 C 2]

The Court is debarred from going into such questions as fancy price, source of the purchase money, etc., if the priee has baen fixed in good faith or paid. A vendee can pay a fancy price out of all proportion to the real price if he so wishes. The only question arising in the first instance is: Was the price paid ? The fact that the price paid differed very substantially from the market value would not lead to the inference that the price was not paid : 2 *P. R.* 1918, *Foll.* ; 10 *P. R.* 1884 and 47 *P. R.* 1909, *Ref.* [P 878 C 2 ; P 879 C 1]

Shamair Chand—for Appellant.

Jagan Nath Aggarwal — for Respondents.

Facts.—The plaintiff sued for possession by pre-emption of 24½ bighas of land sold by a registered deed, dated 4th January 1922, for Rs. 10,000. They claimed that only Rs. 4,500 passed and that the sum of Rs. 5,500, alleged to have been paid in cash before the Sub-Registrar was not in fact paid before him. The trial Judge found that the sum of Rs. 5,500 was paid before the Sub-Registrar and that it had not been proved that any part of it had been returned. It was contended before him that this ended the matter but on the grounds that it had not been clearly established from what source the vendee obtained the money, and that no circumstances had been disclosed as to why a fancy price should be paid, he held that the price had neither been fixed nor paid in good faith. He then went into the question of market value and found it to be Rs. 4,900. He accordingly decreed the suit on payment of Rs. 600 within a month, as Rs. 4,300 had to be paid to a mortgagee.

On appeal the learned District Judge held that no question arose as to the admitted sum of Rs. 4,500 and that the finding of the trial Court as regards payment of the balance of Rs. 5,500 was correct. It was also argued before him that this concluded the matter but he held that this was not the case as the question of market value was material. He agreed that the market value was Rs. 4,900 and though he thought it possible that the price paid was in reality more than that he dismissed the appeal. He also remarked that no explanation had been given why the vendee should have wished to pay a fancy price.

The vendee preferred this second appeal.

Addison, J.—(After setting out the facts as above, the judgment proceeded.) S. 25, Punjab Act I, 1913 applies to this case. The Court has to determine whether the price has been fixed in good faith or paid (not " paid in good faith "). It is only if it is found that the price was not fixed in good faith or paid that the market value is to be fixed as the price. If, however, the finding is that the price is fixed in good faith, or paid, such price should be fixed as the price for the purposes of the suit. The section is clear and admits of no doubt. The Court is debarred from going into such questions as fancy price, source of the purchase money, etc., if the price has been fixed in good faith or paid. A vendee can pay a

fancy price out of all proportion to the real price if he so wishes. The only question arising in the first instance is : Was the price paid? It has been held on good evidence that it was paid and there was no proof of return. In these circumstances under S. 25 the price had to be taken and no question of market value arose. Besides, the fact that the price paid differed very substantially from the market value would not lead to the inference that the price was not paid. It follows that the decision of the Courts below was wrong in law and can be challenged in second appeal.

In *Thakar Singh* v. *Nabi Bakhsh* (1) it was held that if the price was paid, there was no need to go further and that a man could say that, whatever the market value might be, he had paid the price mentioned in the sale deed and that the pre-emptor must pay that sum. This is clear authority for the proposition that the question of market value is immaterial in a case like the present : cf. also *Imam-ud din* v. *Nur Khan* (2) and *Hol Ram* v. *Rana Palia* (3). For the reasons given therefore I would accept this appeal and modifying the orders of the Courts below, would decree the suit only on payment of Rs. 10,000 minus Rs. 4,300 due to the mortgagee, i. e., Rs. 5,700. The additional sum to be paid must be paid on or before 15th August 1927. If the sum is so paid the appellant will have his costs here and in the lower appellate Court. If it is not so paid the suit will stand dismissed with costs throughout.

Johnstone, J.—I concur.

D.D. *Appeal accepted.*

(1) [1918] 2 P. R. 1918=133 P. L. R. 1917=39 I. C. 735=37 P. W. R. 1918.
(2) [1884] 10 P. R. 1884.
(3) [1909] 47 P. R. 1909=123 P. L. R. 1909 =2 I. C. 83 =71 P. W. R. 1909.

A. I. R. 1927 Lahore 879

ZAFAR ALI, J.

Nabi Bakhsh—Plaintiff—Appellant.

Nur-ud-Din and *another*—Defendants—Respondents.

Second Appeal No. 1994 of 1926, Decided on 22nd December 1926, from decree of Addl. J., Lahore, D/- 23rd April 1926.

Civil P. C., O. 17, R. 1—Adjournment of hearing is discretionary—What is sufficient cause is a question of fact—Second appeal does not lie.

The question whether a plaintiff has sufficient cause for not producing his evidence on the due date is one of fact, depending on the discretion of the Court concerned ; and a Court of second appeal cannot interfere with the exercise of such discretion : 24 *I. C.* 206 ; 88 *P. R.* 1916 ; 25 *All.* 71 and 26 *All.* 327, *Foll.* ; 19 *Cal.* 253 (*P. C.*) and 20 *Cal.* 740, *Dist.* [P 879 C 2]

Aziz Ahmad for *Sheo Narain* — for Appellant.

Shambu Lal Puri—for Respondents.

Judgment. — The plaintiff-appellant attended the Court below with his witnesses on 17th November 1925, and again on 12th January 1926, but the case was adjourned each time. On the third date of hearing, i.e., on 22nd February 1926, the plaintiff failed to produce any witnesses and, therefore, his suit was dismissed under sub-R. 3, added to R. 1, O. 17, Civil P. C., by the Lahore High Court. His appeal against that order having been dismissed by the District Judge, he appears in this Court in second appeal.

Counsel for the respondents raises a preliminary objection that this second appeal is not competent because the question whether the plaintiff had sufficient cause for not producing evidence on the date in question is a question of fact, and as that question has been decided against the plaintiff by two Courts, it cannot be made a ground for second appeal. Mulla's comment on O. 17, R. 1, is that "What is sufficient cause is a question of fact in each case." In *Parsottam Das* v. *Kesho Saran* (1) it was held that

> the question of granting or refusing an adjournment on the ground that a party is not ready with evidence, which he desires to produce, is one essentially for the discretion of the Court concerned, a discretion to be exercised judicially upon a fair consideration of the opportunities the party in question has had of getting his evidence ready in time and the reasons given by him for having failed to do so,

and that

> it is impossible for a Court of second appeal to interfere with the exercise of such discretion.

In *Asa Ram* v. *Budhu Mal* (2) it was held that

> no second appeal lies as to the exercise of discretion by a lower Court under S. 5, Lim. Act,

and *Tulsa Kunwar* v. *Gajraj Singh* (3)

(1) [1914] 24 I. C. 206.
(2) [1916] 88 P. R. 1916=43 P. W. R. 1916=35 I. C. 67=132 P. L. R. 1916.
(3) [1902] 25 All. 71=(1902) A. W. N. 203.

and *Hamid Ali* v. *Gaya Din* (4) were cited and followed.

Counsel for the appellant argues that in this particular case the question whether the plaintiff had sufficient cause for not producing evidence is a matter of inference and can, therefore, be raised in second appeal, but the rulings relied upon by him, viz., *Lachmeswar Singh* v. *Manowar Hossein* (5) and *Moni Lal* v. *Khiroda Dasi* (6) are distinguishable and are not in point. I am, therefore, of opinion that the preliminary objection must prevail and that no second appeal lies.

This appeal is accordingly dismissed with costs.

J.V. *Appeal dismissed.*

(4) [1904] 26 All. 327=(1904) A. W. N. 23.
(5) [1892] 19 Cal. 253=19 I. A. 48=6 Sar. 133 (P. C.).
(6) [1893] 20 Cal. 740.

A. I. R. 1927 Lahore 880 (1)

DALIP SINGH, J.

Kundan Lal—Plaintiff—Petitioner.

v.

Lekh Raj—Defendant—Respondent.

Civil Revn. No. 703 of 1926, Decided on 21st January 1927, from order of Small Cause Court Judge, Amritsar, D/- 15th June 1926.

T. P. Act, S. 50—Lessor not taking steps to secure lessee in possession and asking him to attorn to third person—Tenancy should be deemed to be determined and lessors's remedy for rent does not lie against lessee.

Where the lessors, on being appealed to by the lessee, took no steps to secure the lessee in possession of the premises and in fact, told him to attorn to a third person,

Held : that the lessee was not liable to pay rent to the lessor. [P 880 C 2]

K. L. Puri—for Petitioner.

Shamair Chand—for Respondent.

Judgment.—This is a revision from the decision of a Small Cause Court dismissing in part the plaintiff's suit for rent. The facts found by the learned Judge are that the defendant was a monthly tenant of the plaintiff, but that one Sher Thakar Singh ousted the plaintiff from possession of the property as well as from possession of other property. Sher Thakar Singh had acquired a share in the disputed property along with the plaintiff. He threatened the defendant with eviction and the defendant brought the matter to the plaintiff's notice, but the plaintiff showed indifference and took no action to secure the defendant's occupation of the premises. Upon this he held that the tenancy had terminated from December 1924. He also held that the defendant had been paying rent to Sher Thakar Singh in good faith under threat of eviction, and, therefore, under S. 50, T. P. Act, the defendant was not liable to pay rent to the plaintiff.

In revision it is contended that S. 50 has no application, that the tenancy had not terminated and, therefore, the defendant was liable to pay rent to the plaintiff. Counsel for the respondent replies that the finding is that the tenancy has terminated and that the Court has believed the evidence of certain witnesses from which the Court was at liberty to draw the inference that there was either express or implied surrender of the tenancy and that, therefore, the tenancy had terminated. Counsel has also cited Mitra, p 201, in support of the proposition that, where payment of rent is made on threat of eviction, the defendant is not liable to pay rent to the original lessor. It seems to me that, on the finding of fact that the plaintiff, on being appealed to by the defendant took no steps to secure the defendant in possession of the premises, and, in fact, according to the evidence, told him to attorn to Sher Thakar Singh, that the tenancy may well be held to have determined and the plaintiff's remedy is either against Sher Thakar Singh or would lie in a suit for damages against the defendant for not restoring possession to the plaintiff, his lessor. Be that as it may, I think that substantial justice has been done and I decline to interfere in revision.

I, therefore, dismiss the revision with costs.

G.B. *Revision dismissed.*

A. I. R. 1927 Lahore 880 (2)

BROADWAY, J.

Basant Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 2413 of 1927, Decided on 26th October 1927, from order of Sess. Judge, Karnal, D/- 18th July 1927.

Penal Code, S. 304-A—Hunting party—Shooting one of the party instead of the game accidentally was held to be due to accident—Penal Code, S. 80.

B with some companions went into a jungle to shoot pig. He took up his position and waited, while his companions proceeded to beat a pig towards him. In due course a boar was driven in his direction and *B* fired at him. *B*, however, missed the boar and hit *A* causing him injuries which resulted in his death.

Held : that the act of *B* in firing was neither negligent nor rash within the meaning of S. 304-A, I. P. C. [P 881 C 2]

Nand Lal—for Petitioner.

Anant Ram Khosla—for the Crown.

Judgment. — Basant Singh, son of Tikka Singh, a Jat of mauza Nahar in the district of Saharanpur, has been convicted of an offence under S. 304-A, I. P. C., and sentenced to six months' rigorous imprisonment. An appeal by him having been dismissed, he has come up to this Court under S. 439, Criminal P. C. The facts of the case are briefly as follows :

Basant Singh, a young man of about 21 or 22 years of age, with some twenty companions went into the jungle to shoot pig. He took up his position and waited in the jungle, while his companions proceeded to beat a pig towards him. In due course a boar was driven in his direction, and, on coming into the open where he was, Basant Singh fired at him. He, however, missed the boar and hit Amar Singh, his wife's sister's husband, causing him injuries which resulted in his immediate death.

It has been urged that the killing of Amar Singh, was purely accidental and that there was no such negligence on the part of the petitioner as would bring the act within the purview of S. 304 A, I. P. C. On the facts found by the learned Sessions Judge in this particular case I am of opinion that the view contended for by Dr Nand Lal on behalf of the petitioner is correct. Shooting pig on foot is not on the same level as shooting pigeon. The beaters as well as the petitioner were well aware that there was a certain amount of risk attached to what they were doing. The beaters, amongst whom was Amar Singh deceased, knew exactly where Basant Singh was seated whereas Basant Singh could not possibly tell, with any degree of exactitude, the position of the various beaters. It has been proved that Basant Singh only fired when the boar came into sight and, in the circumstances, I cannot regard his act in firing as either negligent or rash within the meaning of those two expressions as contained in S. 304-A, I. P. C. I therefore, accept this petition, set aside the conviction and sentence and direct that the petitioner be discharged from his bail bond.

S.J. *Petition accepted.*

A. I. R. 1927 Lahore 881

ADDISON, J.

Hoshnak Singh and *another*—Accused —Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 310 of 1927, Decided on 7th October 1927, from order of Sess-Judge, Hoshiarpur, D/- 17-2-1927.

Indian Penal Code, S. 325—Culpable homicide not amounting to murder—More than one person aggressing—Common object to inflict grievous hurt must be presumed.

Where six persons, one of whom had an iron shod lathi, came determined to take possession of a *taur* while the deceased was determined to resist them and the person having the iron-shod lathi inflicted the fatal injury on the head of the deceased and thus fractured his skull and killed him :

Held : that the members of the party were undoubtedly the aggressors and they certainly knew that grievous hurt was likely to be inflicted and came prepared in furtherance of their common object to inflict it.

Further, the man who inflicted the fatal injury when he aimed the blow he did, at the deceased's head, knew that there was a likelihood of his death, seeing that he had brought with him such a lathi. [P 882 C 1]

Nanak Chand—for Appellants.

Iqbal Chand Chopra—for the Crown.

Judgment.—Six persons have been convicted in connexion with the death of Fateh Singh of village Khere in the Hoshiarpur District on 12th August 1926. Maluk Singh, the nephew of Ganga Ram, has been sentenced to seven years' rigorous imprisonment, including three months' solitary confinement under S. 304, Part 2, I. P. C. Ganga Ram and his son Sadhu Singh have been sentenced to three years' rigorous imprisonment, including two months' solitary confinement, under S. 325, I. P. C. The three others, namely, Waryam Singh and Hoshnak Singh, who are brothers, and Didar Singh, none of whom are related to Ganga Ram, have been sentenced also to three years' rigorous imprison-

ment, including two months' solitary confinement, under S. 325, I. P. C.

Ganga Ram, his son Sadhu Singh, his nephew Mulak Singh, and Didar Singh have preferred one appeal and the two brothers Hoshnak Singh and Waryam Singh have preferred another, while there is one revision petition for enhancement of the sentences, brought by one of Fateh Singh's relatives.

The dispute arose over a *taur* which fell to Ganga Ram's share in 1875. One Ishar Singh, however, had become owner of part of it by adverse possession, while Fateh Singh had also certainly become owner of another part by adverse possession. This was held to be the case in two civil suits lately decided. This litigation also shows that Fateh Singh appeared to be in effective possession of more than the area alleged in the suit by Ganga Ram to have been with him. In any case it is established by the evidence that at the time in question Fateh Singh was in effective possession, and had erected a strong thorn fencing to show that he was so. There is no doubt that Ganga Ram and others came determined to take possession while Fateh Singh was determined to resist this, the feelings of both parties being embittered by the civil litigation which had taken place between them. It is also established by the evidence that it was Maluk Singh who with an iron-shod lathi inflicted the fatal injury on the head of Fateh Singh, which fractured his skull and killed him. The members of Ganga Ram's party were undoubtedly the aggressors and they certainly knew that grievous hurt was likely to be inflicted and came prepared in furtherance of their common object to inflict it. Further, Maluk Singh, when he aimed the blow he did at Fateh Singh's head, knew that there was a likelihood of his death, seeing that he had brought with him such a lathi.

The difficulty in this appeal is whether the three outsiders, namely, the two brothers, Hoshnak Singh and Waryam Singh and Didar Singh took part or not in the attack. The witnesses for the prosecution are admittedly enemies of the two brothers Hoshnak Singh and Waryam Singh. They had no injuries upon their persons and it has not been shown that there was any particular reason for them to side with Ganga Ram. Considering the partisan nature of the evidence I must hold that these two are entitled to the benefit of the doubt. I accordingly accept their appeal and acquit them.

As regards Didar Singh there is not the same amount of enmity proved between him and the prosecution witnesses but one of them, Indar Singh who is a cousin of the deceased, admitted that Didar Singh's uncle, Ishar Singh, had given evidence against him during the trial of him and others for the murder of the father of the two appellants, Hoshnak Singh and Waryam Singh. Didar Singh had also no injury upon him. It is admitted by the learned Sessions Judge that the prosecution evidence is of a partisan nature. In these circumstances I also accept the appeal of Didar Singh and acquit him as he is entitled to the benefit of the doubt.

It might be mentioned that three out of the four assessors were of opinion that Hoshnak Singh and Waryam Singh took no part in the occurrence, while two out of the four considered that Didar Singh alse took no part. Only one assessor was of opinion that all the six persons sent up for trial took part. In my opinion, however, it has been satisfactorily established that Ganga Ram, his son, and his nephew did come determined to take possession of his *taur* in question armed with dangs. These three were undoubtedly present. Ganga Ram received four injuries, his son Sadhu Singh two and Maluk Singh received seven injuries, one of them being grievous. On the other side Fateh Singh had four injuries, including the fatal injury caused by the lathi on his head, Thakar Singh had three injuries and Lakha Singh had seven. In the circumstances described Maluk Singh has been properly found guilty under S. 304-II I. P. C. while Ganga Ram and his son Sadhu Singh were properly convicted under S. 325, I. P. C. as their common intention was certainly to proceed to the inflicting of grievous hurt in furtherance of the common object.

A plea was put forward on behalf of Ganga Ram that his sentence should be reduced as he is 70 or 75 years old. On the other hand it is owing to him that the attack took place. There is, however, one circumstance in his favour that he did not do more than encourage the others in their efforts. Considering his age I think some leniency might be

shown to him. I accept his appeal to the extent of reducing the sentence passed upon him to eighteen months' rigorous imprisonment. I dismiss the appeals of Maluk Singh and Sadhu Singh as the sentences in their case are not excessive. I see no reason to enhance the sentences and dismiss the revision petition.

S.J. *Appeal partly accepted.*

A. I. R. 1927 Lahore 883 (1)

ZAFAR ALI, J.

Mt. Parbati—Judgment-debtor — Appellant.

v.

Firm Wiru Mal-Haveli Ram of Gujranwala—Decree-holders— Respondents.

Misc. Second Appeal No. 2872 of 1926, Decided on 4th May 1927, from an order of Dist. Judge, Gujranwala, D/- 2nd October 1926.

Hindu Law—Widow—Right of maintenance or residence is not a charge on property—Lawful debts supersede the right.

The right of a Hindu widow to residence in the ancestral dwelling house, as well as to maintenance out of the family property, or the self acquired property of her husband, is not a charge on such property, and, as a general rule, takes predecence over debts contracted by the deceased in the ordinary way of business or living: 36 *P. R.* 1907 and *A. I. R.* 1926 *Lah.* 167, *Foll.* [P 883 C 1, 2]

Parkash Chandra—for Appellant.

Faqir Chand—for Respondents.

Judgment.— The house which has been attached was the obstructed heritage of Guranditta Mal, inasmuch as it had devolved upon him on the death of his maternal uncle who was the last owner. On the death of Guranditta Mal it descended to his only son Wazir Chand. The latter contracted a debt for his marriage and died without repaying it. The creditors obtained a decree for Rs. 566-5-9 and costs of the suit against his property which was in the hands of his mother and widow, defendants 1 and 2. The house having been attached in execution of the decree, the mother objected, claiming her right of residence and maintenance in the house. This objection has been disallowed by the Courts below.

In *Nihal Devi* v. *Shib Dial* (1) it was held that the right of a Hindu wife or widow to reside in the ancestral family dwelling house is, as a general rule, superseded by debts incurred by her husband in the ordinary way of business and living. In the present case the house was not the ancestral family dwelling house. There can be no manner of doubt that the widow was entitled to maintenance out of her husband's separate as well as coparcenary property, vide Mulla's Hindu Law, S. 465; but the claim of the widow for maintenance is not a charge upon the estate of her deceased husband: Mulla's Hindu Law, S. 475). Debts contracted by a Hindu take precedence over the rights of maintenance of his wife or infant child or his widow, A Hindu is, no doubt bound to maintain his wife or infant child, but that obligation is a personal obligation and the payment of debts takes precedence over a right of maintenance: *Sunder Singh* v. *Ram Nath* (2). In the present case the evidence on the record shows that Wazir Chand contracted the debt at the bidding of his mother who wanted him to marry. I am, therefore, of opinion that the objection to attachment has been rightly disallowed and I d smiss the appeal with costs.

J.V. *Appeal dismissed.*

(1) [1907] 36 P. R. 1907=118 P. W. R. 1907=11 P. L. R. 1908.

(2) A. I. R. 1926 Lah. 167=7 Lah. 12.

A. I. R. 1927 Lahore 883 (2)

ZAFAR ALI, J.

Sheo Narain—Defendant—Appellant.

v.

Atma Ram and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 2440 of 1926, Decided on 6th May 1927, from an order of the 1st Cl. Sub-Judge, Hissar, D/- 15th July 1926.

Civil P. C., O. 9, R. 13—Application to set aside ex-parte decree dismissed for failure to pay process fee—Dismissal is appealable.

Where an application to set aside an ex-parte decree is consigned to the record room on account of the applicant's failure to pay the process-fee, that is tantamount to an order dismissing the application for default under O. 9, R. 13, and therefore an appeal lies from such an order: *A. I. R.* 1924 *Lah.* 281, *Foll.* [P 884 C 1]

Kishen Dayal—for Appellant.

Nanwan Mal and *Nawal Kishore*—for Respondents.

Judgment.—This is an appeal against an order of a Subordinate Judge of Hissar

rejecting an application to set aside an ex-parte decree for Rs 34.438-9-0.

Counsel for the respondents raised two preliminary objections one after the other. The first was that the appeal was barred by time as it was filed on the 19th October 1926, while the last day on which it could be preferred was 18th October. But the 18th October was declared a public holiday, and so the appeal could be filed on the following day. The second objection was that the order appealed against was not appealable. The application was dismissed because the applicant had failed to pay process-fee for issuing notice of the application to the decree-holder. The respondent's counsel argues that the order of dismissal was under O. 9, R. 2, Civil P. C., which was applicable to all proceedings to civil Courts by virtue of S. 141, Civil P. C., and not under O. 9, R. 13. But *Bahadur Singh* v *Wasawa Singh* (1) is an authority against this contention. In that case it was held by Mr. Justice Harrison that

where an application to set aside an ex-parte decree is consigned to the record room (as in the present case) on account of the applicant's failure to pay the process-fee, that is tantamount to an order dismissing the application for default under O. 9, R. 13, Civil P. C., and, therefore, an appeal lies from such an order.

I, therefore, overrule this objection also.

As regards the merits, the order of the Court below is very brief and does not show whether the applicant was present or not when it was made. Nor does it appear whether the order which is in Urdu is in the handwriting of the Reader of the Subordinate Judge whose signature under it is in English. The applicant has filed an affidavit to the effect that he did file talabana, but that it might have been mislaid. It does not appear whether the lower Court enquired from him why he failed to file it.

I, therefore, accept the appeal and set aside the order, and direct the Court below to decide the application on the merits. As agreed to by counsel on both sides I direct the parties to appear in the Court below on Monday, the 16th May 1927. No order as to costs in this Court.

D.D. *Appeal accepted.*

(1) A. I. R. 1924 Lah. 281.

A. I. R. 1927 Lahore 884

ZAFAR ALI, J.

Gursaran Das—Plaintiff—Appellant.

v.

District Board, Jullundur—Defendant—Respondent.

Civil Appeal No. 1888 of 1926, Decided on 21st April 1927, from decree of Dist. Judge, Jullundur, D/- 19th March 1926.

Limitation Act, S. 5—Appeal filed with deficit Court-fee—Deficit made good beyond time—Delay not excused—Civil P. C. O., 41, R. 1.

Where the appellant's counsel acted with gross negligence in valuing the appeal, and thus it was presented with insufficient Court-fees and the deficit was made good beyond limitation:

Held : that the delay in making good the deficiency that occurred in consequence of clear negligence cannot be condoned : *A. I. R.* 1922 *Lah.* 233; 1 *Lah.* 234 and 55 *P. R.* 1913, *Foll.*

[P 885 C 1]

Jagan Nath Aggarwal—for Appellant.

Mukand Lal Puri—for Respondent.

Judgment.—This second appeal was lodged on the 23rd June 1926 which was the last but one day of the prescribed period of limitation. The land in dispute was valued at Rs. 10 and Court-fees were paid on that value in the trial Court. This second appeal was, however, valued for purposes of jurisdiction at Rs. 10 and for Court-fees at Rs. 5. This office, therefore, returned the memorandum of appeal with the query how the value of the appeal for purposes of Court-fees was arrived at. The appellant's counsel refiled it on the 9th July with a note to the effect, that the appeal was valued at Rs. 5 which was half the value of the land. Thus it is clear that the counsel was under the impression that the subject-matter in dispute in the appeal was half the land that was sued for. The office returned the appeal again the same day (9th July) with a note, pointing out that the appeal was about the whole of the land. The learned counsel replied it on the 13th July repeating his remark that the appeal was for half the land. It was again returned and then the counsel seems to have paid due attention to the matter which he had failed to do before, and realized that the subject-matter in dispute in appeal was the whole of the land and not half of it, and he made up the deficiency in Court-fees on the 24th July, that is, long after the expiration of the period of limitation.

In these circumstances the objection raised by the respondent's counsel that the appeal had become barred by time must prevail. The appellant's counsel obviously acted with gross negligence in valuing the appeal, and the delay in making good the deficiency that occurred, in consequence of clear negligence, cannot be condoned. *Umed Ali* v. *Municipal Committee, Jhang Maghiana* (1), *Ramji Lal* v. *Shibba* (2), *Lekh Ram* v. *Ramji Das* (3), *Dalip Singh* v. *Umrao Singh* (4) are the rulings in point. The appellant's counsel relied on *Achut Ramchandra Pai* v. *Nagappa Bab Balgya* (5), but the charitable view taken in that case has not been followed by any other High Court including our own and it was dissented from in *Narayana Rao* v. *Seshamma* (6).

The appellant's counsel further contends that the appeal holds good in respect of a moiety of the land, but the subject-matter in dispute in appeal is not such as may be split up into halves. I therefore dismiss the appeal with costs.

Appeal dismissed.

D.D.

(1) A. I. R. 1922 Lah. 233=2 Lah. 1.
(2) A. I. R. 1923 Lah. 309.
(3) [1920] 1 Lah. 434=57 I. C. 215.
(4) [1913] 55 P. R. 1913=19 I. C. 788=130 P. L. R. 1913.
(5) [1914] 38 Bom. 41=21 I. C. 337=15 Bom. L. R. 902.
(6) [1914] 27 M. L. J. 677=26 I. C. 33.

A. I. R. 1927 Lahore 885

MARTINEAU, J.

Duni Chand—Plaintiff—Appellant.

v.

Nizam-ud-din—Defendant—Respondent.

Second Appeal No. 1443 of 1924, Decided on 28th January 1925, from decree of Addl. Judge, Lahore, D/- 17th March 1924.

Specific Relief Act, S. 54—Person having possession is entitled to an injunction restraining a person, having no title, from interfering.

A person in possession of a site has a right to retain that possession as against another who has no title. He is surely entitled to prevent a person who has no title from interfering with the full enjoyment of his possession: 78 *P. R.* 1902, *Foll.*; 51 *P. R.* 1904, *Diss. from.* [P 885 C 2, P 886 C 1]

C. H. Carden Noad and *Devi Das*—for Appellant.

Aziz Ahmad and *Mohsin Shah*—for Respondent.

Judgment.—The plaintiff alleged that he had purchased some buildings and a yard at an auction-sale and had got possession thereof in 1907, and that the defendant, the owner of adjoining property, had made a drain leading into the yard and two doors opening on to it, that the defendant's tenants had constructed ovens in the yard, and that they were using the yard as a passage. He asked for an injunction directing the defendant to close the drain and the doors and demolish the ovens shown in the plan, and restraining him from using the yard and from interfering with plaintiff's user. The defendant denied the plaintiff's title to the yard and alleged that the drain, the doors and the ovens had been in existence for over 20 years.

The Courts below have concurred in dismissing the suit. The learned Additional Judge finds that the plaintiff did not purchase the yard at the auction-sale, but purchased only two kothris adjoining it, and that although he was given possession of the yard as well as the kothris in 1907, he has not been in exclusive adverse possession of the yard for the space of 12 years, and on these findings he has upheld the dismissal of the suit without deciding how long the drain, the doors and the ovens have been in existence. The plaintiff has filed a second appeal.

It is difficult to reconcile the learned Additional Judge's finding that the plaintiff has not proved his exclusive adverse possession of the yard for 12 years with the further finding that possession was delivered to the plaintiff in 1907. It is not alleged that any person is in possession jointly with the plaintiff. The defendant, as pointed out, by the learned Judge himself does not claim to be in possession of the yard, but only alleges that he has been making use of it in certain ways. Further, is it necessary for the plaintiff to prove title? He is, at any rate, in possession of the yard and has a right to retain that possession as against any person who has no title. If he were dispossessed by such a person he could, without proving his own title, recover possession, in accordance with the decision of a Division Bench of the Chief Court, in *Abdul Hamid* v. *Sarbuland Khan* (1), which is entitled to greater weight than the Single Bench ruling

(1) [1902] 137 P. L. R. 1902=78 P. R. 1902.

Tulla v. *Gopi* (2), and when he can do this he is surely entitled to prevent a person who has no title from interfering with the full enjoyment of his possession. It is in fact clear from S. 54, Specific Relief Act, that an injunction can be granted not merely when the right of an owner of property is invaded, but also when the invasion is of the plaintiff's enjoyment of the property.

I hold, therefore, that the plaintiff can maintain the suit without proof of title or 12 years adverse possession. It is for the defendant to prove the rights of easement which he alleges, and as the lower appellate Court has given no findings on the question of the existence of those rights the case must be remanded.

I accept the appeal, set aside the decree of the lower appellate Court and remand the case to that Court under O. 41, R. 23, Civil P. C., for a fresh decision. The Court-fee paid on the memorandum of appeal will be refunded, and other costs in this Court will be costs in the case.

N.K. *Case remanded.*

(2) [1904] 51 P. R. 1904.

A. I. R. 1927 Lahore 886 (1)

ADDISON, J.

Umar Din and *others*—Plaintiffs—Appellants.

v.

Umar Hayat—Deft.—Respondent.

Misc. Second Appeal No. 2800 of 1926, Decided on 5th May 1927, from order of Addl. Dist. Judge, Sialkot, D/- 26th October 1926.

Civil P. C., O. 41, Rr. 23 and 25—Trial Court deciding some issues and dismissing suit—Remand, without deciding any of the issues, is wrong.

Where the trial Court framed seven issues, but decided only the first two and dismissed the suit, and the appellate Court remanded the case without deciding any of the issues.

Held: that the order of the appellate Court is wrong as neither R. 23 nor R. 25 of O. 41 applied. [P 886 C 2]

Khurshaid Zaman—for Appellants.

Mehr Chand—for Respondent.

Order.—The parties went to trial on seven issues. The Court of first instance heard the evidence on the whole case. It then proceeded to decide the first two issuesand as a result of its decision on them dismissed the suit with costs. The plaintiffs appealed in the Court of the Additional District Judge, Sialkot. He passed an order to the effect that the Subordinate Judge had not gone into all the issues struck and that it appeared to him to be necessary that the case should be remanded so that findings should be recorded on all the issues. He accordingly remanded the suit under O. 41, R. 23, Civil P C., for this purpose and ordered the stamp on appeal to be refunded. Against this decision the plaintiffs have preferred this second appeal.

It is obvious that the order of the Additional District Judge is wrong. O. 41, R. 23 did not apply as a decision on the two issues, which had been decided, was not given by the Additional District Judge. Further O. 41, R. 25 did not apply as it could not be said that it was essential to the right decision of the suit upon the merits that the other issues should be decided. It was admitted before me that the two issues which have been decided go to the root of the case and that, if the decision of the trial Court as to them is upheld, the appeal must be dismissed. In these circumstances I accept this appeal and setting aside the order of the Additional District Judge, direct the District Judge to proceed with the hearing of the appeal in accordance with law. If he comes to a different decision from that of the trial Court as regards the first two issues, it will then be necessary for him to decide whether the suit is to be remanded under O. 41, R. 23 or R. 25, Civil P. C. Parties will bear their own costs here.

The District Judge should see that the Court-fee which was illegally refunded is paid in again by the plaintiffs-appellants.

R.D. *Order set aside.*

A. I. R. 1927 Lahore 886 (2)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Jam Budha—Defendant—Appellant.

v.

Dasu Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 1800 of 1923, Decided on 10th November 1927, from decree of Dist. Judge, Multan, D/- 2nd May 1923.

Limitation Act, Art. 144—Adverse possession—Possession by one cosharer is possession by all—Overt act by the cosharer in possession is necessary before claiming sole possession.

The possession of one cosharer is the possession of all the cosharers and in the absence

of an ouster or overt act amounting to ouster, time does not run against the cosharer who is not in actual possession of his share. In order to establish his adverse possession the cosharer in possession must explicitly deny and repudiate the title of the other cosharers to their knowledge, and at least 12 years must expire from the date of the denial, and repudiation before his possession matures into ownership. [P 887 C 1]

Hargopal—for Appellant.
Nand Lal—for Respondents.

Shadi Lal, C. J.—The learned District Judge, concurring with the trial Judge, has held that the suit brought by the plaintiff for possession of the immovable property sold to his father by the defendant was within time; and the only question for determination is whether the suit was barred by limitation. Now, it is beyond dispute that the defendant sold to the plaintiffs' father a certain share in joint property, and the plaintiffs' father became in pursuance of the sale a cosharer in that joint property. It has been frequently pointed out that the possession of one cosharer is the possession of all the cosharers and that in the absence of an ouster or overt act amounting to ouster, time does not run against the cosharer who is not in actual possession of his share. In order to establish his adverse possession the cosharer in possession must explicitly deny and repudiate the title of the other cosharers to their knowledge, and at least 12 years must expire from the date of the denial, and repudiation before his possession matures into ownership. Now, the learned District Judge holds that the adverse possession in the present case began only in 1910, and the suit was admittedly brought within 12 years from that date.

The defendant, therefore, has failed to establish the bar of limitation, and the appeal preferred by him is dismissed with costs.

S.J. *Appeal dismissed.*

A. I. R. 1927 Lahore 887

HARRISON AND TEK CHAND, JJ.

Muhammad Bakhsh and *others*—Plaintiffs—Appellants.

v.

Ramzan and *others*—Defendants—Respondents.

Second Appeal No. 2541 of 1923, Decided on 21st September 1927, from decree of Dist. Judge, Gujranwala, D/- 19th April 1923.

Cosharers—Possession of one is possession of all—Adverse possession—Overt act is necessary.

Where in a suit by cosharers for a declaration that they were entitled to one-half of a joint khata, it appeared that in 1899 an entry was made in the revenue records to the effect that their share was one-third and not one-half but this was not discovered by them till 1911, and on the discovery they attempted to have the matter corrected, but without success, till in 1920 in partition proceedings commenced by the other side, the plaintiffs denied the correctness of the entry :

Held : that the possession of one cosharer is the possession of all, provided always that there had been no overt act of adversity. [P 887 C 2]

Mukand Lal Puri—for Appellants.
Nihal Chand—for Respondents.

Harrison, J.—The plaintiffs in this case sued for a declaration that they were entitled to one-half of a joint khata. Their suit has been dismissed in both the lower Courts chiefly on the ground that in the year 1899 an entry was made in the revenue records, which they are not shown to have discovered until 1911, to the effect that their share was one-third and not one-half as previously recorded. In 1911, on discovering this entry, they made an attempt to have the matter corrected, but without success. In 1920, in partition proceedings, which had been started by the other side, the plaintiffs denied the correctness of this entry and were referred to a civil Court. They instituted this suit within a month.

On these facts it has been held that the defendants have established adversity. Now, the possession of one cosharer, it has been held in countless rulings, is the possession of all, provided always that there had been no overt act of adversity. No such overt act is shown to have taken place to the knowledge of the plaintiff until 1911, and, therefore, the defendants have wholly failed to rebut the plaintiff's case. The suit being for declaration, a fresh cause of action arose on the occasion of every fresh denial and there certainly was a fresh denial in the year 1920 at the time of the partition proceedings. So far from there having been any delay the plaintiffs instituted their suit within a month, and in our opinion are clearly entitled to the relief they seek. We accept the appeal and decree the plaintiffs' suit with costs throughout in all Courts.

S.J. *Appeal accepted.*

A. I. R. 1927 Lahore 888 (1)

SHADI LAL, C. J.

Bura—Plaintiff—Petitioner.

v.

Teja Singh and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 203 of 1926, Decided on 7th December 1926, against order of Sub-Judge, 4th Class, Shekhupura, D/- 28th November 1925.

Civil P. C., O. 9, R. 3—Dismissal of suit for default on judgment day is improper.

There is no rule of procedure which would justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment : 82 *P. R.* 1901 ; 254 *P. L. R.* 1911, *Foll.* [P 888 C 2]

Zafrulla Khan—for Petitioner.

Judgment.—The suit which has led to this application for revision, was instituted by the plaintiff on 26th June 1922, and after recording all the evidence for the parties and hearing arguments on the merits the Court postponed it to 22nd October 1923, for delivery of judgment. No judgment was, however, delivered either on that date or any subsequent date in spite of several adjournments. On 12th May 1924, the Subordinate Judge, after stating that Sheikh Karam Ali, pleader for the plaintiff, was present and had requested that his client should be informed, passed an order to the effect that the suit be dismissed for the present default of prosecution.

Sheikh Karam Ali has filed an affidavit in this Court in support of his allegation that he did not appear for the plaintiff Bura in the Court of the Subordinate Judge on 12th May 1924, and that before the dismissal of the suit he had asked the Subordinate Judge on one or two occasions when the judgment was to be pronounced, but got the reply that the judgment had not been written and that it was unnecessary for him to attend the Court in connexion with the case. Mr. Zafrullah Khan for the petitioner urges that the order of the Subordinate Judge in so far as it records the presence of Sheikh Karam Ali on 12th May 1924, and attribtes to him the statement referred to above contains a misstatement of facts and that there was no occasion for dismissal for default when the case had been finished and the only thing required to be done was the delivery of judgment.

It has been laid down in *Jiwanda Mal* v. *Muhammad Ali* (1), that there is no rule of procedure which would justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment and the same view has been affirmed in *Nand Lal* v. *Shankru* (2). The order of the lower Court dismissing the suit for default is wholly unjustified and must be set aside.

Accordingly, I accept the application for revision and, setting aside the order, direct the lower Court to decide the case on the merits. The costs in the application shall be costs in the cause.

J.V. *Application accepted.*

(1) [1901] 82 P. R 1901.
(2) [1911] 165 P. W. R. 1911=11 I. C. 842=254 P. L. R. 1911.

A. I. R. 1927 Lahore 888 (2)

COLDSTREAM, J.

Ram Saran and *another*—Plaintiffs—Appellants.

v.

Mt. Ganga Devi and *others*—Defendants—Respondents.

Second Appeal No. 3178 of 1925, Decided on 27th October 1926, from decree of Dist. Judge, Jullundur, D/- 23rd October 1925.

(a) Will—Construction.

Where a will by a Hindu provided : "On my death my wife will be owner, and after her my daughter, and they will be entitled to alienate for necessity (*ba-shart-i-zarurat*). On *G's* (daughter's) death *N* (a collateral) will be owner. If he does not exist, his children will be owners."

Held : that the will conveyed an unlimited estate in the property to *G*. The words "*ba-shart-i-zarurat*" were not intended to limit the legatee's power of alienation to exercise only where technical legal necessity arose. Their ordinary meaning would be that the legatee could alienate if she thought it necessary to do so : *A. I. R.* 1925 *Lah.* 122, *Rel. on.* [P 889 C 2]

(b) Practice — Evidence — No objection to admissibility of a document raised — Both parties relying on it—Decision can be based on it.

Where no objection is raised to the admissibility of a document and both parties rely on it the document can be the basis of decision : *A. I. R.* 1924 *Lah.* 265, *Foll.* [P 889 C 2]

Madan Gopal for *Badri Das*—for Appellant.

Fakir Chand—for Respondents.

Judgment.—On 13th February 1922, Mt. Ganga Devi sold a house at

Phillour to Khushi Ram for Rs. 1,000. Ram Saran and Nika Ram, collaterals in the 4th degree of Mt. Ganga Devi's father, instituted the suit from which this appeal arises for a declaration that the alienation would not affect their reversionary rights after Mt. Ganga Devi's death. The trying Court found that the plaintiffs were reversioners of Hira Ram and were entitled to bring the suit notwithstanding the existence of a lady alleged by the defendants to be a daughter of Mt. Ganga Devi and that the alienation was not proved to be for necessity and consideration. He decreed the suit accordingly.

The vendee appealed and the learned District Judge of Jullundur has accepted the appeal and dismissed the suit on the ground that Mt. Ganga Devi was an absolute owner of the property in dispute by virtue of the will of her father Hira Ram and had full power of alienation in respect of it when she sold it. Against this decision the plaintiffs have filed the present second appeal in this Court and the grounds taken by Mr. Madan Gopal, who appears for them, are, firstly, that the District Judge ought not to have based his decision upon a will the execution of which has not been proved and upon the contents of which the vendee had not relied in contesting the suit in the first Court. Mr. Madan Gopal's second argument is that under the provisions of this will Mt. Ganga Devi had no more power than the ordinary rights of a daughter in possession of her father's estate as a life-interest.

I find no force in the first ground. The sale-deed itself stated that Mt. Ganga Devi had acquired the property by virtue of the will of her father, dated the 10th April 1902. The plaintiffs themselves relied upon the will and summoned Mt. Ganga Devi to produce the original. Mt. Ganga Devi declared that the original had been mislaid and the plaintiffs filed a certified copy of the will which was a registered one. The list of documents shows that the plaintiffs filed the copy to prove the fact that Mt. Ganga Devi's interest in the property was not that of a full owner. The admission of this document was not objected to by either party and it is clear from the Subordinate Judge's judgment that when the case was argued the defendant's counsel took advantage of it without any objection on the part of the plaintiffs as regards its admissibility. Again, when the appeal was argued, no objection on the ground that the will ought not to be taken into evidence appears to have been urged before the learned District Judge although the appeal was based mainly upon the contention that under the will Mt. Ganga Devi had full power of alienation. In my opinion the learned District Judge made no mistake in basing his decision upon the will. The ruling *Channi Bibi* v. *Ahmed Khan* : *A. I. R.* 1924 *Lah.* 265 (1) clearly supports this decision.

The relevant passage in the will is as follows :

> On my death my wife will be owner, and after her my daughter, and they will be entitled to alienate for necessity (ba shart-i-zarurat). On Mt. Ganga Devi's death Nathu Ram, son of Nihal Chand, the son of my father's younger brother, will be owner. If he does not exist, his children will be owners.

This Nathu Ram was a collateral of Hira Ram one degree nearer than the plaintiffs. He was dead at the time of Mt. Ganga Devi's sale and he left no descendants. After considering the will and the rulings of the Indian Courts regarding the interpretation of Hindu wills similarly worded I think that Mr. Fakir Chand's contention that the will conveyed an unlimited estate in the property to Mt. Ganga Devi must be held correct. The opening words of the will raise a presumption that Hira Ram's object in executing it was to make provisions for his daughter who was a young widow and had treated her father well. The will states that after Hira Ram's widow's death his daughter will be malik and there is authority for regarding the use of this word as proof of an intention to confer an absolute estate (see for instance, *Surajmani* v. *Rabi Nath* (1), *Bhaya Ram* v. *Nathu* (2) and *Wazir Devi* v. *Ram Chand* (3). I do not think that the words "ba-shart-i-zarurat" were intended to limit the legatee's power of alienation to exercise only where technical legal necessity arose. Their ordinary meaning would be that the legatee could alienate if she thought it necessary to do so. That such an interpretation is permissible is clear from the judgment last cited, *Wazir Devi* v. *Ram Chand* (3) where at p. 419 in dealing with a will

(1) [1908] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P. C.).
(2) A. I. R. 1924 Nag. 195.
(3) [1920] 1 Lah. 415=58 I. C. 938.

in which the words were " *intiqual waghaira ka waqt zarurat unko ikhtiar hoga* " Dundas, J., remarked that the word " zarurat" cannot be held to be equivalent to *jaiz zarurat*. Lastly the provision that on the death of Mt. Ganga Devi Nathu Ram and his children should succeed to the property does not cut down the previous absolute gift to a life-interest : see *Karam Singh* v. *Rupwanti* (4).

On these findings the appeal fails and I dismiss it with costs.

G.B. *Appeal dismissed.*

(4) A. I. R. 1925 Lah. 122.

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*A. I. R. 1927 Lahore 890

BROADWAY AND JAI LAL, JJ.

Bura Mal—Plaintiff—Appellant.

v.

Tulsi Ram—Defendant--Respondent.

First Appeal No. 2497 of 1925, Decided on 1st December 1927, from order of Senior Sub-Judge, Sialkot, D/- 5th October 1925.

(a) *Court-fees Act, S. 7 (iv) (c)—Suit against a person claiming property under a will—Plaintiff alleging will to be forged and praying for injunction—S. 7 (iv) (c) applies.*

Where a party to a suit alleged that a certain will had been set up by the opposite party and asked for a declaratory decree to the effect that it had not been executed by the deceased, that the document produced was a forgery and that he was the legal heir of the deceased and for a prepetual injunction directing the opposite party to refrain from interfering with the property.

Held : that the suit clearly fell within the ambit of S. 7 (iv) (c), Court-fees Act, and that, therefore, it was necessary for the plaintiff to fix a value on the relief sought by him : 36 *All.* 500 ; 40 *Cal.* 245 and 33 *Bom.* 307, *Foll.* [P 890 C 2]

(b) *Suits Valuation Act* (7 *of* 1887), *S.* 8—*Value for jurisdiction may not be the same :as for Court-fees.*

Although there is ample authority for the proposition, namely, that when a plaintiff fixes the value of the relief he seeks, the jurisdictional value must always be regarded as being the same, there is no authority for a proposition converse to the above : 111 *P. R.* 1913 (*F.B.*), *Foll.* [P 891 C 1]

Moolchand and *Beni Parshad Khosla*—for Appellant.

Shamair Chand and *Muhammad Amin*—for Respondent.

Broadway, J.—One Panna Lal, son of Shankar Das, died on the night of the 14th July 1924, leaving certain house property as well as shops. A man named Bura Mal, claiming to be a relative instituted a suit on 20th January 1925, for a declaration and for the issue of a perpetual injunction. He alleged that he was a cousin of the deceased and that on the death of Panna Lal he, the plaintiff, had gone to the house and shops and affixed his locks thereon and that subsequently one Tulsi Ram has placed his locks on the same house and the same shops claiming to be entitled to the same under a will alleged to have been executed by the deceased Panna Lal on 14th July 1924. Tulsi Ram, defendant, contested the case and alleged that the will was a genuine one, that he had been living with the deceased Panna Lal for a considerable period and that it was as a reward for the services rendered to the deceased that the property had been bequeathed to him, Tulsi Ram. He further pleaded that he had locked the house and the shops when taking the body of the deceased to be cremated and that on his return he found that Bura Mal had put his locks on the same premises.

Various issues were settled with which it is not necessary to deal as the plaint was rejected on the 5th October 1925 on the ground that it was insufficiently stamped and the plaintiff had failed to make good the Court-fees within the period fixed by the Court. Against this order of rejection the plaintiff Bura Mal has come up to this Court in appeal and on his behalf Mr. Mul Chand addressed the Court at considerable length while Mr. Shamair Chand replied on behalf of the respondent.

It was urged by Mr. Mul Chand that the plaint ought not to have been rejected inasmuch as the suit fell within the purview of Art. 17, Court-fees Act, while Mr. Shamair Chand urged that the view taken by the Court below was correct and that the law applicable was S. 7 (iv) (c). Now a reference to the plaint shows that the plaintiff definitely alleged that a certain will had been set up and asked for a declaratory decree to the effect that it had not been executed by the deceased on the 14th July 1924, that the document produced by the defendant was a forgery and that the plaintiff was the legal heir of Panna Lal. He further asked for a perpetual injunction to issue directing the defendant to refrain from interfering with his property and to remove his

locks from the house and the shops in question. It has been held in many cases that a prayer for an injunction amounts to consequential relief. In this connexion a reference may be made to *Jageshra* v. *Durga Prasad Singh* (1) *Raj Krishna Dev* v. *Bipin Behari Dev* (2), and *Vachhani Keshabhai* v. *Vachhnai Naubha Bavaji* (3). In these circumstances I am of opinion that the suit clearly falls within the ambit of S. 7 (iv) (c), Court-Fees Act and that, therefore, it was necessary for the plaintiff to fix a value on the relief sought by him. He fixed the sum of Rs. 105 as the value so far as the injunction was concerned and it is urged by Mr. Shamair Chand that inasmuch as he had fixed the value of the property in suit at Rs. 16,000 the Court below had correctly held that he should pay a stamp on the total namely Rs. 16,105.

It seems to me, however, that this contention is not quite correct. It is,true that it was for the plaintiff to fix the value on the relief sought by him, and as was held in *Baru* v. *Lachhman* (4), the value fixed by the plaintiff must be treated as the value for purposes of jurisdiction. Here it was urged by Mr. Shamair Chand that although he had not valued the relief sought he had actually valued the suit for purposes of jurisdiction and that it should, therefore, be held that the value of the relief sought was Rs. 16,000. No authority has been cited for this proposition although there is ample authority for the converse proposition, namely that when a plaintiff fixed the value of the relief he seeks, the jurisdictional value must always be regarded as being the same. It was urged that the plaintiff was not entitled to fix any arbitrary value but that the Courts were entitled to see that the value fixed by him was proportionate to the value of the property. Doubtless there is authority for this proposition in a decision by the Calcutta High Court. That decision was, however, not approved of in *Baru* v. *Lachhman* (4), where it was held by the Full Bench that the plaintiff was entitled to fix whatever value he chose. By that decision I feel bound. In the present case a reference to the plaint shows clearly that the plaintiff and his legal adviser were under the impression, although an erroneous one, that the suit fell within the purview of Art. 17, Court-fees Act. That being so it was clear that they were bound to fix the value for purposes of jurisdiction which they were bound to fix at the correct figure, i.e., the value of the property. It was never present in their minds that in placing the value of Rs. 16,000 on the property in suit, they were fixing the value of the relief that was being sought. In these circumstances it seems to me that the plaintiff should be given an opportunity of fixing the value of the relief sought by him, and I would, therefore, return the memorandum of appeal to the appellant directing him within ten days to fix the value of the relief at such figure as he may choose and to pay the proper stamp thereon. When he has done so it will be necessary for us to consider the next step in the case.

Jai Lal, J.—I agree.

Case remanded.

S.J.

(1) [1914] 36 All. 500=24 I. C. 679=12 A.L.J. 844.
(2) [1913] 40 Cal. 245=16 C. L. J. 194=17 I. C. 162=17 C. W. N. 591.
(3) [1909] 33 Bom. 307=1 I. C. 108=11 Bom. L. R. 30.
(4) [1913] 111 P. R. 1913=23 P. L. R. 1914=22 I. C. 503=228 P. W. R. 1913 (F.B.).

A. I. R. 1927 Lahore 891

DALIP SINGH, J.

Kirpa Ram—Plaintiff—Appellant.

v.

Notified Area Committee, Pindi Bhattian—Defendant—Respondent.

Second Appeal No. 2299 of 1926, Decided on 24th January 1927, from decree of Dist. Judge, Gujranwala, D/- 11th May 1926.

(a) *Punjab Municipal Act* (1912), *Ss.* 184 *and* 193—*Right to drain includes right to clean and supervise it.*

The right to supervise the drain and to have a right of way to the drain is accessory to the right to the drain and the Committee are, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain : 45 *P. R.* 1905, *Foll.* [P 893 C 1]

(b) *Punjab Municipal Act, S.* 193—*Sanction.*

Where once the Municipal Committee has given sanction to roof a drain, it cannot revoke it : 52 *P. R.* 1900 and 42 *Bom.* 629, *Foll.* [P 893 C 1]

Badri Das—for Appellant

Fakir Chand—for Respondent.

Judgment. — The plaintiff-appellant applied to the Notified Area Committee, Pindi Bhattian, to build on his own property according to a plan. The Com-

mittee gave the necessary permission on 30th December 1922, but imposed a condition that the public drain which had been passing through the property proposed to be built on should not be blocked and should not be roofed over by the plaintiff and that a space of three feet wide around the drain should be left vacant for the sweeper to come and clean the drain. The plaintiff brought the present suit for a perpetual injunction restraining the Committee from preventing the plaintiff from blocking the drain and generally from building on his own property and for damages for the trouble caused to him.

The facts found are that the drain passes through the property of the plaintiff, having collected the drainage water of the public street and that it has been there for a long time and, therefore the Committee have a right of easement to pass their water through this drain, and that, therefore, the plaintiff is debarred from blocking this drain. It was also held by the trial Court that the Committee were entitled to impose the condition regarding the roofing the drain and keeping of space for cleaning it under S. 189, Punjab Municipal Act, and that the action of the Committee was neither ultra vires nor in bad faith. On the question of damages it was held that no evidence to prove any damages had been given and, therefore, the plaintiff was not entitled to damages. The plaintiff's suit was dismissed. On appeal the learned District Judge upheld the decision.

In second appeal it is contended that sanction had been granted by the Committee by resolution, dated 30th May 1922, and that, therefore, the Committee could not revoke that sanction. *Ibrahim* v. *Municipal Committee of Lahore* (1) and *Vithal Dhonddev* v. *Alibag Municipality* (2) are cited as authorities for this proposition. In reply counsel for the respondent contends that the question of revocation of sanction was never previously raised and should not be allowed to be raised now. I find, however, that an issue was framed in the trial Court (4)

Whether the defendant gave permission to defendant (plaintiff evidently) to build, and if so, when and on what conditions.

Upon this issue the trial Court interpreted the resolution of 30th May 1922, as not giving the permission at all and it further held that, even if the sanction was given, it was amended by the subsequent revolution, namely, that of 30th December 1922. It is thus clear that the point was raised before the trial Court. In the appeal before the District Judge ground 3 was taken expressly raising this point. The learned District Judge also interpreted the resolution of the 30th May 1922, as not giving any sanction. The resolution is worded as follows :

Sael ko Committee hasb mansha member sahiban jinhon ne moqia mulahza farmakar report ki hai tamir makan aur darwaza rakhne aur nali chhatne ki ijazat di hai. Report kuninda member sahiban ne apni apni report men nali par chhat dalne aur us ki safai wa pani nikalne ka mukhtilif taur per zikr kia hai. Kuchh arsa guzra keh mohalladaran ke wawela karne par janab Mr. Estcourt Sahib Bahadur ne is moqia ka mulahza farmaya tha. Unka hukam purani misil ke sath shamil hai. Meri zati rai chhat dalne ke bare men Sahib Bahadur ke hukam ke barkhilaf pahin hosakti. Is liye misil bame hukam Sahib Bahadur barai istaswab Bahadur Deputy Commissioner Bahadur mursal howe.

This resolution is signed by various persons, presumably by the members of the Notified Area Committee. I find it impossible to interpret this resolution in any other way than to hold that it states that the Committee have given sanction to the plaintiff to build his home and roof drain, but, as the view of the President is contrary of the view of the others the matter is referred to the Deputy Commissioner. If such sanction is once given it is clear law that it cannot be revoked.

Counsel for the respondent contends that this resolution does not give sanction and that the point was not raised in the Court below. But, as I have already shown, that point was raised and I am unable to agree with the counsel for the respondent that this resolution can be interpreted to mean that no sanction was given.

The next point raised by counsel for the appellant is that there was no easement vested in the Committee because an easement vests in a dominant tenement and the Committee has no right to discharge water in the drain in the plaintiffs property. This point has no force and was not seriously pressed by counsel for the plaintiff. The dominant tenement is the public street, whose water passes through a drain in it and finally discharges on to the plaintiff's lane. I, therefore, hold that the plaintiff cannot block the drain.

(1) [1900] 52 P. R. 1900=385 P. L. R. 1900.
(2) [1918] 42 Bom. 629=47 I.C. 145=20 Bom. L. R. 756.

The next point is that the learned District Judge has not disposed of the question as to roofing of the drain and three feet wide space alongside the drain. Counsel relies on *Bala* v. *Maharu* (3). He also contends that the Committee cannot enforce its jurisdic rights, if any, by refusing sanction to build and he cited *Ali Mardan* v. *Municipal Committee of Kohat* (4) and *Khagendra Nath Mitra* v *Bhupendra Narayan Dutt* (5). Counsel for the respondent relies on S. 132, S. 189, S. 190 and on *Municipal Committee, Delhi* v. *Abdul Hassan Khan* (6). In *Municipal Committee, Delhi* v. *Abdul Hassan Khan* (6) the bye-laws were on the record so far as the judgment shows. S. 189 refers to bye-laws. No bye-law is either on the record or has been shown to me by counsel for the respondent. He contends that the bye-laws should be taken to be the ordinary bye-laws. I do not know what he means by this contention. I pointed out to him that perhaps S. 193 would apply. Connsel for the respondent accepts this and has also contended that S. 193 would apply.

I consider that S 193 (1) does apply, but in any event as held in *Ali Mardan* v. *Municipal Committee of Kohat* (4) the right to supervise the drain and to have a right of way to the drain is accessory to the right to the drain and the Committee were, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain. I cannot consider that 3 feet wide space is unreasonable for this purpose. I, therefore, hold that the plaintiff is not entitled to block the drain and that he is entitled to roof the drain because the Committee once gave him sanction to roof the drain and cannot revoke it, and I also hold that he must roof the drain in such a fashion as must give passage to the sweeper of the Committee to enter upon and clean the drain. He, therefore, must leave three feet wide space to permit the entry of the sweeper and must not roof the drain in such a fashion as to prevent the entry. As the plaintiff has only partially succeeded in his appeal I leave the parties to bear their costs throughout.

R.D. *Appeal partly allowed.*

(3) [1896] 20 Bom. 788.
(4) [1905] 45 P. R. 1905=40 P. L. R. 1905.
(5) [1910] 38 Cal. 296=8 I.C. 530=15 C.W.N. 316.
(6) A. I. R. 1924 Lah. 393.

A. I. R. 1927 Lahore 893

SHADI LAL, C. J.

Emperor

v.

Seda—Accused—Respondent.

Criminal Revn. No. 425 of 1927, Decided on 20th May 1927, reported by the Dist. Magistrate, Karnal.

Penal Code, S. 379 — Cattle stealing — Punishment.

Where cattle stealing is very rife in a particular locality, a severe sentence should be passed. [P 893 C 2]

Facts.—Five head of cattle, belonging to one Najib, complainant, strayed away from the village grazing ground. While searching for them Najib was informed by one Shiba that the latter had seen accused Seda driving the animals away and that when questioned Seda had stated that he was taking them over to Najib, complainant. Thereafter Najib took the matter before a panchayat, where accused admitted the fact charged against him, returned four of the stolen animals and promised to return the fifth one, a bull-calf, later. This promise accused never kept.

Grounds.—Cattle theft is very rife in this district and a very small percentage of cattle theft cases ultimately reach conviction. Deterrent sentences are, therefore, necessary. In the particular case five head of cattle were stolen. Accused's own witness Albela, D. W. 4 says that accused is a bad character and a habitual cattle thief; so does also Telu, D. W. 5. In the circumstances the proper course would have been for the trying Magistrate to send the case up under 349, Criminal P. C., for the imposition of a severer sentence than the six months the Magistrate himself was empowered to give. I recommend a sentence of rigorous imprisonment for 18 months.

Order.—The accused has been convicted of having stolen five head of cattle, and has been sentenced under 379, I. P. C., to pay a fine of Rs. 150. The offence of cattle lifting is very rife, and the sentence imposed by the Magistrate is wholly inadequate.

Accordingly I accept the recommendation made by the District Magistrate and direct that the accused shall, in addition to the payment of fine, suffer rigorous imprisonment for a period of six months.

D.D. *Order accordingly.*

A. I. R. 1927 Lahore 894 (1)

ZAFAR ALI, J.

Dewa Singh—Plaintiff—Appellant.

v.

Narain Singh and *another*—Defendants—Respondents.

Second Appeal No. 2304 of 1926, Decided on 5th May 1927, from decree of Dist. Judge, Gurdaspur, D/- 10th May 1926.

Contract Act, S. 81—Contract to sell ascertained goods in lieu of debt—Buyer to count and stack the same—Property passes at once.

Where *I* owed money to *D* on a bond and for the money thus due he contracted to sell to the latter at certain specified rates the whole of the bricks that he owned at a certain kiln and according to the terms of contract the buyer was to stack the bricks and to count them and the expenses of stacking were to be debited to the seller, and interest payable on the bond debt ceased to run from the date of sale:

Held: that the seller had nothing more to do in connexion with the sale; it was the buyer who had to stack the bricks for the purpose of counting them and ascertaining their price and the sale was therefore complete. [P 894 C 2]

Des Raj Sawhmey—for appellant.

Brij Lal—for Respondents.

Judgment.—The question of law involved in this second appeal is whether the property in the bricks attached, which originally belonged to the judgment-debtor Ishar Singh, had passed to the buyer Dewa Singh before the attachment.

Ishar Singh owed money to Dewa Singh on a bond and for the money thus due he contracted to sell to the latter at certain specified rates the whole of the bricks that he owned at a certain kiln. The terms of sale were reduced to writing according to which the buyer was to stack the bricks and to count them and the expenses. of stacking were to be debited to the seller. Interest payable on the bond debt ceased to run from the date of sale. It was further stipulated that if the price of the bricks should fall short of the amount due the buyer would take for the balance the coal and other articles belonging to the seller that were lying at the kiln. Now, there can be no manner of doubt that the goods sold were ascertained goods because all the bricks of Ishar Singh lying at the kiln were sold as a whole and payment of the price thereof was also settled. According to S. 78, Contract Act (9 of 1872), where there is a contract for the sale of ascertained goods the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered. Here, as already stated the goods sold were ascertained goods an the price thereof was also paid, inasmuch as the buyer agreed to take them in lieu of the money which the seller owed to him. This settlement was tantamount to payment because the seller's liability to pay interest came to an end from the date of the contract to sell. Further, the seller had nothing more to do in connexion with the sale. It was the buyer who had to stack the bricks for the purpose of counting them and ascertaining their price. It appears that this was also done and the seller's servant and agent, Girdhari Lal, made a final settlement with the buyer and endorsed it on the back of the bond. In these circumstances the sale was complete and Ill. (b) S. 81, Contract Act, is parallel to this case. Girdhari Lal was duly authorized to settle with the buyer as would appear from the written contract of sale, Ex. P-3, and the seller's postcard to Girdhari Lal, Ex. P-2.

I, therefore, accept the appeal and reversing the judgment and decree of the lower appellate Court, restore that of the trial Court. The defendant will pay plaintiff's costs throughout.

R.K. *Appeal accepted.*

A. I. R. 1927 Lahore 894 (2)

SHADI LAL, C. J., AND BROADWAY, J.

Dilsukh Rai and *others*—Defendants—Appellants.

v.

Lachhman Das and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 230 of 1924, Decided on 8th January 1927.

Execution—Decree binding—Powers of Court—Court cannot go behind decree.

A Court executing a decree cannot go behind the terms of the decree and must execute the decree as it stands: 40 *Mad.* 233, (*F. B.*), *Dist.* [P 895 C 1]

Mool Chand—for Appellants.

Parkash Chandra and *Shamair Chand*—for Respondnts.

Shadi Lal, C. J.—This appeal arises out of proceedings in execution of a decree obtained by Lachhman Das and

Kanshi Ram for the recovery of a certain sum of money from the defendants Dilsukh Rai and others, and the question for determination is whether the judgment-debtors are entitled to resist the execution of the decree on the ground that, in pursuance of an agreement arrived at between the parties prior to the date of the decree, the judgment-debtors were not personally liable for the payment of the decretal amount. It appears that this was one of the pleas raised by the defendants in the suit brought by the decree-holders against them, but they did not substantiate that plea and absented themselves from that Court, with the result that an ex-parte decree was passed against them making them personally liable for the debt due to the plaintiffs.

Now the principle of law is firmly established that a Court executing a decree cannot go behind the terms of the decree and must execute the decree as it stands. The learned counsel for the judgment-debtors invites our attention to the judgment of the Madras High Court in *K. A. N. Chidambaran Chettiar* v. *Krishna Vathiyar* (1) in support of the contention that a Court executing a decree is competent to determine the question whether or not the parties had agreed prior to the date of the decree that the decree should not be executed against the judgment-debtor. This view has not been accepted by the Calcutta High Court; vide *Benode Lal Parkashi* v. *Brajendra Kumar Sahai* (2), and *Hasan Ali* v. *Gauzi Ali* (3), but it is unnecessary to pronounce any opinion as to which of the views is correct, because the judgment in *K. A. N. Chidambaran Chettiar* v. *Krishna Vathiyar* (1) is inapplicable to the present case. Here the question is not whether decree should or should not be executed, but whether the Court should depart from the terms of the decree and decline to execute it personally against the judgment-debtors. This would amount to a variation of the terms of the decree, and there can be no doubt that a Court executing the decree has no authority to alter the terms of the decree.

We accordingly accept the appeal and, setting aside the judgment of the Single Bench as well as that of the District Judge, restore that of the Court of first instance. The respondents must pay the costs incurred by the appellants.

R.D. *Appeal accepted.*

(1) [1917] 40 Mad. 233=5 M. L. W. 132=32 M. L. J. 13=37 I. C. 836=(1917) M.W.N. 44 (F. B.).
(2) [1902] 29 Cal. 810=3 C. W. N. 838.
(3) [1904] 31 Cal. 179.

A. I. R. 1927 Lahore 895

ADDISON, J.

Nabi Bakhsh—Objector—Petitioner.

v.

Udho Ram and *others*—Decree-holder and Judgment-debtors—Respondents.

Civil Revn. Petn. No. 707 of 1926, Decided on 1st February 1927, from order of Sr. Sub-Judge, Gurdaspur, D/- 28th July 1926.

Civil P. C., O. 21, R. 58 and S. 47—Objection under R. 58 by one of the defendants—Decision of executing Court is appealable—Civil P. C., S. 47.

Where one of the defendants to the suit objected to the attachment in execution of the decree under O. 21, R. 58 :

***Held* : that the objector being a party to the suit, the proceedings were governed by S. 47, and an appeal lies from the decision of the executing Court.** [P 896 C 1]

Mehr Chand Mahajan— for Petitioner.

C. L. Gulati—for Respondents.

Judgment.—One Udho Ram obtained a bond from Fazal Din, and, shortly after Fazal Din's death, sued his widow and his two brothers, Nabi Bakhsh and Alaf Din, for Rs. 120 due on the bond. The widow was impleaded as the representative of the deceased Fazal Din, while the two brothers were impleaded as having intermeddled with the deceased's estate. It was specifically stated in the plaint that they had taken possession of certain property belonging to the deceased. At first the brothers denied that they had any property of the deceased. Later, all three defendants made a statement to the effect that they were willing that a decree should be passed for Rs. 120 against the estate of the deceased Fazal Din. This was accepted by the plaintiff and a decree in these terms was given.

The decree-holder, having attached the property which, as stated in the plaint, had been taken possession of by the two brothers, applied to sell it. An objection was preferred by one of the brothers to the effect that the property was his. The trial Court upheld the objection and ordered the release of the property from attachment. On appeal the Senior Sub-

Judge held that the property belonged to the deceased Fazal Din and he accepted the appeal and directed the property to be sold in execution of the decree. Against this decision this revision has been preferred here.

The only question argued was that no appeal lay to the Senior Sub-Judge, as the objection was under O. 21, R. 58, Civil P. C., and the decision of the executing Court was final, subject to a regular suit being instituted by the decree-holder. The question in fact is whether the objector was a party to the suit and, therefore, these proceedings were governed by S. 47 of the Code, or whether he was exonerated by the decree and thus these proceedings were under O. 21, R. 58, Civil P. C. It seems to me that, when all three defendants confessed judgment and agreed to a decree being passed against the estate of the deceased Fazal Din, this meant that the widow, as the proper legal representative of the estate, confessed judgment completely and that the two brothers confessed judgment to the extent that they had intermeddled with the estate, i. e., to the extent that they had taken possession of the property of their deceased brother. This being my view, it follows that the objector was a party to the suit and that an appeal lay to the Senior Sub-Judge. It is true that the decree of the trial Court might have been expressed more clearly, but I hold that the proper interpretation of the decree is as given by me above. An appeal, therefore, lay to the Senior Sub-Judge and I dismiss this revision, but leave the parties to bear their own costs.

R.D. *Revision dismissed.*

A. I. R. 1927 Lahore 896

DALIP SINGH, J.

Udham Singh and *another* —Plaintiffs —Appellants.

v.

Jowala Singh and *others*—Defendants —Respondents.

Second Appeal No. 1320 of 1926, Decided on 14th January 1927, from decree of Addl. Dist. Judge, Amritsar, D/- 16th December 1925.

(a) Civil P. C., S. 100—Custom (Punjab)—Alienation—Question as to necessity is one of law.

It is not possible to lay down a principle that in all tribes custom would recognize an alienation for a debt due from a previous holder of the land as a justifiable necessity.

The question, whether a certain alienation is for necessity or not, when the facts are undisputed, is a question of law: 19 *P. R.* 1915, *Foll.* [P 897 C 1]

(b) Custom (Punjab)—Alienation by daughter-in-law.

An alienation by daughter-in-law for her father-in-law's debt is for necessity: 119 *P. R.* 1886, *Foll.* [P 897 C 2]

Mehr Chand Mahajan—for Appellants.

Din Dayala Khanna - for Respondents.

Judgment.—Plaintiffs in this case brought a declaratory suit to the effect that the mortgage by defendant 1 in favour of defendant 2 could not affect their reversionary rights after the death of defendant 1. The trial Court framed various issues, and held that the land was ancestral, but also pointed out that as the alienation was by a widow, it was immaterial whether the land was ancestral or not. It also held that this mortgage was made by defendant 1 in lieu of certain decretal debts due from her father-in-law, Jiwan Singh the last male holder of the estate. Defendant 1 is the widow of the predeceased son of Jiwan Singh. It held that as these decrees were against Jiwan Singh merely as a surety, defendant 1 was not justified in mortgaging the ancestral estate for the money due from Jiwan Singh as surety. It held that there was legal necessity to the extent of Rs. 305, which was an antual debt of Jiwan Singh, and gave a decree that the mortgage would not affect the reversionary rights of the plaintiff beyond Rs. 350, Rs 45 being the registration expenses.

In appeal the learned Additional District Judge held that the payment of her father-in-law's debt by the daughter-in-law, was a necessity justifying the alienation made by her. He relied on *Chandu* v. *Buta* (1), a Division Bench ruling, which supports his view. He also relied on *Bhanbul Devi* v. *Narain Singh* (2), where it was held that an alienation by a widow for a deceased husband's debt was justifiable and that such property is liable to be attached in the hand of the widow.

In second appeal counsel for the appellants urges that *Chandu* v. *Buta* (1) is bad law, in that it goes counter to the

(1) [1886] 119 P. R. 1886.
(2) [1915] 39 P. R. 1915=103 P. W. R. 1915 =29 I. C. 572=3 P. L. R. 1916.

principle enunciated in *Jagdip Singh* v. *Narain Singh* (3). He contends that there was no legal obligation on a widowed daughter-in-law, to discharge her father-in-law's debt. The widow represents her husband the predeceased son. The property if not charged, would not be liable in the hands of the son, and, therefore, would not be attachable in the hands of his widow. The widow is under no moral obligation to discharge her father-in-law's debts and, therefore, there is no necessity for the alienation. He distinguishes *Bhanbul Devi* v. *Narain Singh* (2), because in that ruling it was held that a widow represents her husband for all purposes and her estate is a sort of extension of the husband's estate. The principle of that ruling, therefore, according to him, is not applicable to a widowed daughter-in-law. The counsel for the respondents contends that *Chandu* v. *Buta* (1), is good law, and cited *Art.* 63, *Rattigan's Digest* in support of the proposition that an alienation for debt due from the father-in-law was justifiable. That article refers to ancestral debts, but counsel for the respondents was unable to give me any ruling directly dealing with ancestral debts. The counsel for the appellants, however, very properly drew my attention to two rulings, one *Thakuri* v. *Ganda Mal* (4) and the other *Ramkaran* v. *Hukman* (5), where it was held that an alienation by a son to pay his father's debts was a justifiable necessity. Counsel for the appellants contends, however, that these rulings were prior to the Full Bench ruling reported in *Jagdip Singh* v. *Narain Singh* (3) and are no longer good law. Counsel for respondents was given time by me to see if he could find any ruling bearing on the point, but the only ruling he has referred me to is *A. I. R.* 1926 *Lahore*, *p.* 671, where a single Judge of this Court held that, an alienation by a mother for her son's debt was good.

The matter is by no means free from difficulty. I do not think that it is possible to lay down a principle that in all tribes custom would recognize an alienation for a debt due from a previous holder of the land as a justifiable necessity. The rulings to which my attention has been drawn and which were referred to above do not give any definite reasoning on the point. Logically from the principle enunciated in *Jagdip Singh* v. *Narain Singh* (3) and followed in *Chogat* v. *Aso Mal* (6), it would follow that there was no legal obligation on a son of a previous male holder of ancestral land to pay the debt due from such previous male holder, nor could the pious obligation imposed by Hindu law on a son to discharge his father's debts be imported into the customary law which might vary from tribe to tribe. If the matter were res integra, I would be inclined to hold that the case should be remanded for enquiry as to whether by custom in this particular case the alienation was justifiable or otherwise, but in *Santa Singh* v. *Waryam Singh* (7), which was approved in *Raja* v. *Allah Ditta* (8), it was held that the question, whether a certain alienation was for necessity or not, when the facts were undisputed, was a question of law, and in the only ruling directly in point, namely, *Chando* v. *Buta* (1), it was held that an alienation by daughter-in-law for her father-in-law's debt was for necessity. In the present case there was no remand, and if my principle of decision were correct, the appeal would succeed, because the onus of proving that the alienation was for valid necessity would lie on the alienee. Bowing however, to the authority of *Santa Singh* v. *Waryam Singh* (7) and *Chando* v. *Buta* (1), I hold that the alienation was for justifiable necessity and dismiss the appeal. I make no order as to costs.

N.K. *Appeal dismissed.*

(3) [1913] 4 P. R. 1913=173 P. L. R 1912=15 I. C. 866=160 P. W. R 1912.
(4) [1879] 78 P. R. 1879.
(5) [1914] 51 P. W. R. 1914=22 I. C. 544=79 P. L. R. 1914.
(6) [1913] 30 P. R. 1913=17 I. C. 371=270 P. L. R. 1914.
(7) [1915] 19 P. R 1915=147 P. W. R. 1914=24 I. C. 361=207 P. L. R. 1914.
(8) [1915] 110 P. R. 1915=112 P. W. R. 1915=29 I. C. 802=37 P. L. R. 1916.

A. I. R. 1927 Lahore 897

SHADI LAL, C. J.

Behari Lal—Plaintiff—Petitioner.

v.

Muhammad Sher & Co.—Defendants—Respondents.

Civil Ref. No. 32 of 1924, Decided on 4th January 1925, made by Deputy Commissioner, Shahpur, on 1st October 1924.

Punjab Alienation of Land Act (13 *of* 1900), *S.* 21—*Genuine dispute between the parties—S.* 21-*A does not apply.*

The object of S. 21-A is to enable correction of decrees which on the face of the record in-

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fringe the provisions of the Act, and the section would not apply to a case where there is a genuine dispute between the parties in the subject-matter of the suit: 52 *P. R.* 1916 (*F.B.*), *Foll.* [P 893 C 1]

S R. Laul for *Behari Lal*—for Respondents.

Judgment. — This was an action brou ht by the plaintiff for a declaration that he was the owner of the land in dispute and that the defendants had no concern with it. Two of the defendants admitted the plaintiff's claim; and as against the remaining two defendants who absented themselves, the plaintiff produced evidence which satisfied the Court that the land belonged to him. The Sub-Judge, in view of the admission referred to above, and the evidence produced by the plaintiff passed a decree in favour of the plaintiff on 5th January 1923.

Against this decree the Deputy Commissioner has made an application under S. 21-A (2), Punjab Alienation of Land Act, and several objections have been taken to this application. In the first place, it is quite clear that the decree of the Sub-Judge is not contrary to any of the provisions of the Alienation of Land Act. The plaintiff's claim has been decreed on the merits, and there is no evidence on the record to show that the defendants were the real owners of the property and that the decree is the result of any collusion between the parties. As pointed out by the Full Bench in *Feroz Din* v. *Basri* (1) the object of S. 21-A is to enable correction of decrees which, on the face of the record, infringe the provisions of the Act, and that the section would not apply to a case where there is a genuine dispute between the parties in the subject-matter of the suit. There can be no doubt that the High Court cannot set aside a decree pessed by a competent Court merely on the conjecture that the parties have colluded with each other.

It is further contended on behalf of the plaintiff that the decree could not be treated as one passed with the consent of the parties and that it was appealable to the District Judge. The Deputy Commissioner should, therefore, have applied to the District Judge and not to the High Court. It is also urged that the Deputy Commissioner was informed of the decree on 5th August 1924, upon receiving a report, dated 30th July 1924, from the Sub-Divisional Officer; and that the application for revision, which was made on 21st October 1924, was barred by time. Both these contentions appear to be well-founded but, considering that the decree, as it stands, does not infringe the provisions of the Alienation of Land Act, it is unnecessary for me to determine them.

The application is accordingly dismissed with costs.

N.K. *Application dismissed.*

(1) [1916] 52 P. R. 1916=35 P. L. R. 1917 =32 I. C. 446=72 P. W. R. 1916 (F. B.).

A. I. R. 1927 Lahore 898

JAI LAL, J.

Nathu Lal and *others* — Plaintiffs—Appellants.

v.

Muni Lal and *others*—Defendants—Respondents.

Misc. Second Appeal No. 2512 of 1925. Decided on 14th April 1927, from order of Dist. Judge, Ludhiana, D/- 22nd July 1926.

Specific Relief Act, S. 21 (*g*)—*Agreement contemplating performance of acts and those contemplating forbearance from performance—Injunction in latter class of cases can be given —Specific Relief Act, Ss.* 56 *and* 57.

There is a clear distinction between agreements which contemplate the continuous performance of specific acts for more than three years and contracts which contemplate forbearance from the performance of certain acts. While the former kind of contracts cannot be enforced under S. 21 (g) and, therefore, a mandatory injunction in respect thereof cannot be granted under S. 56, there is nothing in that section to prohibit the grant of preventive relief by way of an injunction in the latter kind of cases. This follows from the clear wording of S. 57, Specific Relief Act, which is an exception to S. 56. [P 899 C 2, P 900 C 1]

Plaintiffs and defendant, owners of adjoining houses and belonging to the same family, entered into a registered agreement that they shall not rent any portion of their respective houses to strangers, but will do so only to the members of the bradari to which they belonged. In violation of the conditions of the registered agreement, defendant rented a portion of his house to strangers. The other parties to the agreement instituted the suit for an injunction restraining defendant from renting the property to strangers. [P 899 C 1]

Held: that the relief by way of injunction can be granted to the plaintiff and is not prohibited by S. 56, though the second part of the relief, that defendant be directed to eject the tenants to whom he has rented his portion of the property, may involve the performance of a duty as

that term is used in S. 21 (g), and an injunction to that extent may perhaps not be granted to the plaintiffs. [P 900 C 1]

Jaggan Nath Aggarwal — for Appellants.

Shamair Chand—for Respondents.

Judgment.—The plaintiffs and defendant 1, who apparently are owners of adjoining houses and belong to the same family entered into a registered agreement on 17th July 1923 that they shall not rent any portion of their respective houses to strangers, but will do so only to the members of the bradari to which they belong. Defendant 1 instituted a suit for a declaration that the above agreement was not binding on him as it was obtained from him by means of fraud. The suit was dismissed. It appears that in violation of the conditions of the registered agreement already referred to he rented a portion of his house to strangers The other parties to the agreement instituted the suit out of which this second appeal has arisen for an injunction against defendant 1, restraining him from renting the property to strangers, and for a direction that he should eject the tenants to whom the property had already been let and who did not belong to the bradari of the parties. In the alternative it was claimed that, on failure of defendant 1 to comply with the order of the Court the other defendants, the tenants, be ejected by the Court.

Hans Raj, defendant, who was in occupation of one of the houses in suit under a lease granted by defendant 1 to one Mani Lal, stated in his written statement that his lease has already expired and that if he were given a fortnight's time he would vacate the premises. Mani Lal, who was the original tenant and who had sublet the house to Hans Raj, pleaded that he had no concern with it and asserted that the plaintiffs had no locus standi to file a suit against him. The other tenant-defendant did not file any pleas. Defendant 1 raised various legal pleas, the more important of which I will discuss in due course. The trial Court dismissed the suit, but the learned District Judge, on appeal by the plaintiffs, held that they were entitled to sue for an injunction, but following *Daropti* v. *Jaspat Rai* (1), he declined to grant a decree for the injunction prayed for on the ground that it would not be a sound judicial discretion to perpetuate the liability incurred by defendant 1 by virtue of the agreement of the 17th July 1923 by granting its specific performance.

He considered that the relief claimed by the plaintiffs virtually amo nted to a prayer for specific performance of the contract. He remanded the case to the trial Court for the assessment of damages payable to plaintiffs owing to the breach of contract by defendant 1. The plaintiffs have presented this second appeal in this Court.

Mr. Jagan Nath Aggarwal, who appeared on behalf of the appellant, confined his case to a relief for injunction against defendant 1. He did not ask me to grant any relief to his clients against the other defendants on the ground that they did not actually contest the plaintiff's suit. With regard to the prayer for injunction the learned counsel contended that under S. 57, Specific Relief Act, he was entitled to an injunction. The learned counsel for the respondent, on the other hand, relied upon S. 56 (f), Specific Relief Act, which lays down that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. He further relied upon S. 21 (g), Specific Relief Act, which provides that a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date, cannot be specifically enforced.

The argument of the learned counsel was that the present suit really involves the specific performance of contract entered into between the parties not to let the property in dispute to persons who do not belong to the bradari of the contracting parties. Even if that be so, it seems to me that there is a clear distinction between agreements which contemplate the continuous performance of specific acts for more than three years and contracts which contemplate forbearance from the performance of certain acts. While the former kind of contracts cannot be enforced under S. 21 (g) and, therefore, a mandatory injunction in respect thereof cannot be granted under S. 56, there is nothing in that section to prohibit the grant of preventive relief by way of an injunction in the latter kind of cases. This follows from the clear wording of section 57, Specific Relief Act, which is

(1) [1905] 49 P. R. 1905=28 P. L. R. 1905.

an exception to S. 56. Illustrations (a) and (b) to S. 57 make the distinction quite clear. All that the plaintiffs now claim is that the defendant may be restrained from letting his portion of the property to a stranger, and this relief by way of injunction can in my opinion be granted to him, and is not prohibited by S. 56. The second part of the relief originally claimed by plaintiffs, that defendant 1 be directed to eject the tenants to whom he has rented his portion of the property may involve the performance of a duty as that term is used in S. 21 (g), and an injunction to that extent may perhaps not be granted to the plaintiffs, but the plaintiffs are satisfied with an injunction restraining the defendant from letting his portion of the property to unauthorized persons in violation of the express terms of the agreement already mentioned and as there is no prohibition to the grant of such an injunction I accept this appeal and grant the plaintiffs a decree for an injunction restraining defendant 1 from letting his portion of the houses in suit to persons who do not belong to the bradari of parties. In view of the fact that the plaintiffs have not been given the whole relief that they claimed I direct the parties to bear their own costs throughout. I express no opinion as to the right of the plaintiffs to take any action that they may be advised to take against the tenants in any subsequent proceedings.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 900 (1)

FFORDE, J.

Naurang Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1029 of 1926, Decided on 7th Jan. 1927, from order of Addl.Sess.J.,Lyallpur,D/- 10th June 1926.

Arms Act (11 *of* 1878), *S.* 19 *(f)—Forbidden weapon discovered by reason of information from accused—His conviction is valid—Evidence Act, S.* 27.

Where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused person, his conviction based upon that evidence is valid : 72 *P. L. R.* 1916, *Foll.*

[P 900 C 2]

Moti Sagar—for Petitioner.

C. H. Carden Noad—for the Crown.

Judgment.—The petitioner Naurang Singh has been convicted under S. 19 (f), Arms Act, of having been in possession of a revolver, and has been sentenced to two years' rigorous imprisonment.

It appears that the revolver was found, after a very considerable search extending over several days, in a well which the petitioner had pointed out to the police as being the place in which he had thrown this weapon. The learned appellate Court has maintained the conviction relying upon a Division Bench decision of the Chief Court in *Isher Singh* v. *Emperor* (1). That case is, undoubtedly, an authority for holding that where an article, the possession of which is forbidden by the Arms Act, has been discovered by reason of information given by an accused person, the conviction based upon that evidence is legally sound. Following that decision, in my judgment, the conviction cannot be disturbed on revision. Mr. Moti Sagar has strongly urged that the sentence is excessive. He points out that it was through the assistance of the petitioner himself that the revolver was ultimately discovered, that the police on their first attempt to find the weapon in the well did not succeed, and it was not until some days after the operation had been started, and until a dredger had been used, that the revolver was ultimately discovered. As the petitioner apparently disclosed the fact that he had disposed of such a weapon, immediately after he was interviewed by the police, I think the sentence is somewhat severe. I would accordingly reduce it to 12 months' rigorous imprisonment which, I think, would meet the ends of justice. In other respects the petition is dismissed.

J.V. *Sentence reduced.*

(1) [1916] 72 P. L. R. 1916=33 I. C. 823=50 P. W. R. 1915 Cr.

A. I. R. 1927 Lahore 900 (2)

TEK CHAND AND AGHA HAIDAR, JJ.

Ganga Ram—Plaintiff—Appellant.

v.

Mohamed Hussain and *others*—Defendants—Respondents.

First Appeal No. 494 of 1925, Decided on 3rd May 1927, from decree of 1st Cl. Sub-J., Amritsar, D/- 2nd February 1925.

Civil P. C., S. 11—*Parties not the same—Suit s not barred.*

Where the prior suit was between *A* and *B* and the subsequent suit was between *A* on the

one hand and *B* and other persons interested in the result of the suit :

Held : that the parties in the two suits not being the same, the subsequent suit was not barred : 26 *Cal.* 428 (*F. B.*) and 12 *P. R* 1903, *Dist.* [P 902 C 2]

Nand Lal and *A. R. Kapur*—for Applt.

Jagan Nath Aggarwal and *Lal Chand*—for Respondents.

Agha Haidar, J.—This appeal arises out of a declaration that the sale-deed, dated 9th November 1919, executed by defendant 4 for herself and as guardian of defendants 1 to 3 who were then minors, with regard to 45/80ths share in a certain shop mentioned in para. 1 of the plaint, was totally null and void and absolutely infructuous and that, therefore, the sale-deed respecting the share of defendants 1 to 3 was liable to be cancelled. The trial Court raised only three preliminary issues in the case and as a result of its finding on issue 5 dismissed the plaintiffs' suit as being barred by the rule of res judicata. The plaintiff has come up in appeal to this Court.

The facts are briefly these :

One Khair Din died some time before 1919 leaving him surviving his widow Mt. Hayat Bibi, Muhammad Hussain and Muhammad Sadiq, minor sons, Mt. Rahmat Bibi and Mt. Barkat Bibi, minor daughters, and two adult sons Hissam Din and Mehr Din. The property left by Khair Din with which we are concerned in the present appeal was a shop described in the plaint. The property can be conveniently divided into 80 sihams, and the result would be that Mt. Hayat Bibi would be entitled to ten sihams, each son would get fourteen sihams and each daughter would be entitled to seven sihams. Hissam Din who is impleaded in the present suit as defendant 5 inherited fourteen sihams in his own right and he further acquired the interest of his brother Mehr Din in the property. On 7th November 1919, he executed a mortgage in favour of Ganga Ram, the present plaintiff, for a sum of Rs. 1,500, in which he mortgaged the 28/80ths share which had come to him. On 9th November 1919, Mt. Hayat Bibi in her own right and as guardian of Muhammad Hussain, Muhammad Sadiq and Mt. Rahmat Bibi, minors transferred in lieu of a sum of Rs. 4,500, their 45/80th share to Hissam Din. Out of the consideration, a sum of Rs 3,500, was to be left for the benefit of the three minors as their share of the consideration money to be subsequently invested in the purchase of some profitable property.

On 13th January 1920, Hissam Din transferred to Shah Din, who is impleaded in the present suit as defendant No. 6, the whole of the property of Khair Din which had now passed into his hands, for a sum of Rs. 9,000. This document also contained the condition that Rs. 3,500 was to be set apart for the benefit of the minors and finally on 9th February 1922, Shah Din transferred to Ganga Ram, the present plaintiff and mortgagee from Hissan Din, the whole shop for a consideration of Rs. 7,500 The documents dated respectively 9th November 1919, and 13th January 1920, were registered on 2nd February 1920, and the document dated 9th February 1922, was registered on the same date that is to say, on 9th February 1922. This document is printed at p. 9 of the paper-book and at p. 10 we find the details of the consideration. A sum of Rs. 3,500 out of the total consideration was to be paid according to the condition laid down in the documents on two subsequent dates. Ganga Ram, it appears, did not pay this sum of Rs. 3,500 as stipulated in the sale-deed which had been passed to him by Shah Din. The result was that Shah Din had to bring a suit against Ganga Ram.

The pleadings in that suit have been printed and so is also the judgment of the learned Subordinate Judge, 2nd Class, Lala Deoki Nandan. The suit was for the recovery of a sum of Rs. 3,500, plus interest on the ground that Lala Ganga Ram had failed to pay the money under the terms of the sale deed which he had received from Shah Din. Lala Ganga Ram in his reply pleaded that the plaintiff's title was defective and that he was not owner of the entire house at the time of the sale. He further pleaded that the share (35/80ths) in dispute was owned by the three minors whose guardian had no power to sell it and that the sale in question was, therefore, null and void as against him being the result of fraud practised upon him by the plaintiff. He also pleaded that the plaintiff was not entitled to the balance of consideration money. The learned Subordinate Judge raised four issues, and the argument before him on behalf of the defendant was that the mother, who had transferred the property of her minor sons, was not entitled to do so under the Mahomedan

Law and, therefore the title of Hissam Din and after him that of Shah Din was defective and that Shah Din had not passed a good and clear title to the defendant. The learned Subordinate Judge, after referring to some authorities, held that, although the mother was not a legal guardian of the minors' property and could not transfer the same as their de facto guardian, the transaction was on the whole for the benefit of the minors and was not open to any legal objection.

Whether that decision was correct or not, it is not for us at this stage of litigation to express any views upon it. The fact, however, remains that the learned Subordinate Judge clearly and distinctly arrived at a finding that the interests of the minors were not in any way jeopardized and that it was not open to them to challenge the transaction on the ground that their mother had no authority to transfer their shares. The importance of the decision and the decree passed by the learned Subordinate Judge in that suit, as would subsequently appear, lies in the fact that Shah Din was the sole plaintiff and Ganga Ram was the sole defendant in the case. That decision was not appealed against and was allowed to become final. Babu Ganga Ram on 30th August 1923, filed the present suit. In this suit he impleaded not only Shah Din, but also Muhammad Hussain, Muhammad Sadiq, Mt. Ramat Bibi, Mt. Hayat Bibi and Hissam Din among the heirs of Khair Din. The learned Subordinate Judge raised three preliminary issues, namely :—(1) Does the suit lie as framed? (2) Has the plaint been correctly valued for jurisdictional purposes? (3) Is the present suit barred?

So far as the first issue is concerned, he held that the suit was properly framed and no argument has been addressed to us by the learned counsel for the respondents to challenge this finding.

Dr. Nand Lal, who appeared on behalf of the plaintiff-appellant, urged that as the decision, dated 13th July 1923, was given by a learned Subordinate Judge, 2nd Class, and the valuation of the present suit was Rs. 6,000, he had no jurisdiction to try the present suit and that this being so any decision given by him could not operate as res judicata so as to bar the present suit. We have considered this point and we do not think that there is any substance in it. A plea was raised in the present suit about the valuation given in the plaint by the plaintiff. The plaintiff did not produce any evidence whatsoever in order to show that the market value of the property in suit was Rs. 6,000. On the materials on the record we think that the learned Subordinate Judge was perfectly right when he calculated the market value of the 35/80ths share of the property in suit on the basis of the sale consideration of the sale-deed executed by Shah Din in favour of the present plaintiff, for a sum of Rs. 7,500. This being our view, we did not ask the respondents' counsel to address any argument in reply on the point.

The real and substantial question involved in the present appeal, however, is whether or not the present suit is barred by the rule of res judicata. We have heard Dr. Nand Lal at very considerable length and our view is that, having regard to the array of the parties in the two litigations, that is to say, in the litigation which came to an end by the decree passed by Lala Deoki Nandan on 13th July 1923, and the present suit, the decision given by Lala Deoki Nandan cannot be res judicata. That was a suit as already noted, between Shah Din (plaintiff) and Babu Ganga Ram, defendant, only. Here we find other persons, besides Shah Din, impleaded as defendants, in the suit. It cannot be said that the persons, who have been impleaded and especially defendants 1 to 3, are merely pro forma parties against whom no relief is sought and who would not in any way be interested in the result of the litigation. These minor defendants are persons who can, if they feel so inclined bring an action challenging the transfer made by their mother on their behalf during their minority. Whether their objections would be valid or invalid is a different matter; but the fact remains that they are interested in the property in suit and it cannot be said that they are not necessary parties for the purpose of this litigation. In fact we are prepared to hold that minors, having regard to the nature of the previous transactions, are vitally interested in the result of the present case. This being our view, we are driven to the conclusion that the present suit cannot be barred by the rule of res judicata because the parties to the present suit are not the same as those in the previous suit. Mr. Jagan Nath on behalf of the respondents has

argued, strenuously that the present case would be governed by *Dwarka Nath Roy* v. *Ram Chand* (1), and that this Court could affirm the decree of the Court below and hold that the suit was barred by the rule of res judicata *qua* Shah Din, defendant 6. On a perusal of that judgment we do not think that case is an authority for this proposition. Mr. Jagan Nath also invited our attention to *Mt. Janno* v. *Rafik Khan* (2). That ruling refers to a different class of cases altogether where Expl. 6 S. 2, Civil P. C., comes into operation. The present case does not belong to that class of suits.

On a consideration of all the facts and circumstances of the case we think that the learned Judge was not right in throwing out the plaintiff's suit on the preliminary plea of res judicata. We express no opinion whatsoever on the merits of the case. All that we do at the present moment is to hold that the present suit is not barred by the rule of res judicata. We accordingly allow the appeal, set aside the decree of the Court below and remand the case under O. 41, R. 23, Civil P. C., to the trial Court for decision in accordance with law. Stamp on the memorandum of appeal filed in this Court will be refunded and costs here and hereinafter will abide the event.

D.D. *Case remanded.*

(1) [1899] 26 Cal. 428=3 C. W. N. 263 (F. B.).
(2) [1903] 12 P. R. 1903=19 P. L. R. 1903.

A. I. R. 1927 Lahore 903

ADDISON, J.

Buta—Defendant—Petitioner.

v.

Tirlok Chand—Plaintiff—Respondent.

Civil Revn. Petn. No. 661 of 1926, Decided on 22nd January 1927, from decree of 1st Class Sub-Judge, Gujrat, D/- 19th April 1926.

Evidence Act, S. 34—Account books produced—Evidence of payment of specific sums paid not given—Evidence is not enough to charge defendant with liability.

Where there were only the account books and the general statement of the plaintiff that there were dealings between him and defendant,

Held: that the dealings were not proved under S. 34, Evidence Act, in absence of evidence of specific sums having been paid: *A.I.R.* 1924 *Lah.* 540; *A.I.R.* 1922 *Lah.* 338; *A.I.R.* 1923 *Lah.* 431 and 82 *P. R.* 1914, *Foll.* [P 904 C 1]

Jamna Das—for Petitioner.

Joti Sarup and *Gulla Ram*—for Respondent.

Judgment.—Plaintiff alleged that defendant borrowed from him Rs. 44-15-0 and attached his thumb-mark to an entry against this amount in his bahi. He accordingly brought the present suit for Rs. 95 principal and interest. Defendant pleaded that this debt had been paid off and that he had paid Rs. 148 to the plaintiff on 10th June 1925, for which sum plaintiff gave him a receipt. He further urged that the plaintiff had taken advantage of him and made him pay much more than was due. Defendant accordingly counter-claimed for Rs. 59-1-0. The plaintiff replied that the receipt for Rs. 148 had been granted by him but that this payment was in settlement of another account. The trial Judge held that the plaintiff had not established any other account and decreed the defendant's counter claim. On appeal the Senior Subordinate Judge held that the other account had been proved and setting aside the order of the trial Judge gave plaintiff a decree for Rs. 95. Against this decision the defendant has applied on the revision side to set aside the decree of the appellate Court and to dismiss the plaintiff's suit. He has not asked that a decree should be given to him for his counter-claim.

The sum of Rs. 44-15-0, constituting the principal of the amount in suit, was the first transaction in the account put in by the plaintiff, an entry as regards this item being thumb-marked by the defendant. The plaintiff has proved that there are dealings entered in his account books thereafter. He has put in copies of his khata and roznamcha bahis as regards these dealings. None of the subsequent entries bear any thumb-mark. Besides proving his account books, the plaintiff in the witness-box stated generally that there were subsequent dealings. Apart from that, there is no evidence to establish that this was the case. Further, it is clear that there was only one khata account and not two separate khata accounts, as stated by the plaintiff after the defendant's pleas were put in. The plaintiff's plea, therefore, that the sum of Rs. 148 was in payment of a sum due on another account is not correct.

The principal question, however, is whether the plaintiff has proved any dealings subsequent to the advance of Rs. 44-15-0, the entry regarding which was duly thumb marked by the defen-

dant. It was held in *Ganga Ram* v. *Kaka Ram* (1) that, where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to accept as sufficient proof the entries uncorroborated by any evidence other than a somewhat vague statement by one of the plaintiffs. A somewhat similar ruling is *Abdul Ali* v. *Puran Mal* (2). In *A. I. R.* 1923 *Lah.* 431, it was held that the statement of a munim, who made daily balances each day, was not sufficient proof of the plaintiff's claim on book account when the actual items were not paid in his presence. In *A. I. R.* 1924 *Lah.* 540, the plaintiff's account books were proved and two witnesses were examined. One munim said that dealings took place in his presence between the plaintiff and defendants, and that a particular payment was also once made by the defendants in his presence. Another munim said that the defendants had taken away goods in his presence. It was held, however, that this was not sufficient evidence that any single article charged against the defendants was supplied to them: see also *A. I. R.* 1922 *Lah.* 338, on p. 343, Col 2, para. 2.

In the present case there are only the account books and the general statement of the plaintiff that there were subsequent dealings. Following the above rulings, I must hold that the dealings were not proved under S. 34, Indian Evidence Act I, therefore, accept the revision and dismiss the plaintiff's suit The parties will bear their own costs throughout.

D.D. *Revision accepted.*

(1) [1914] 47 P. L. R. 1914=22 I. C. 403=53 P. W. R. 1914.
(2) [1914] 82 P. R. 1914=25 I. C. 560=277 P. L. R. 1914.

A. I. R. 1927 Lahore 904 (1)

AGHA HAIDAR, J.

Sher Singh—Appellant.

v.

Ishar Das and *others*—Respondents.

Misc. First Appeal No. 2831 of 1926, Decided on 27th April 1927, from order of Dist. Judge, Ferozepore, D/- 26th August 1926.

Provincial Insolvency Act **(1920), *S. 47—Mortgagee without possession is a secured creditor.***

A simple mortgagee is just as much a secured creditor as a mortgagee with possession. [P 904 C 2]

Mehr Chand Mahajan for Badri Das—for Appellant.

Judgment.—This is an appeal by a secured creditor and it arises out of certain insolvency proceedings. Into the earlier history of this insolvency matter I need not go. For the purposes of the present decision it may be noted that the present appellant proved his mortgage before the receiver as would appear from the report submitted by the receiver to the Court on 3rd November 1925. Mr. Chuni Lal, who was predecessor-in-office of the learned District Judge, passed the order under appeal on 19th December 1925, and treated the appellant as a secured creditor, but curiously enough the learned District Judge in his order dated 26th August 1926, has completely ignored the previous proceedings and has observed as follows :

Petitioner's counsel says the two houses were mortgaged without possession and have never been in his possession and are now in the receiver's possession. I rule, therefore, that Bedi Sher Singh is not secured creditor.

This view of the learned District Judge which is not based upon any reasoning whatsoever is erroneous. It does not appear what the words : "I rule, therefore, that Bedi Sher Singh is not a secured creditor," really mean. If the meaning of the learned District Judge is that a mortgagee, who is not actually in possession of the property, cannot be a secured creditor, he is wrong, because a mortgagee without possession, in other words, a simple mortgagee is just as much a secured creditor as a mortgagee with possession.

Under these circumstances, I set aside the order of the learned District Judge and remand the case with directions that he should take action under S. 47 (3), Insolvency Act. The respondent is not represented. Costs would be costs in the insolvency proceedings.

R.D. *Case remanded.*

A. I. R. 1927 Lahore 904 (2)

ADDISON, J.

Hukam Chand — Defendant — Petitioner.

v.

Jowala Singh—Plaintiff—Respondent.

Civil Revn. Petn. No. 296 of 1926, Decided on 28th October 1926, from order of 1st Class Sub-Judge, Rawalpindi. D/- 16th December 1925.

Limitation Act (9 *of* 1908), *Sch.* 1, *Art.* 164—*Application to set aside ex-parte decree dismissed for default—Application made to set aside the dismissal of first application—Such second application cannot be treated as an original application to set aside the ex-parte decree.*

An application to set aside an order dismissing in default a previous application made to set aside an ex-parte decree does not lie and it is not necessary to treat the second application as an original application to set aside the ex-parte decree : *A. I. R.* 1925 *All.* 773 and 1 *Lah.* 339, *Foll.* [P 905 C 2]

M. S. Bhagat—for Petitioner.

Man Singh and *B. D. Qareshi*—for Respondent.

Judgment.—On 4th April 1925, both a summons and a registered letter were sent to the defendant to appear on 30th April 1925, in answer to the plaintiff's suit. The report on the summons was that he was not served as he was away for 20 days and it was not known when he would return. The registered letter was marked "Refused." On this the presiding Judge ordered sub-tituted service under O. 5, R. 20, Civil P. C., and passed a decree ex parte in favour of the plaintiff against the defendant on 22nd May 1925. On 23rd August 1925 the defendant applied to set aside the ex-parte decree against him, alleging that he had only come to know of it the day before. Notice was ordered to issue on this application to the decree-holder for the 10th October. On that date the petition was dismissed in default. On the same day, namely, the 10th October 1925, an application was made to set aside the order of dismissal in default regarding the first petition. The Subordinate Judge refused to do so and against his decision this revision petition has been admitted.

The only statement on the record was that of the petitioner's counsel to the effect that he had ordered his munshi to stay in the verandah of the Court and to inform him whenever the application was called. Accordingly he was called at once by his munshi and arrived in Court to find the or ginal petition dismissed in default a few minutes after this was done. The Subordinate Judge, however, considered on the strength of *Pitambar Lal* v. *Dodee Singh* (1), that the second application must be treated as an original application to set aside the ex-parte decree and that being the case, it was clearly time barred. That seems to have been his principal reason for dismissing the second petition though he has also said that the counsel's absence was no ground for setting aside an ex-parte decree.

(1) A. I. R. 1924 All. 503=46 All. 319.

It is clear that what happened was that the counsel was two minutes late, that the petitioner did not come that day, as it was not a day fixed for evidence, on account of the fact that he was then living in Gurdaspur, which is a long distance from Rawalpindi. There thus was sufficient cause for setting aside the order dismissing the first application in default and the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in refusing to set aside that order. Further it was held in *Ganesh Prasad* v. *Bhagchi* (2), *Abdul Rahman* v. *Sahahana* (3) that an application does lie and that it is not necessary to treat the second application as an original application to set aside the ex-parte decree. For this reason also the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in holding that the second application could only be looked upon as an original application.

I accept this petition for revision and, setting aside the order of the Court below dated the 16th December 1925, hereby set aside the order of dismissal in default with regard to the first petition, dated the 23rd August 1925, and direct that it be restored to the pending file. The Subordinate Judge will now proceed to a decision whether the first application to set aside the ex-parte decree should be granted or not. The parties will bear their own costs here.

J.V. *Petition accepted.*

(2) A. I. R. 1925 All. 773=17 All. 878.
(3) [19-0] 1 Lah. 339=58 I. C. 748.

A. I. R. 1927 Lahore 905

ZAFAR ALI, J.

Ganeshi Lal and *others*—Objectors—Appellants.

v.

Firm Sheo Singh-Nihal Singh and *others* — Decree-holders and Judgment-debtors—Respondents.

Misc. First Appeal No. 1278 of 1926, Decided on 17th November 1927, from order of the Sr. Sub.-Judge, Karnal, D/- 19th January 1926.

(*a*) *Civil P. C., O.* 21, *R.* 58—*Adverse decision against transferees of judgment-debtors on their objection—Appeal lies.*

Transferees of the rights of the judgment-debtors in property attached are their representatives and as such are competent to appeal under S. 47 from the adverse decision passed in objection proceedings : *A. I. R.* 1926 *Lah.* 134, *Foll.* [P 906 C 2]

(*b*) *Civil P. C., O.* 41, *R.* 1—*Preliminary order—Copy not filed in time—Preliminary order not contested — Delay was condoned—Limitation Act, S.* 5.

Where a copy of the order of the Court below on a preliminary issue was not filed along with the copy of the final order, and when it was filed the period of limitation had expired, but it was found that preliminary order was not contested:

Held : that it would be but fair to condone the delay under S. 5, Limitation Act : *A. I. R.* 1926 *Lah.* 638 and 28 *P. L. R.* 537, *Ref*: (*vide A. I. R.* 1928 *Lah.* 46, *Ed.*) [P 907 C 1]

(*c*) *Registration Act, S.* 17—*Compromise decree.*

Compromise affecting immovable property embodied in the decree requires no registration. [P 907 C 1]

H. C. Kummar and *J. G. Sethi*—for Appellants.

Shamair Chand—for Respondents.

Judgment.—This is a miscellaneous first appeal against an order of the Senior Sub-Judge of Karnal, allowing in part an objection to an attachment in execution of a decree. The property attached was a ginning factory and the judgment-debtors were Nathu Ram and his two brothers. They are residents of Karnal and the factory is also situate in that very town. There were two decrees against them, the decree-holders being: (1) the firm of Sheo Singh-Nihal Singh of Delhi, and (2) the firm of Nagni Ram-Ganeshi Lal of Lahore. The objection petition was filed as against one of these decree-holders only, namely, the firm of Sheo Singh-Nihal Singh of Delhi. In the suit brought by that firm an order was made on the 2nd July 1920 for attachment of the factory before judgment, and the warrant of attachment issued was duly served on Nathu Ram's two brothers, but not on him. Nathu Ram, however, evenutally made a compromise with the firm of Sheo Singh-Nihal Singh and a consent decree, which was ex parte against his brothers, was accordingly passed on 5th December 1923. The decree was for Rs. 12,000-which amount was made payable by two instalments and recoverable from the property already attached before judgment by order of the Court, and "the judgment debtors were not to alienate that property before satisfaction of the decree.

In the other suit also attachment before judgment was ordered, but the order of attachment was not duly communicated to any one of the defendants. A similar consent decree for Rs.6,500 was, however, passed on 13th December 1923, on the basis of a compromise filed by Nathu Ram and the plaintiffs of Lahore. The latter having not been impleaded as respondents in the objection petition now in question, the order made on that petition cannot affect them.

The objectors' claim was that half the factory was sold to them by Nathu Ram for Rs. 19,000 on 15th January 1924. The learned Senior Sub-Judge has found that the objectors paid, as a matter of fact, Rs. 15,000 only and ordered that they had a valid charge on half the factory to the extent of Rs. 15,000. The objectors appeal.

Mr. Shamair Chand, who appears on behalf of the decree-holders of Delhi, raises three preliminary objections. The first is that the appeal does not lie as the objectors were not parties to the suit in which the decree was passed. To this the reply of the appellants' counsel is that the objectors, being the transferee of the rights of the judgment-debtors, were their representatives, and were as such competent to appeal under S. 47, Civil.P. C., as held in *A.I.R.* 1926 *Lah. p.*134 (*Ishar Das* v. *Perma Nand.*)

Mr. Shamair Chand, in view of that ruling, withdraws this objection.

His second objection is that the decree-holders of Lahore, who were no parties to the objection case, could not be impleaded as respondents in this appeal. The appellants' counsel has nothing to say against this objection and this must prevail. His third objection is that the appeal was barred by limitation in as much as a copy of the order of the Court below on a preliminary issue was not filed along with the copy of the final order and that when it was filed the period of limitation had expired. He relies upon *Abdulla* v. *Behari Lal* (1) and *Bhiwani Cotton Spinning and Weaving Mill Co. Ltd.* v. *Bishen Sahai Bhagwan Dass* (2). There can be no doubt that the copy of the order on the pre-

(1) A. I. R. 1926 Lah. 638.
(2) [1927] 28 P. L. R. 537.

liminary issue, as well as that of the final order, should both have been filed along with the memorandum of appeal, but, in the circumstances of the present case when the preliminary order was not contested, it will be but fair to condone the delay, and I accordingly extend the time under S. 5, Limitation Act.

But the objectors' appeal must fail on the merits. The question whether they paid Rs. 19,000 or Rs. 15,000 only was decided on the testimony of Lala Ram Chandra, pleader, who was the mortgagee of half the factory, and had obtained decree to recover his mortgage money by sale of the property. He realised his money and gave a receipt to the objectors (purchasers) for Rs. 18,.100 on 5th February 1924. His evidence, however, was that this sum included (1) Rs. 15,000 and (2) Rs. 1,000, which he previously received from the mortgagors themselves on 10th November 1923 and 17th November 1922 respectively, and (3) Rs. 593-12-0, which he had remitted in favour of the mortgagors. The learned Senior Sub-Judge has expressed, in respect of this witness, the opinion that he is a gentleman of probity and he has believed his evidence on this point. There appears to me no adequate reason for discrediting his testimony and I, therefore, consider that the finding of the Court below that Rs. 15,000 only was paid by the objectors to this witness is correct.

The next point is whether the decree created a valid charge on the factory to the extent of the amount decreed. That the decree does create a charge on the property that was attached before judgment is clear from the decree itself. Whether the attachment was valid or not is of no consequence because the phrase "the property that was attached" was used in the decree only to describe that property. Further as the judgment-debtors are bound by that decree so are the objectors who stand in their shoes and are their representatives. Lastly it was urged that the compromise required registration, but it did not, because its terms were embodied in the decree and it is the decree that is to be enforced. The appeal fails and I dismiss it with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 907

JAI LAL, J.

Shankar and *others*—Defendants—Appellants.

v.

Arjan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2085 of 1926, Decided on 28th March 1927, from decree of Dist. Judge, Gurdaspur, D/- 23-6-1926.

Registration Act, Ss. 49 and 17 — Document requiring registration but not registered is not admissible.

An unregistered agreement relinquishing immovable property and requiring registration under S. 17 cannot be received in evidence. [P 908 C 1]

Shamair Chand and *J. N. Bhandari*—for Appellant.

Fakir Chand—Respondents.

Judgment.—The relationship between the parties will appear from the pedigree which is to be found in the judgment of the learned District Judge. The plaintiff Arjan instituted a suit for a declaration that he was entitled to the land in suit by virtue of an agreement made by the contesting defendants, the sons of his brother Fakir. An oral agreement alleged to have been made in 1887, seems to have been set up before the learned District Judge but has been held not proved. In the plaint reliance is placed on a written agreement alleged to have been executed in 1908 but this agreement was unregistered and was objected to as inadmissible on that account on behalf of the defendants. The District Judge has held that though initially the document relied upon by the plaintiff was inadmissible for want of registration it can be relied upon by the plaintiff as it has been acted upon. In support of his view the learned Judge relied on certain authorities which the counsel for the appellant contends do not support the view of the learned Judge. I do not propose to go into this question as in my opinion it has not been established by any evidence on the record that the agreement of 1908 was acted upon.

The only evidence in support of his conclusion relied upon by the learned District Judge is that in the jamabandis of 1910-11 and 1922-23 the areas in possession of the plaintiff and the defendants respectively are not according to the original shares by inheritance and that there is a disparity in the areas which is due to the agreement contained in the

document relied upon by the plaintiff. The learned counsel for the respondent has not been able to show that after the execution of the document in 1908 any land which was previously in possession of the defendants passed to the possession of the plaintiff. On the other hand it appears that the area that is actually in possession of the defendants has remained the same at any rate since 1905 and 1906 up till now. The learned counsel moreover has not been able to show that the difference between the areas in the possession of the two .contending parties represents the area in respect of which the document was executed by the defendants in favour of the plaintiff in 1908. It is, therefore, impossible to hold that there is any evidence in support of the conclusion of the learned District Judge that the document relied upon by the plaintiff was acted upon.

Counsel for the respondent then asked me to remand the case to have further enquiry made into the matter but the extracts of the jamabandi of the years prior to 1908 are on the record and the learned counsel has not been able to show from them that any land was actually handed over by the defendants to the plaintiff on the execution of the document in suit and consequently I do not think that there is any justification for a remand. It is admitted by both parties that the entire holding is recorded as joint property of the parties and that the present dispute has arisen out of partition proceedings. It appears to me more likely that in 1908 the defendants executed the document in favour of the plaintiff relinquishing their right in the land in suit but such relinquishment was never followed by actual transfer of possession and in fact no possession could be transferred having regard to the fact that the joint holding had not been partitioned. There was therefore no occasion to act on the agreement except after partition and in the first attempt to partition the agreement was repudiated by the defendants.

Accepting this appeal I set aside the decree of the learned District Judge and dismiss the plaintiff's suit, but under the circumstances of the case I leave the parties to bear their own costs throughout.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 908

JAI LAL, J.

Malak Mohammad Khan—Plaintiff—Appellant.

v.

Het Ram and *another*—Defendants—Respondents.

Second Appeal No. 2887 of 1926, Decided on 28th March 1927, from decree of Sr. Sub-Judge, Rohtak, D/- 27th Aug. 1926.

Limitation Act, S. 5—Discretion.

Discretion exercised by the lower appellate Court will not be interfered with by the High Court. [P 909 C 1]

Nand Lal—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The plaintiff instituted four suits to pre-empt four sales in respect of shares in the same property in favour of the same vendees, which were tried together and dismissed. The Subordinate Judge wrote two judgments, disposing of the four suits, and made a reference to one in the other. In fact, the two judgments were supplementary to each other. The plaintiff appealed in all the four cases, but in two of them, that is, Nos. 200 and 201, he did not file copies of the judgment written in the other two cases. The Senior Subordinate Judge, who heard the appeals, dismissed them so far as these suits, Nos. 200 and 201, were concerned on the ground that they had not been properly instituted for want of copies of the Judgment in the other two cases. He then proceeded to decide the appeals in the other two suits and finally dismissed them, holding that the plaintiff had failed to prove his right to pre-empt the sales. The latter thereupon filed second appeals in all the four cases, two of them were dismissed in limine, but the remaining two, that is, those relating to suits Nos. 200 and 201, have been admitted to a hearing.

After hearing arguments of counsel, I hold that even if I were inclined to disagree with the Senior Subordinate Judge in his opinion that copies of the supplementary judgment should have been filed by the appellant with the memoranda of appeals or that the learned Judge below should have exercised his discretion by extending the time under the circumstances and by granting permission to the appellant to file copies of the judgment concerned, I consider that, having regard to the fact that the finding in

the other two cases, which must now be deemed to be final and conclusive, the plaintiff has no locus standi to pre-empt the sales, which finding also governs the two appeals before me, I should decline to interfere on this appeal. The learned Senior Subordinate Judge has declined to exercise a discretion that vested in him to extend the time, and under the circumstances referred to above it is not incumbent on me to interfere with the exercise of that discretion on a second appeal. I dismiss the appeals but leave the parties to bear their own costs.

D.D. *Appeals dismissed.*

A. I. R. 1927 Lahore 909

CAMPBELL, J.

Firm Ganga Ram-Bishen Das—Plaintiffs—Appellants.

v.

Firm Hari Ram-Ram Lal and *another*—Defendants—Respondents.

Second Appeal No. 3008 of 1926, Decided on 14th April 1927, from decree of Addl. Dist. Judge, Amritsar, D/- 4th December 1926.

(a) *Contract Act, S. 73—Damages—Breach of contract to sell—Measure.*

The rule governing the measure of damages for breach of contract to sell goods is that such measure is the sum by which the contract price falls short of the price at which the purchasers might have obtained goods of like quality at the time and place that they should have been delivered. [P 911 C 1]

(b) *Civil P. C. S. 100—Whether other proceedings were prosecuted diligently and in good faith is a question of fact—Limitation Act. S. 14.*

The finding that other proceedings were prosecuted in good faith and diligently is a finding of fact and cannot be interfered with in second appeal. [P 910 C. 2]

G. C. Narang—for Appellants.

J. G. Sethi—for Respondents.

Judgment. These two appeals Nos. 3008 and 3009 of 1926 arise out of two similar suits by the same plaintiffs for damages for breach of contract to supply salt. The quantity to be supplied in each case was 420 maunds. It appears that indents for these two consignments were placed at the Salt Mines at Khewra and that the indents were afterwards sold by the original indentor to another person and that thereafter they were re-sold to various persons until they were purchased first by the defendants Hari Ram-Ram Lal and later on for the plaintiffs by Nathu Mal-Saran Das. The two suits were numbered in the trial Court as 544 and 545. The contract in respect of which Suit No. 544 was brought was in writing and was as follows :

Amritsar Treasury.
Khewra salt agreed to be given.
Name of seller : Bhai Hari Ram-Ram Lal.
Name of purchaser : Bhai Budha Mal-Waisakhi Mal :

Received Rs. 250 (two hundred and eighty rupees) in cash on account of profits in connexion with one cheque for 420 maunds (four hundred and fifty maunds). The purchaser shall take delivery of the railway receipt on payment of the remaining sum of Rs. 612-8-0 (rupees six hundred and twelve annas eight). If he fails to do so, he shall be liable for all damages that may accrue. The amount of cheque No. 2390/351 dated 18th September 1917, corresponding to 3rd Asauj Sambat 1974. was agreed to be paid. The purchaser shall be responsible for enhancement or reduction in the rate of salt of this cheque made by the Government, the seller shall have nothing to do with this. The seller shall have the goods challaned to any station the purchaser likes. The purchaser shall pay the railway freight for the salt ; whatever condition regarding gunny bags is fixed at the time of the transaction shall be put down below. On receipt of a letter from the Sahib the purchaser shall supply gunny bags. If he fails to send them within 15 days, the seller himself shall send them after purchasing the same The amount shall be realized with interest at the rate of 1 per cent.

(Sd.) Ram Lal.

The following was the contract which was the basis of Suit No. 545 :

Khewra salt—Agreed to be given by Bhai Hari Ram-Ram Lal and agreed to be taken by Bhai Nathu Mal-Saran Das.

Received Rs. 264 (two hundred and sixty four rupees) cash on account of profits for one cheque for 450 (four handred and fifty) maunds. The purchaser shall take delivery of the railway receipt on payment of the remaining sum of Rs. 612-8-0 (six hundred and twelve rupees eight annas). If he does not take delivery thereof he shall be liable for all damages. The amount under cheque No. 572/39 dated 6th September 1917, corresponding to 22nd Bhadan Sambat 1974, is agreed to be paid into the Pind Dadan Khan Treasury. The purchaser shall be responsible for enhancement or reduction in the rate of salt of this cheque made by the Government. The vendor shall have nothing to do with this. The vendor shall have the goods challaned to any station the purchaser likes. Railway freight for the salt shall be payable by the purchaser. Whatever condition with respect to gunny bags is made at the time of the contract shall be put down below. The purchaser shall supply empty gunny bags for salt. If he does not do so within 15 days, he shall have to pay interest at 1 per cent. contract made on 16th Maghar Sambat 1974 through Budh Singh and Tara Singh brokers.

(Sd.) Ram Lal,
for Hari Ram-Ram Lal Vendors

It is not now disputed that the contracts were broken by the present defendants-respondents Hari Ram-Ram Lal the sellers. The plaintiffs claimed damages on the basis of the rates prevailing at Gujranwala, their place of business and the trial Court held that they were entitled to damages based on these rates and held the rates given in the plaints to be correct. The total amounts of damages assessed by the trial Court were Rs. 610-9-0 in one case and Rs. 666-13-0 in the other. To each of these sums interest was added and total decrees given were for Rs. 825-9-0 and Rs. 896-13-0 respectively.

The defendants appealed and the appeals were sustained by the learned Additional Judge to this extent that he held that no interest could be awarded upon the damages and that the rates by which the measure of damages was to be governed were those of Amritsar and not Gujranwala. The grounds for the second decision were that the plaintiffs were undisclosed principals, that the appellants were not given any notice by the plaintiffs or their agent that the salt was to be sent to Gujranwala, and that as the contract was entered into at Amritsar the Amritsar rates should have been allowed.

The plaintiffs have come to this Court on second appeal, and the defendants Hari Ram-Ram Lal have filed cross-objections that the suits were barred by limitation a point which was held against them in both Courts below.

I take this latter point of limitation first. It is common ground that whether or not the defendants received a notice from Khewra to supply gunny bags for the salt, they did not pass on the intimation to the plaintiffs, and that the plaintiffs never sent any information to the defendants about the station to which the salt was to be sent. The fact seems to be that in some manner not precisely accounted for this particular salt has been delivered to some other person, probably some one through whose hands the indents passed before they reached the present defendants. It is admitted that the two consignments of salt were ready packed in bags for dispatch at Khewra on 26th October 1920 and 9th November 1920. The two suits were instituted respectively at Gujranwala on 24th October 1923 and 6th November 1923. Both parties have agreed that the article of the Limitation Act applicable is Art. 115 and that the suits should have been brought within three years of the breach of the contracts. The Gujranwala Court after about a year, held that it had no jurisdiction to hear the suits and hence the plaints were returned and presented again in the Court of Amritsar which eventually decided the suits. The trial Court and the lower appellate Court have held that the plaintiffs were entitled to the benefit of S. 14, Lim. Act, in respect of the time during which the suits were pending at Gujranwala, as they had filed the suits there in good faith and had conducted them diligently. This is a finding of fact with which I cannot interfere. So far as limitation is concerned the question before me is whether the suits were instituted at Gujranwala within three years from the date of the breach of contracts. It has been argued for the defendants that the breach occurred when the plaintiffs failed to intimate to the defendants that gunny bags were to be sent for the salt and that the date upon which such intimation should have been sent was manifestly some time before 26th October 1920, and 9th November 1920. I, agree, however, with the Courts below that, on the terms of the contracts the breach occurred when the sellers of the contracts omitted to tender the railway receipts to the purchasers. The conditions of the bargain were not such that if the sellers did not call upon the buyers to supply gunny bags, the contract was terminated. In these circumstances the Courts below were correct in holding that the two breaches took place some time after 26th October 1920, and some time after 9th November 1920, and the suits were, therefore, within time. This is the only point contained in the cross-objections which has been argued.

As regards interest, it is conceded for the appellants that interest could not have been allowed unless there had been an agreement to pay interest or notice had been given that interest would be charged, or interest was chargeable by usage. Their learned counsel contends that there is an implied agreement in the contract to pay interest and also that the plaintiffs have proved usage. So far as the implied contract is concerned, the plaintiffs' learned counsel relies upon the sentence providing for the payment of interest at 1 per cent. on the costs

of the gunny bags if the sellers have to purchase them, but I cannot see that this is to be read in connexion with the previous stipulation occurring earlier in the document regarding liability to damages. The learned Additional Judge was right, I consider, in holding that there was no agreement to pay interest. On the point of usage reliance is placed upon the statements of two witnesses, Nathu Mal and Jai Singh, and upon the fact that in a similar suit brought against other persons by the defendants as purchasers suing for damages they claimed interest. What the witnesses are reported as saying is far too vague to be construed into a statement that by mercantile usage interest is chargeable upon damages for breach of such contracts as those now before me and the fact that the defendant claimed interest in their other suit and did not get it is no proof of usage. There is, I consider, no force in this part of the appeal.

The second point argued is that the plaintiffs were entitled to damages at the Gujranwala rates because their business is there, and because they had the right under the contract to name a place at which the salt was to be delivered to them. The rule governing the measure of damages admittedly is that such measure is the sum by which the contract price falls short of the price at which the purchasers might have obtained goods of like quality at the time and place that they should have been delivered. I do not think that the mere fact that the plaintiffs were undisclosed principals justified the learned Additional Judge in holding that damages were not to be based upon the market rates at Gujranwala. The more correct view was that taken by the trial Court. The defendants, however, have shown successfully that the rates allowed by the trial Court were too high, being retail rates, and that the wholesale rate was stated in his cross-examination by Jai Singh the witness whose statement the trial Court accepted as Rs. 2-13-6. The Amritsar rate allowed by the learned Additional Judge was Rs. 2-12-0 and hence the difference is very small. This in fact is conceded by the learned counsel for the appellants whose principal object in the appeal was to secure a finding that the appellants were entitled to interest upon the damages.

The appeals are accepted to this extent that in each case the decree of the plaintiffs will be one for Rs. 2-13-6 multiplied by Rs. 450 minus Rs 853-8-0, the deductions fixed by the Additional Judge. The cross-objections are dismissed in each case. The plaintiffs-appellants will have their costs on the amounts by which they have succeeded.

G.B. *Appeal partly accepted.*

A. I. R. 1927 Lahore 911

ADDISON, J.

Firm Gurranditta Ram-Ram Kishen—Plaintiff—Petitioner.

v.

Sukhu Ram and *others*—Defendants—Respondents.

Civil Revn. No. 134 of 1926, Decided on 7th January 1927, from order of 2nd Class Sub-Judge, Multan, D. 17th November 1925.

Civil P. C., S. 115—*Although another remedy is open, revision will be allowed in exceptional cases.*

It is a general rule that High Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances: 65 *P. W. R.* 1908, *Rel. on.* [P 912 C 1]

Jiwan Lal Kapur for *Nand Lal* —for Petitioner.

Arjan Das—for Respondents.

Judgment.—The plaintiffs obtained ex-parte decree against all five defendants on 21st May 1924. Four out of the five defendants applied to have this decree set aside on 2nd March 1925. By order dated 8th April 1925, the ex-parte decree was set aside, no special mention being made as to whether it was set aside only as regards the four defendants who had applied or as regards all the five defendants. The hearing of the suit was then fixed for the 29th June 1925. On that day it was discovered that the defendant, who had not applied, was not present and the plaintiffs were ordered to put in the process-fee in order to serve him by registered post. The next hearing of the suit was fixed for the 4th November. In the meantime, the Subordinate Judge hearing the suit, left the district and it came before another Subordinate Judge. On 4th November this second Subordinate Judge dismissed the whole suit under O. 9, R 2, Civil P. C. An application was made to him to set aside that order

and to restore the suit to the pending file, but he dismissed this application on 17th November 1925 although he accepted the contention that the suit should not have been dismissed as against all the defendants if the defendants before the Court were individually responsible. Against this order the plaintiffs have come here in revision.

It was part of the plaintiff's case that they had put in the process fee, which, they alleged, must have been mislaid in the Court. This was not impossible, seeing that the case in the meantime came before a different Subordinate Judge. I think the explanation, which was given on oath, should have been accepted and the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in not restoring the suit. It is true that it is a general rule that this Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances : see *Shahab Din* v *Anjaman Inaumania* (1).

I accordingly accept this petition and make an order setting aside the dismissal of the suit and direct the Subordinate Judge to proceed to hear it. There will be no costs here

G.B. *Petition allowed.*

(1) [1903] 65 P. W. R. 1908.

A. I. R. 1927 Lahore 912

TEK CHAND, J.

Hakam Beg and *others*—Plaintiffs—Appellants.

v.

Rahim Shah and *others*—Defendants—Respondents.

Second Appeal No. 1172 of 1926, Decided on 2nd February 1927, from decree of Senior Sub-Judge, Amritsar, D/- 12th January 1926.

Civil P. C., O. 41, R. 1—Memo. of second appeal must be accompanied by copy of decree of lower appellate Court.

It is necessary that every second appeal preferred shall be accompanied by a copy of the decree of the lower appellate Court with the memorandum of second appeal.

[P 913 C 1]

Jalal-ud-din—for Appellants.

Mehr Chand Mahajan — for Respondents.

Judgment.—Hakam Beg and Jhanda Beg, sons of Bakhshinda Beg, and a number of other Mughal proprietors of mauza Khilchian in the Amritsar District, instituted a suit against Rahim Shah for possession of a site in the village abadi which the latter had purchased from one Nathu Shah. The suit was decreed by the Subordinate Judge, Fourth Class, Amritsar. Rahim Shah, defendant preferred an appeal to the Senior Sub-Judge, who by his order, dated 22nd December 1924, accepted Rahim Shah's appeal and dismissed the plaintiffs' suit. Against this judgment and decree of the Senior Sub-Judge, a second appeal was preferred to this Court by Hakam Beg and Jhanda Beg, two of the plaintiff-proprietors. This appeal came up for hearing before Jai Lal, J., on 13th July 1925. Counsel on both sides complained that the learned Senior Sub-Judge in his appellate order had relied on evidence which was not on the record and it was agreed that it was not possible to come to any definite conclusion on the existing materials. The case was accordingly remanded to the Senior Sub-Judge with directions to restore the appeal on its original number and to dispose of it in accordance with law. He was further directed to place on the record copies or extracts from such land revenue records as the parties wanted to produce and his attention was drawn inter alia to a certain number of points which required determination. The Court-fee on the memorandum of appeal was refunded to the appellants and it was directed that other costs would abide the result

On remand, the defendants' appeal to the Senior Sub-Judge was restored on its original number. The parties were allowed to produce fresh documentary evidence, arguments were heard and the defendant's appeal was accepted with costs throughout on 12th January 1926. Against this decree Hakam Beg and Jhanda Beg, plaintiffs-appellants preferred a second appeal to this Court through Mr. Jalal-ud-Din, advocate. The memorandum of appeal was not accompanied by a copy of the appellate decree of the Sr. Sub-Judge, dated 12th January 1926. To the memorandum of appeal was appended a note by the learned advocate to the following effect :

The above appeal was remanded by the Hon'ble Mr. Justice Jai Lal on 13th July 1925. Please put up C. A: No. 433 of 1925 S. B., therefore, no need of filing the copies of the previous orders.

It is noteworthy that this note did not contain any reasons for not filing a copy

of the decree of the Senior Sub-Judge dated January 1926, against which the appeal had been preferred. The office returned the memorandum of appeal to the appellants' counsel on 21st April 1926 with the remark that a copy of the lower appellate Court's decree should be filed and that the appeal without a copy of the decree could not be considered to have been presented within limitation. On 22nd April 1926, Mr. Jalal-ud-din refiled the memorandum of appeal with the following note :

As the lower appellate Court has maintained its previous order the decree of the same Court is on the previous record to which I made reference in my note dated 12th April 1926. Thus there was no need for filing the copy of the decree. But, however, I have asked my client to furnish me with a copy of the decree which will be duly filed no sooner it is received. Time may be granted for the said purpose.

No affidavit was filed along with this note nor was any stamped application asking the Court to extend time uuder S. 5, Lim. Act, presented. On 28th April 1926, Mr. Jalal-ud-din filed a copy of the decree of the lower appellate Court. The appeal came up for preliminary hearing before a Motion Bench on 27th May 1926, and was admitted for final disposal before Single Bench. It seems that before that Bench no prayer was made for extension of time and certainly no orders condoning the delay were passed.

The appeal having come up for hearing before me to-day, a preliminary objection came from the respondents that the appeal was time barred and ought to be dismissed as such. Mr. Jalal-ud-din, for the appellants, has filed to-day a copy of an affidavit by Hakam Beg, lambardar, one of the appellants, which was attested before a Magistrate of the Third Class at Amritsar on 7th June 1926, but which had not been filed in this Court until after the preliminary objection had been raised by the respondents to-day.

As has been noted above the judgment and decree of the lower appellate Court, against which the present second appeal has been preferred are dated 12th January 1926. The copy of the judgment of the lower appellate Court was applied for on 3rd March 1926, and delivered to the appellants on 8th March 1926. Thus the appellant was entitled to six days in addition to the statutory 90 days, i. e., he could prefer the appeal within 96 days from the date of the decree appealed against. Thus the last date for preferring the appeal was 18th April 1926. The copy of the lower appellate Court's decree having been filed in this Court on 28th April 1926 the appeal must be considered to have been presented on that date. It is, therefore, ten days out of time.

Mr. Jalal-ud-din has not sought to support the position that he had taken in his note dated 12th April 1926, namely that as the decree of the lower appellate Court now appealed against re-affirmed that Court's previous decree, it was not legally necessary for him to file a copy of the decree dated 12th January 1926. It is obvious that Jai Lal, J., remanded the case under O. 41, R. 23. The previous decree of the Senior Sub-Judge had been vacated and he was directed to re-hear the appeal and to dispose of it according to law. Under the circumstances, the contention would be untenable that a copy of the decree dated 22nd December 1924 which was on the record of Civil Appeal No. 436 of 1925 could be considered sufficient accompaniment for the purposes of the present appeal.

Mr. Jalal-ud-Din has, however, put forward a new contention that though under O. 41, R. 1, it is necessary that every appeal preferred shall be accompanied by a copy of the decree appealed from, this rule applied only to first appeal against original decrees and that there is no rule of law which required the presentation of a copy of the decree of the lower appellate Court with the memorandum of second appeal. Mr. Jalal-ud-Din argues that though the practice of this Court and of the Chief Court has invariably been to insist upon a copy of the lower appellate Court's decree being filed with the memorandum of a second appeal yet, he argues, that this is merely a rule of practice and not a rule of law. This contention ignores the provisions of O. 42, R. 1, which specifically lays dowu that the rules of O. 41, shall apply, so far as may be, to appeals from appellate decrees. I am, therefore, of opinion that the contention of Mr. Jalal-ud-Din on this point has no force and must be overruled. (The judgment then considered evidence and proceeded.) Under the circumstances I must hold that no sufficient cause has been made out for condoning the delay in not presenting a copy of the lower appellate Court's decree with the memorandum of appeal. It is not necessary to

refer to the authorities cited by the respondent's counsel that it is essential that a memorandum of appeal must be accompanied by a copy of the decree appealed against. Indeed the provisions of O. 41, R. 1, are imperative on this point. The appeal is, therefore, barred by time and is dismissed with costs.

R.D. *Appeal dismissed.*

A. I. R. 1927 Lahore 914

ADDISON, J.

Shop Idan Lachhmi Narain—Creditor—Appellant.

v.

Bahadur Chand—Second Party—Respondent.

Misc. First Appeal No. 1192 of 1926, Decided on 12th January 1927, from order of Dist. Judge, Ferozepur, D/- 29th March 1926.

(a) *Provincial Insolvency Act* (5 *of* 1920), *S. 37—Debtor failing to apply for discharge within specified time—Court must annul adjudication order—Order should also be passed vesting debtor's property in a receiver.*

A Court has no option but to annul an adjudication when an insolvent fails to apply for an order of discharge within the time specified by the Court. But, with a view to protect the creditors the Court should pass an order under S. 37, Act 5, 1920, vesting the property of the debtor in a person appointed by it: *A. I.R.* 1926 *Lah.* 370 and 94 *I. C.* 234, *Foll.* [P 914 C 2]

(b) *Provincial Insolvency Act, S.* 75 (2) *and* (3)—*No appeal lies under sub-S.* (2) *if leave is not applied for under sub-S.* (3).

No appeal lies under S. 75 (a), Act 5, 1920, if leave to appeal has not been applied for under S. 75 (3). [P 914 C 2]

(c) *Provincial Insolvency Act, S.* 37—*Order passed under S.* 37 *is appealable.*

An appeal does lie from an order passed under S. 37, Act 5, 1920. [P 914 C 2]

J. N. Bhandari—for Appellant.

Anant Ram Khosla—for Respondent.

Judgment.—Two brothers were separately adjudicated insolvents on 15th July 1922 at the instance of a creditor. A receiver was appointed at the same time and each insolvent was directed to apply for his discharge within six months of the date of adjudication. Neither did so and on 29th March 1926 the District Judge annulled the adjudication under the provisions of S. 43, Insolvency Act. Against these orders the petitioning creditor has preferred two appeals.

It is objected that no appeal lies under S. 75 (2), Insolvency Act, and that the appeals must be dismissed as no leave has been applied for under S. 75 (3) of the Act. It seems to be that this objection must be upheld. Leave to appeal was given during the hearing of the appeal in *Bansidhar* v. *Kharag Jit* (1), but in that case the petition praying for leave to appeal had been presented with the petition of appeal, whereas in the two appeals before me no petitions have been presented, praying for leave to appeal. These two appeals must therefore be dismissed as incompetent.

There is also a third appeal by the same petitioning creditor. After the District Judge had annulled the adjudication of the two brothers, he then, on 10th July 1925, under the provisions of S. 37, Insolvency Act, ordered the property of Baghi Ram, which had vested in the receiver, to be restored to him. It is prayed on appeal that there should only have been a conditional restoration and that the learned District Judge should have ordered under S. 37 that the property should vest in the old receiver for the benefit of the creditors. In *Roop Narain* v. *King King & Co.* (2) it was held that a Court has no option but to annul an adjudication where an insolvent fails to apply for an order of discharge within the time specified by the Court. But with a view to protect the creditors the Court should pass an order under S. 37, Provincial Insolvency Act, vesting the property of the debtor in a person appointed by it. The present is undoubtedly a good case where this should be done in order to protect the petitioning creditor and other creditors. An appeal does lie from an order passed under S. 37 of the Act. I, therefore, accept the third appeal and, instead of the order passed by the District Judge, direct that the property of the debtor Baghi Ram shall vest in Seth Chanan Mal who was the receiver in the insolvency proceedings. This order will continue for six months from to-day within which time the petitioning creditor or creditors should have been able to take further steps to protect the property.

I make no order as to costs in these appeals.

J.V. *Appeal accepted.*

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(1) [1915] 37 All. 65=26 I. C. 926=12 A. L. J. 1273.

(2) A. I. R. 1926 Lah. 370.

A. I. R. 1927 Lahore 915

TEK CHAND, J.

Mohammad Fazal Azim and *others*—Judgment-debtors—Appellants.

v.

Mutsadi Lal and *others* — Decree-holders—Respondents.

First Misc. Appeal No 2957 of 1926, Decided on 12th March 1927, from order of 1st Cl. Sub-Judge, Rohtak, D/- 4th December 1926.

Civil P. C., O. 41, R. 6 (2)—Order under, is appealable.

Section 47 is comprehensive enough to include an order under O. 41. R. 6, and permits the institution of an appeal against an improper order passed under that section : *A. I. R. 1924 Lah.* 631. [P 915 C 2]

Jagan Nath Aggarwal—for Appellants.

Sardha Ram—for Respondents.

Judgment.—On 20th July 1925, a preliminary decree for foreclosure of a mortgage was passed by the Senior Sub-ordinate Judge, Delhi, in favour of Mut-sadi Mal against Mohammad Fazal Azim and others declaring that Rs. 13,365 was the amount due by the mortgagor to the mortgagee, and that if that sum were not paid on 20th August 1925 the mortgaged property would be sold, and if any sum remained unrealized after such sale the plaintiff would be at liberty to apply for a personal decree against the defendants and other moveable and immovable property belonging to them. A first appeal was presented by the defendants to this Court and was admitted to a Division Bench. Nothing having been paid by the mortgagors within the period specified, a final decree was passed on 29th October 1925. A first appeal was preferred against this decree also and was duly admitted. The decree-holder took steps to have the property sold and the judgment-debtors Fazal Azim, etc., filed in the lower Court an application under O. 41, R. 6, Civil P. C., praying that the sale of the mortgaged property be stayed pending disposal of the appeal by the High Court stating that they were prepared to furnish security for the amount of interest which would accrue due during the pendency of the appeal. This application was rejected by the learned Sub-Judge on the ground that the appeal against the final decree was pending in the High Court, and unless an order was received from this Court, he could not stay execution. Against this order Fazal Azim, etc., have preferred a miscellaneous appeal under S. 47, Civil P. C., to this Court.

Mr. Sardha Ram for the respondent decree-holders raises a preliminary objection that no appeal lies and in support of his contention he relies upon a remark in Mulla's Commentary on the Civil Procedure Code The learned commentator has given no authority in support of his remarks, nor does he specify any reason for the conclusions arrived at by him. In my opinion S. 47 is comprehensive enough to include an order under R. 6 and permits the institution of an appeal against an improper order passed under that section. The question was considered by Scott Smith, J., in *Phallu Mal* v. *Banarsi Das*, *A. I. R.* 1924 *Lah.* 631, where it was held that such an order was appealable. I concur in the reasoning of the learned Judge, and hold that the judgment-debtor's appeal is competent. I, therefore, overrule the preliminary objection.

On the merits I am of opinion that the learned Sub-Judge was in error in rejecting the application under O. 41, R. 6, Mr. Sardha Ram, for the respondents, has not sought to defend the order, but says that sufficient security should be furnished by the judgment-debtors, appellants, before the sale is stayed. This request is reasonable, and, after hearing Mr. Jagan Nath, I direct that the sale of the mortgaged property shall be stayed on condition that within a period of two months from to-day the judgment-debtors, appellants furnish security of a substantial person of Delhi to the effect that in the event of their appeal to this Court being dismissed and thereafter the mortgaged property being sold if the sale proceeds are found insufficient to meet the decretal amount together with interest and costs, the surety will make good the deficiency. If the judgment-debtors fail to furnish the security within two months, the sale shall proceed. The appeal is, accordingly, accepted and the sale of the mortgaged property stayed, subject to the judgment-debtors furnishing security as ordered above. The parties will bear their own costs in this Court.

D.D. *Appeal accepted.*

A. I. R. 1927 Lahore 916

DALIP SINGH, J.

Mangta and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 797 of 1927, Decided on 31st October 1927, from order of 1st Cl. Magistrate, Kaithal, D/- 22nd June 1927.

Criminal P. C. S. 342—Evidence recorded after examination of accused without further explanation from him cannot be taken into account.

Where a Magistrate recorded some evidence against the accused after they had been examined and no further explanations were called for from them as regards this evidence, the evidence after the accused had been examined cannot be taken into account. [P 916 C 2]

Ganpat Rai—for Appellants.

R. C. Soni—for the Crown.

Judgment.—The appellants Mangta and Bichha have been convicted by the learned Magistrate according to the judgment under S. 258, Criminal P. C. As they were charged respectively under Ss. 397 and 394, I. P. C., I presume that the learned Magistrate meant to convict them under the sections under which they were charged, that is he meant to convict Mangta, accused, under S. 397 and Bichha accused under S. 394, I. P. C. He has sentenced Mangta to seven years' rigorous imprisonment including three months' solitary confinement and Rs. 200 fine or in default to six months' further rigorous imprisonment, and Bichha appellant to three years' rigorous imprisonment and Rs. 200 fine or in default to six months' further rigorous imprisonment. Rs. 200 of the fine, if realized, is to be paid to Naraina complainant and Rs. 100 to Budh Ram complainant.

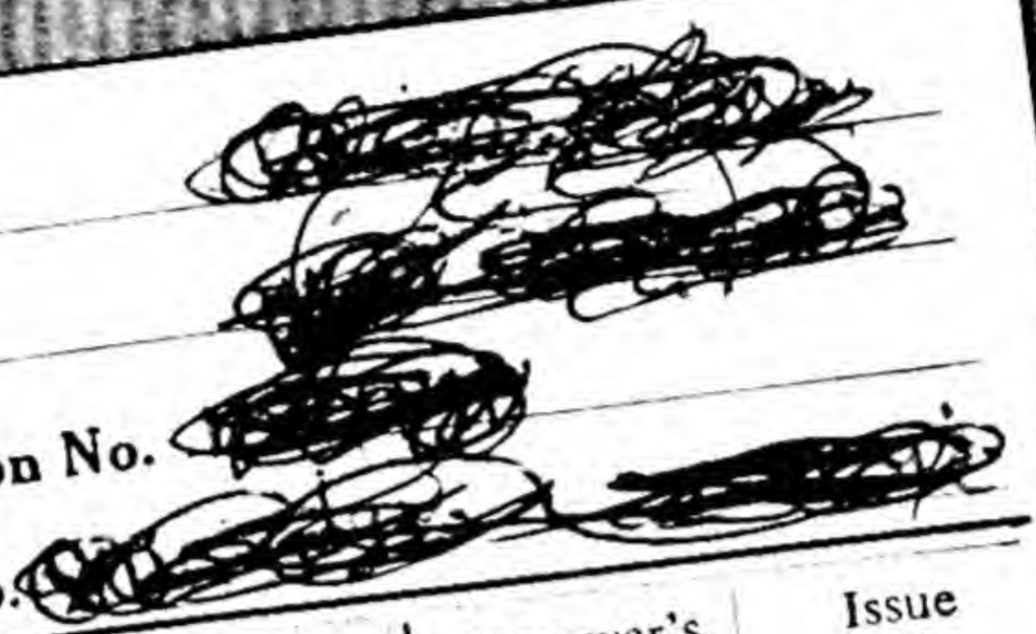
The facts of the case as shown by the prosecution evidence are that Naraina's donkeys were missing for some time. Finally he discovered that they were with Mangta appellant. He and Kalu proceeded to address Mangta on the subject and a bhunga of Rs. 50 was settled. One Budh Ram was also included in the matter to stand surety for Naraina not filing a complaint after recovery of the donkeys. The appellants accompanied Naraina and Kalu and Budh Ram along a road and the two donkeys were discovered there and duly handed over to Naraina. Rs. 50 were also paid to the appellants and the parties separated. As they were going away Naraina, however, said that he would complain to the police about the whole subject as Rs. 50 have been extorted from him. Upon this Mangta attacked Naraina with a cutting weapon and inflicted grievous and dangerous injuries on him and Bichha appellant attacked Kalu and also inflicted hurts on him with a lathi. Budh Ram, who came to the rescue of these people also had his arm severed at the wrist evidently by a blow from Mangta appellant's cutting weapon. Thereafter the appellants took away the two donkeys, which were recovered later from one Maru who said he had got them from Matu, who in his turn said that he had got them from the appellant Mangta.

These facts are established by the evidence of Naraina, Kalu and Budh Ram. There is no reason to doubt their evidence. Counsel for the appellants has argued that in any case there was no robbery as the hurt was not caused in the committing of theft or in order to commit theft. It seems to me that the appellants wished to remove the donkeys, which would be the main evidence in the case, threatened by Naraina, and they proceeded to inflict the injuries that they did inflict with this object in view. I therefore, consider that Mangta has been rightly convicted under S. 397, I. P. C., and I do not consider the sentence in any way severe. I also consider that Bichha has been rightly convicted under S. 394, I. P. C., and the sentence is not severe in his case either.

Counsel for the Crown has very properly pointed out to me that the learned Magistrate recorded some evidence against the appellants after they had been examined and no further explanations were called for from the accused as regards this evidence. The evidence, however, or rather the material portion thereof consists in the recovery of a chhavi blade from Mangta. Quite apart, however, from this recovery of a chhavi blade I consider that the case is sufficiently made out against him. I have accordingly not taken into account the evidence after the accused had been examined. Counsel for the appellants did not raise this point at all. I, therefore, dismiss the appeal.

S.J. *Appeal dismissed.*

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Author
Accession No.
Call No.
Borrower's No.
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Borrower's No.
Issue Date

Title [redacted]

Author

Accession No. [redacted]

Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

Title _____

Author _____

Accession No. _____

Call No. _____

Borrower's No.	Issue Date	Borrower's No.	Issue Date

Title

Author

Accession No

Call No

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE